



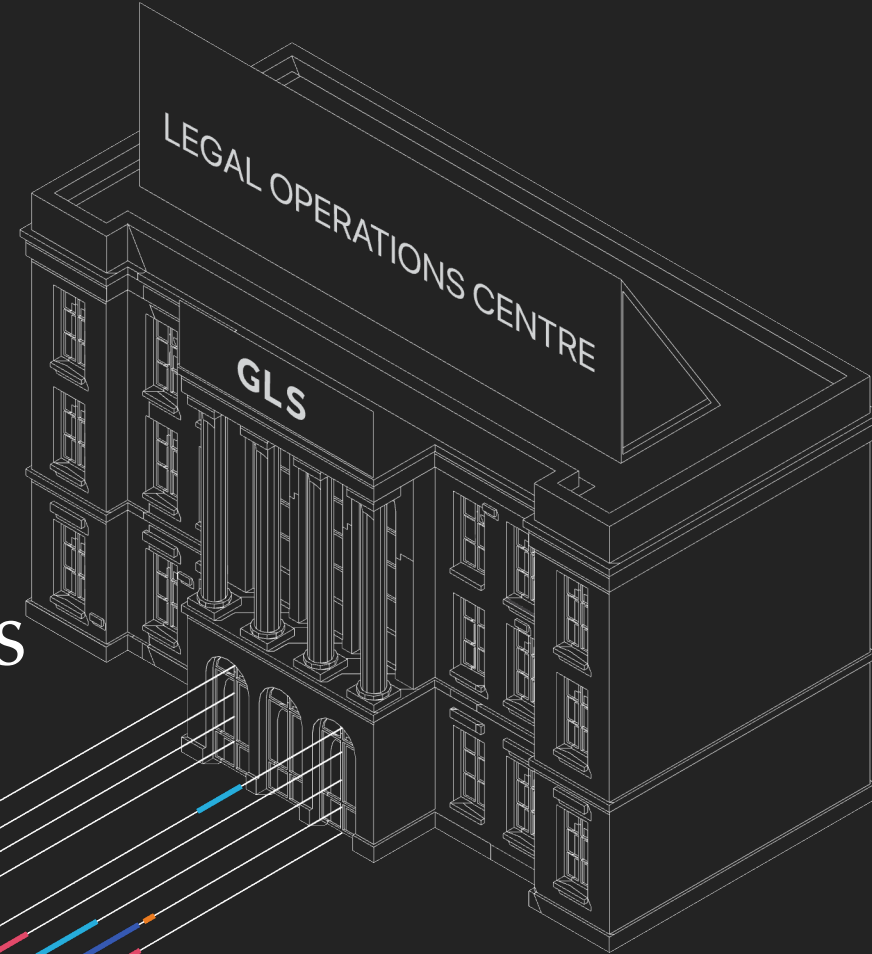
Global Legal Solutions®

Negotiating Liabilities & Indemnities

Enhancing Productivity Through Knowledge

GLS Group | GLS Legal Operations Centre Welcome Pack

www.gls-legaloperations.com





Session Overview

Usage Instruction: The full context of these slides is delivered via the speaker's narration along with these slides. You can arrange a digital recording version of this session by request for delivery into your organisation's ecosystem. **Contact info@glsl.global**

Contract Review Theory: The Big 6

Liabilities & Indemnities in Context

Negotiations & Negotiation Strategy

Contract Block Review: Liabilities

Contract Block Review: Indemnities

Next Steps

Q&A



Contract Review Theory: The Big 6

Driving contract review quality and efficiency

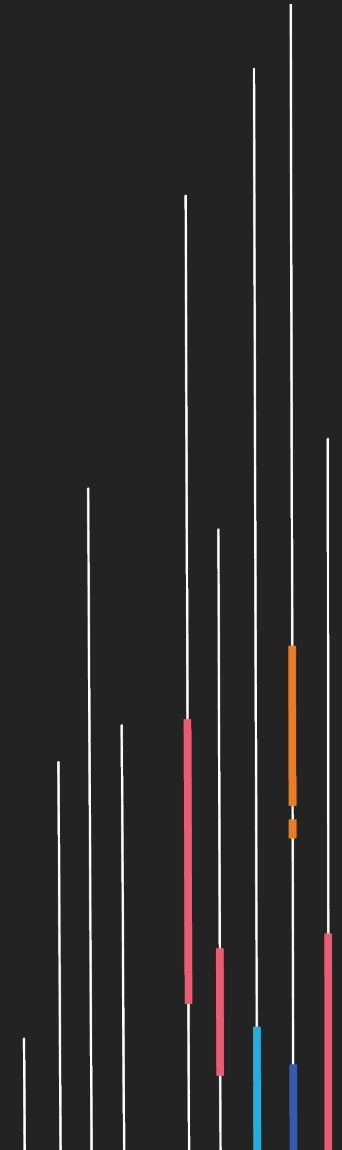
The Big 6: Contract Focal Points

An IHL Efficiency Strategy:	Big 6 Contract Provisions:
Key focal points for most contractual reviews	Indemnities*
Primary arbitrators of risk in most agreements	Liabilities*
Efficient focal point for in-house legal teams	Warranties
Express & qualitative review scenarios	Intellectual Property
Significant comfort comes from getting this right	Payment
Big 6 Essential Training: starts with these 2 areas*	Termination



Liabilities & Indemnities in Context

Important clauses that invoke review based pressure



INDEMNITY CLAUSES:

An indemnity is a key way of allocating identified contract-related risks between the Parties. The indemnity requires a commitment of one party to pay for the financial loss incurred by another party where a pre-agreed event or series of events occurs (or not).

