Agreed Damages or Unenforceable Penalties – Drafting to Affirm the Former and Avoid the Latter

Glenn West, writing in Weil, Gotshal & Manges LLP's **Global Private Equity Watch**, says that agreed damages provisions are a staple of many commercial contracts.

But their enforceability is frequently questioned because of the common law's requirement that the damages payable for breach of contract not exceed the amount required to compensate the non-breaching party for the foreseeable losses it actually sustained by virtue of the breach.

West discusses a case that he says presents an important practical reminder: practitioners seeking to ensure that agreed damages provisions are enforceable should avoid limiting the items of loss for which the agreed damages are providing compensation and constitute a legitimate pre-estimation.

Read the article.

Cloud Solutions: The Danger of ‘Floating’ Contracts

In most cloud engagements these days, it is not only the customer’s data that is in the cloud, but also many key parts of the vendor contract as well, explains **Mike Overly** of **Foley & Lardner**.

“That is, the average cloud vendor today generally places several key areas of the contract in the cloud (e.g., service level standards, security measures, support obligations, service descriptions, etc.). In some instances, the entire contract is in the cloud. What this means is that these key contract provisions or the entire contract ‘floats’ in the cloud and can be changed at any time by the vendor, frequently without notice to the customer. Even if the customer is given notice, in many cases, the customer has no right to object to the changes,” Overly writes.

Read the article.

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Succession Planning: It’s Not

Just for Emergencies

There are specific actions an organization can take to ensure it has the leadership it needs in case of a crisis, as well as for their future sustainability, according to TrainHR.

The company will present a **webinar** on the topic on Thursday, Sept. 7, 2017, at 1 p.m. EDT.

“Best-practice organizations use succession planning to not only prepare for potential leadership challenges but they also rely on such plans to develop and maintain the strong leadership that’s required to grow and keep pace with changes in their business, industry, and overall marketplace,” TrainHR says on its website.

Read more about the webinar.

New Jersey GC Sentenced to Prison in $2.4M Timeshare Scam

The *Philadelphia Business Journal* **is reporting** that the former general counsel of an New Jersey timeshare consulting service was sentenced to a year in prison for conspiring to obstruct justice in a federal criminal case tried in 2013, federal

prosecutors in New Jersey said.

Joshua L. Gayl, 37, was GC of the Vacation Financial, which offered phony consulting services to owners of timeshares, reports **Jeff Blumenthal**.

Gayl pleaded guilty in March 2016 to a criminal information charging him with one count of conspiracy to obstruct justice.

"Gayl admitted that he misled a witness after learning that the witness told the FBI about being defrauded by VO. Prosecutors said he contacted the witness, hoping to obtain statements favoring the defense at trial. He offered the witness assistance in exchange for the information given to authorities" writes Blumenthal.

Read the *Business Journal* article.

Why This Group is Trying to Stop Amazon From Buying Whole Foods

Marc Perrone, president of the United Food and Commercial Workers International Union, sees Amazon the way some Rust Belt workers see global trade – as a threat to American jobs, reports ***The Washington Post***.

Perrone was planning to file a complaint to the Federal Trade Commission, arguing that letting Amazon buy Whole Foods would

trigger a wave of store closures and eventually quash customer choice, writes the *Post*'s **Danielle Paquette**.

"The United Food and Commercial Workers International Union has roughly 1.3 million members across North America, working for retailers at a typical wage of about $18 an hour, including benefits," according to Paquette. "Members are employed at stores such as Kroger, Safeway and Albertsons. Whole Foods, for contrast, isn't unionized."

Read the *Post* report.

Are You Prepared for GDPR? Take the Survey

The General Data Protection Regulation (GDPR) will become law in all EU jurisdictions on May 25, 2018 and will impact organizations that handle EU citizen data for any number of reasons, from employment to customer relations to marketing. Just because a company is not based in or even operating in the EU doesn't mean GDPR won't apply.

It is a broad and wide-ranging regulation that is posing significant challenges for the types of clients Yerra serves, namely global corporations in highly-regulated industries such as banking, consumer goods and pharmaceuticals.

