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Managing Risks in Data Related Agreements

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Overview

- Background
- Risk Identification and classification
- Key Contractual Issues

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Background

- Issues regarding privacy, security and data ownership are becoming increasingly central in tech contracting
- Managing these issues is becoming a critical skill as there is not a one size fits all approach anymore
- Security incidents are on the rise as organizations rely more on third parties and threat actors see how effective these attacks can be
- Data protection laws increasingly require that businesses take a more active role in managing the risks involved with their contracts

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Risk Identification

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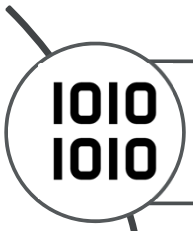
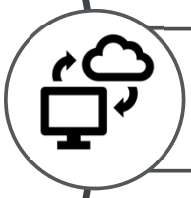
Key Elements to Consider



Data

- Sensitivity of data involved?
- Is sensitivity driven by regulatory requirement?



Service

- Criticality
- Intended use

Vendor/Customer

- What is the maturity of their privacy/security program?
- Are the implemented controls appropriate?

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Contracting

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Defined Terms Matter

- Confidential Information
- Customer Data
- Data Breach / Security Incident
- De-identified Data
- Personal Data

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Data Rights and Responsibilities

- **Ownership/IP**
- Regulatory v. Contractual
- Jurisdictional Issues
- Intended Purpose
- Use/Disclosures

Contract Issues Relevant to Security

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- Additional Docs
- Controls
- Oversight
- Regulatory considerations
- Data Breach
- BC/DR

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Security Exhibit vs DPA

- Rise of regulations requiring specific contractual obligations on each party (e.g. GDPR, CCPA/CPRA)
- Role of the Data Processing Addendum (DPA)
- Role of the Security exhibit
- Pros/Cons of using a single document
- What are clients doing?

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Reps and Warranties

- Moving beyond the "standard"
- How to address issues surrounding data
- Role of reps and warranties with privacy and security
- Interplay with indemnity

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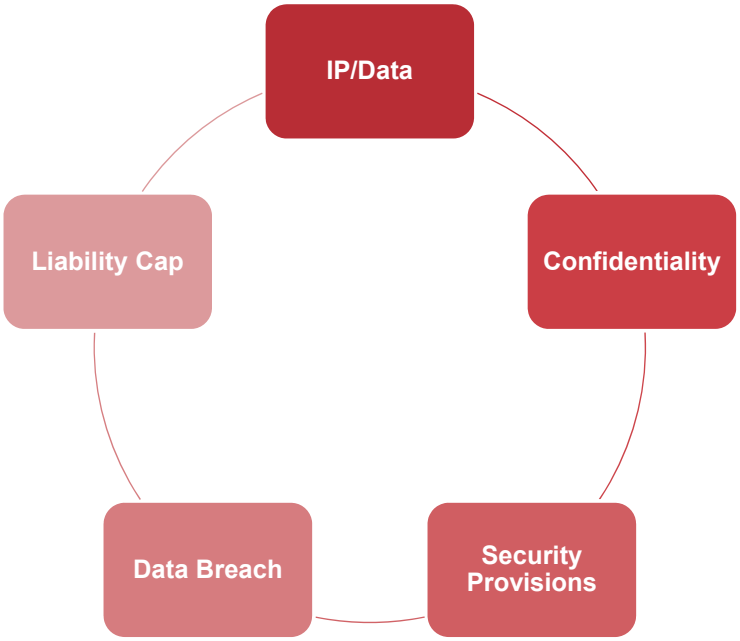
Indemnification



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Limitation of Liability

Cap Amount

Exclusions

Indirect/Special

Trends

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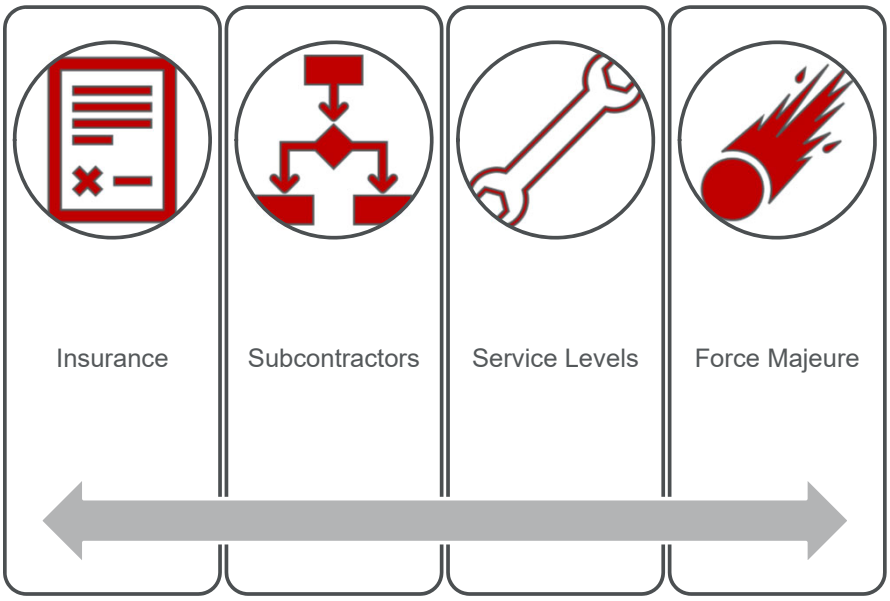
Additional Contractual Concerns



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