To gauge readiness for GDPR across industries and global

regions, Yerra has launched an **industry survey** to help benchmark where global corporations are in their preparations. The GDPR Reality Check survey is being run in collaboration with the Blickstein Group and will be open for submissions through the end of May 2017.

Take the survey.

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Case Study – An Inside Look at PayPal's ELM Implementation

During the 2017 CLOC Annual Legal Operations Institute in Las Vegas, Onit and PayPal presented a session titled, "Next Generation Enterprise Legal Management (ELM): People. Process. Automation." The speakers were Lauren Giammona, Director of Operations, Business Affairs & Legal at PayPal, and Eric M. Elfman, founder and CEO of Onit.

Lauren outlined her implementation experience and shared her 7 key tips for selecting an enterprise legal management (ELM) vendor. *Legaltech News* wrote a **detailed article** summarizing the CLOC session. PayPal and Onit discussed how legal departments can provide "continuous" value to the company, drive operational improvements and allow employees to work in the systems they prefer. The session highlighted:

- The importance of process, workflow and collaboration
- How a business automation tool solves needs beyond e-billing and matter management
- Key benchmarks and metrics that drive innovation and transformation in legal operations

Download the case study.

Dot Your I's, Cross Your T's, and Place Your Commas

When drafting contracts, briefs, and other documents, the significance of placing a comma is often overlooked, points out Hyatt & Weber P.A. The decision to include or omit a comma, however, could be dispositive in a dispute over the meaning of legislation or a contract.

"Indeed, in *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017), the United States Court of Appeals for the First Circuit found the absence of a comma created an ambiguity when interpreting certain legislation, and that ambiguity drove the outcome of the litigation," according to **a post** of the firm's website.

"Guiding principles regarding the use of commas and other writing conventions should be strongly considered when drafting contracts, for example, as including or excluding a comma in a particular contract provision may ultimately determine whether a company owes or is owed millions of dollars in a subsequent dispute," the post continues.

Read the article.

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My Smart Contract Just Ate $14 Million – Now What?

A Canadian digital currency exchange (QuadrigaCX) reported recently that a malfunction in a smart contract is responsible for a $14 million dollar loss of the cryptocurrency ether, reports Jared Butcher in the Steptoe Blockchain Blog.

He explains that a software upgrade performed by the company had an error in the code that prevented the smart contract from properly processing incoming amounts of the cryptocurrency Ether. During the time it took to discover the problem, Ether sent to the company's exchange was "trapped" in the smart contract.

"The potential for new risks and severe consequences arising from smart contracts (compared to traditional contracts) suggests that a re-consideration of indemnification strategies is warranted," Butcher writes. "Risks arising from coding errors or other human errors are not the product of intentional wrongdoing or a catastrophic event and may not involve any injury to a third party."

Read the article.

Qualcomm Accuses Apple of Infringing Six Patents in iPhone, iPad

Image by Kārlis Dambrāns

Chipmaker Qualcomm Inc. will ask the U.S. International Trade Commission to bar Apple Inc. from selling some iPhones and iPads in the United States that use chips made by competitor Intel Corp on the grounds that the devices infringe on six Qualcomm patents, **Reuters is reporting**.

Qualcomm said it will ask the U.S. ITC to ban imports of the Apple devices that use the chips. The company also filed suit in federal court in California on Thursday to request monetary damages.

Reporters **Diane Bartz** and **Stephen Nellis** write: “In its complaint to the ITC, Qualcomm asked the body to ban ‘iPhones

that use cellular baseband processors other than those supplied by Qualcomm's affiliates.' Qualcomm did not name Intel, but Intel began supplying chips for some iPhones starting with the iPhone 7."

Read the Reuters article.

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Post M&A Disputes: Breach of Indemnification Clauses in M&A Contract

Baker McKenzie's **Global Arbitration News** has posted an article discussing the difficult questions raised in both substantive and procedural law by indemnification clauses in share purchase agreements.

The author, **Dr. Philipp Schuett**, explains that the reason is that an indemnification dispute involves at least four parties: "The target company, the third party who raises claims against the target company, the seller (= the indemnitor) and the buyer (= the indemnitee)."

He then discusses the reasons to include indemnification clauses in SPAs, the scope and wording of indemnification clauses, the potential for disputes, and avoidance of post-M&A

disputes.

Read the article.

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Legal Developments Encourage the Use of Smart Contracts in the United States

An alert from **Pillsbury Winthrop Shaw Pittman** takes a look at some new laws in the United States that provide a clear indication that smart contracts will be impactful.

Authors of the article are **Craig A. de Ridder**, **Mercedes K. Tunstall** and **Nathalie Prescott**.

The article covers the Current legal state of smart contracts and blockchain technology, provides a refresher on smart contracts, discusses upcoming smart contract and blockchain technology projects, and looks at the future of smart contracts.

Read the article.

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Law Firm Not Liable for $1.5B Loan Gaffe

Image by C_osett

Entities that loaned General Motors $1.5 billion before it went bankrupt cannot sue GM's law firm, Mayer Brown, for accidentally canceling the collateral on the loan, the Seventh Circuit ruled.

Courthouse News Service **is reporting** that the Chicago-based appeals court ruled Wednesday that Mayer Brown has no duty to GM's lenders because it did not represent them.

The suit was based on a statement drafted by Mayer Brown that mistakenly terminated the collateral securing a $1.5 billion loan. That mistake resulted in the lenders' loans becoming unsecured, putting their claims behind the claims of secured creditors, writes **Lorraine Bailey**.

Read the Courthouse News article.

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Bailey Brauer Helps Secure Appellate Win in Texas Partnership Liability Battle

In a decision relying on the Fifth U.S. Circuit Court of Appeals' application of a 19th century court ruling to Texas general partnership liability law, an agricultural wholesaler will be allowed to enforce a judgment against individual partners of a defunct agribusiness partnership.

The partners of G&K Farms, a North Dakota-based general partnership formed in 2008 to farm land in Texas, amassed debts of nearly $650,000 to Crop Production Services. G&K partners John and Dawn Keeley and Thomas Grabanski made payments on the debt until Grabanski and his wife filed for bankruptcy in 2013.

A default judgment was issued in 2014 against G&K Farms totaling more than $1.3 million, with a subsequent judgment also issued against the Keeleys based on their derivative liability as partners.

In their efforts to vacate the judgment, the Keeleys relied on the 1872 U.S. Supreme Court ruling in *Frow v. De Le Vega*, which they felt protected them from individual liability after Keeley avoided a finding of liability based on a guaranty he signed. *Frow v. De Le Vega* determined that when there are multiple defendants, if some parties present a defense and win, then the ruling can be applied to defaulting parties under certain circumstances.

"The courts had already found that there was no logical application of *Frow* in this case. It was simply a very thinly

veiled attempt by the Keeleys to avoid their responsibilities as partners in repaying the general partnership's debts," said CPS's lead appellate attorney Clayton Bailey of Dallas' **Bailey Brauer PLLC**. "Crop Production Services' trial attorneys, John Mark Stephens and Abel Leal, did a terrific job in the trial court demonstrating that the *Frow* doctrine did not apply."

"This has been a protracted battle that should have been settled years ago. Nevertheless, this is a big win for CPS," said Stephens of the Dallas law firm Johnson Stephens & Leal, PLLC, who represents CPS at trial along with partner Leal. "We are gratified that the Fifth Circuit saw through this smoke screen and affirmed the ruling of the district court."

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Drafting and Negotiating IP & IT Provisions in M&A Transactions

Practical Law will present a free **75-minute webinar** with Rita Berardino, Senior Legal Editor, Practical Law Intellectual Property & Technology, and presenters from Wilson Sonsini Goodrich & Rosati, who will discuss IP and information technology (IT) considerations in drafting and negotiating M&A agreements.

The event will be Wednesday, June 28, 1-2:15 p.m. EDT.

Intellectual property and technology assets have become increasingly significant components of a company's business strategy and the focus of many M&A transactions, the company says on its website.

Topics will include:

- Common structures for M&A transactions.
- Key IP and IT provisions of M&A transaction documents, including:
  - Drafting and negotiation of IP and IT provisions.
  - How courts have interpreted these provisions.
- Key ancillary IP and IT agreements, including licenses and assignments.

A short Q&A session will follow.

Presenters:

- Manja Sachet, Partner, Wilson Sonsini Goodrich & Rosati
- Jason Greenberg, Associate, Wilson Sonsini Goodrich & Rosati
- Jennifer McGrew, Associate, Wilson Sonsini Goodrich & Rosati
- Rita Berardino, Senior Legal Editor, Practical Law Practical Law IP&T (Moderator)

Register for the webinar.

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Judge Rips Lawyers in IP Rift; Will Award Fees to Defendants

A New York federal judge has ruled that no "reasonable attorney" would have sued news organizations for broadcasting or publishing seconds-long clips from the 45-minute live Facebook video of a childbirth, **reports Ars Technica**.

And the media outlets defendants are entitled to recover what may amount to hundreds of thousands of dollars in legal costs, writes **David Kravets**.

"No reasonable lawyer with any familiarity with the law of copyright could have thought that the fleeting and minimal uses, in the context of news reporting and social commentary, that these defendants made of tiny portions of the 45-minute video was anything but fair," U.S. District Judge Lewis Kaplan of New York wrote.

Read the Ars Technica article.

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The Dumbest Class Action Claim Ever

The Milwaukee Journal Sentinel reports on a pair of class-action lawsuits against Home Depot and Menards that **Above the Law** calls "the dumbest class action claim ever."

As *Journal Sentinel* reporter **Rick Romell** explains:

> Menards and Home Depot stand accused of deceiving the lumber-buying public, specifically, buyers of 4×4 boards, the big brother to the ubiquitous 2×4.
>
> The alleged deception: The retailers market and sell the hefty lumber as 4x4s without specifying that the boards actually measure 3½ inches by 3½ inches.

Above the Law's **Joe Patrice** explains that everybody who ever built anything already knew that 3½ by 3½ is the industry standard:

> In fact, if retailers started selling boards that *were* 4 inches by 4 inches, they'd actually be useless because they wouldn't match up with all the other standardized materials that assume the board will be 3 1/2″ by 3 1/2″.

Read the **Journal Sentinel** and **Above the Law** articles.

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Supreme Court Ruling in Drug Case Could Have Big Implications for Product Liability

A Supreme Court decision could make it harder for large groups of plaintiffs to sue corporations in state courts for damages caused by manufacturers' products, **reports Politico**.

The court sided with Bristol-Myers Squibb to limit where patients can seek compensation for harm caused by drugs.

"But the ruling will echo beyond the pharmaceutical industry to potentially affect any liability case in which consumers allege harm caused by a deficient product, including automobiles, tobacco, food and other mass litigation like consumer claims of financial fraud by a company," writes **Sarah Karlin-Smith**. "It could also affect lawsuits against companies being accused of environmental wrongdoing."

Karlin-Smith quotes a blog post by James Beck, who works with pharmaceutical and product liability law at Reed Smith: "This is one of the most important mass tort/product liability decisions."

"It will extremely limit the notion that large companies can be sued by anyone, anywhere," he explained.

Read the Politico article.

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Webinar: Avoiding Construction Claims and Disputes

A Baker Tilly **on-demand webinar** provides an overview of strategies to identify potential claims scenarios and potential resolutions available to mitigate claims.

“Conflict and disagreements are normal on construction projects; however, when everyday disagreements escalate into unresolvable issues, claims and disputes may result,” the firm says on its site. “These can lead to costly and time consuming distractions for your organization and your project.”

Learning objectives:

- Understand red flags associated with high-risk projects
- Learn characteristics of a culture of claims avoidance
- Learn contractual methods/provisions that can help to proactively avoid disputes
- Understand remedies not requiring legal action

Watch the on-demand video.

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Legal Aspects of Smart Contract Applications

Perkins Coie has published a **white paper** that offers an initial analysis of the legal aspects of five prominent smart contract use cases: digital asset sales and capital markets, supply chain management, smart government records and smart cities, real estate land registries, and self-sovereign identity.

In the paper, available on JD Supra, the authors conclude that legal risk is inherent in each of these subject areas, but that with careful risk mitigation planning, companies can overcome those hurdles to offer effective products and services.

The paper consists of four parts: definition of terms, a review of current literature, five uses of smart contracts, and insight into practical steps a business may take when launching a product or service that uses smart contracts to mitigate legal risk.

Read the white paper.