Indemnities are not given lightly.

Indemnities offer greater protection to the indemnified party as the indemnified party does not have to demonstrate a causal link to its loss. Essentially, if the event happens then the indemnifier must pay. Put another way, the indemnity allocates the risk to the indemnifier as the party who caused such risk. This approach effectively takes the risk off the table (as long as the indemnifier has money to pay).

LIABILITY CLAUSES:

Used to define, allocate and limit each party's liability to the other under the Agreement.

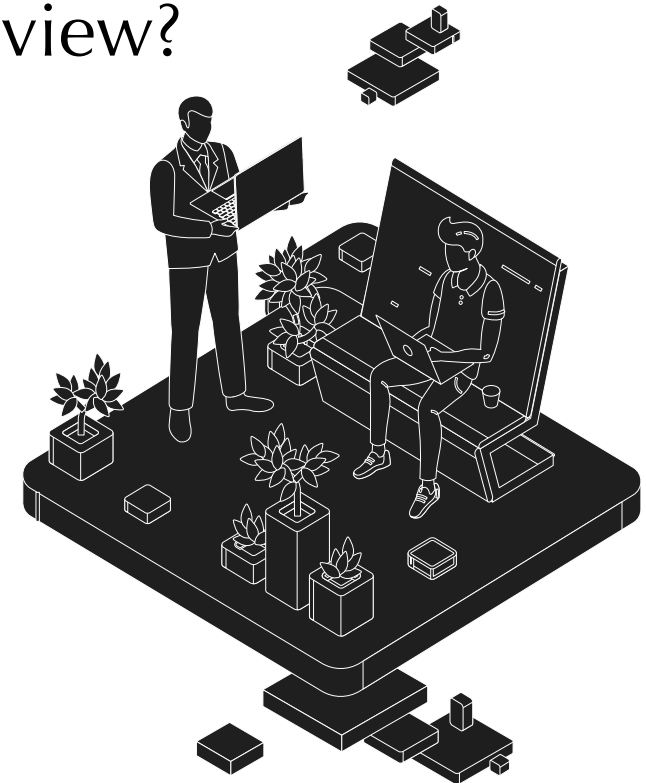
Suppliers limit their liability so risk assumed is consistent with anticipated profit. While this makes sense, there is a tendency to over exclude.

Customers need to know that a supplier's liability for failed performance will (i) motivate their proper performance and (ii) provide adequate recourse (including financial) if things go wrong.

Liability is regulated through two "heads" of losses - direct damages & indirect. Directs flow naturally from the breach of contract. "Indirect" or "consequential" damages are those that are a little harder to predict.

Why are Indemnities / Liabilities Difficult to Review?

1. **PRENUPTIAL:** they are the “what if it all goes wrong” clauses
2. **IMPORTANT:** knowing how important they are can make them stressful to review
3. **FLUID CASE LAW:** cannot settle on the meaning of certain key concepts
4. **DISPERSED:** often scattered across the agreement
5. **KITCHEN SINK DRAFTING:** their importance often precipitates “kitchen sink” excessive drafting
6. **ASYMMETRIC:** requiring lots of adjustment to return to centre
7. **RUSHED:** everything is always super urgent & super rushed



Why are Indemnities / Liabilities Difficult to Review?

Typical Review Dynamics	Ideal Review Dynamics
Scattered/Disjointed	Focused
Evoke emotional response	Calm
High Stakes	Dispassionate
Scary	Methodical
Fluid concepts	Accurate
Urgent	Certain

ANSWER: Use the Block Review System



Successful Negotiations

Is it about getting everything that you want?

What does a “Successful” Negotiation Look Like? (Part 1)

SUCCESSFUL NEGOTIATIONS AREN'T SOLELY ABOUT OUTCOMES

- Negotiation outcomes cannot be guaranteed
- **Focus should not be on “outcome” but on the adequacy/completeness of the “process” that creates the best chance of appropriate outcomes**
- Right Process: prioritized issues, in a business, enabling way whilst utilizing GLP as the North Star
 - a) A focus on “appropriate” review criteria
 - b) Making smart, prioritized choices - “sensible and proportionate” risk mitigation efforts
 - c) Maintaining a sharp focus on being “business enabling”
 - d) And ... as often as possible ... to land in the “approved outcomes” zone

What does a “Successful” Negotiation Look Like? (Part 2)

KEEP A SHARP FOCUS ON WHAT YOU CAN CONTROL

- You can define and adopt your **review/negotiation process**
- You can/must define your **contracting parameters** for each key issue
- You can identify “SBU/Country **specific/exceptional**” **modifications** ...
- You can control how well you understand the deal you are supporting
- You can anticipate most **counterparty arguments and tactics**
- You can be **prepared with counterarguments**, counter-offers and a few “tricks



Recommended Review & Negotiation Strategy

More Science Less Art

5 Step Review & Negotiation Process:

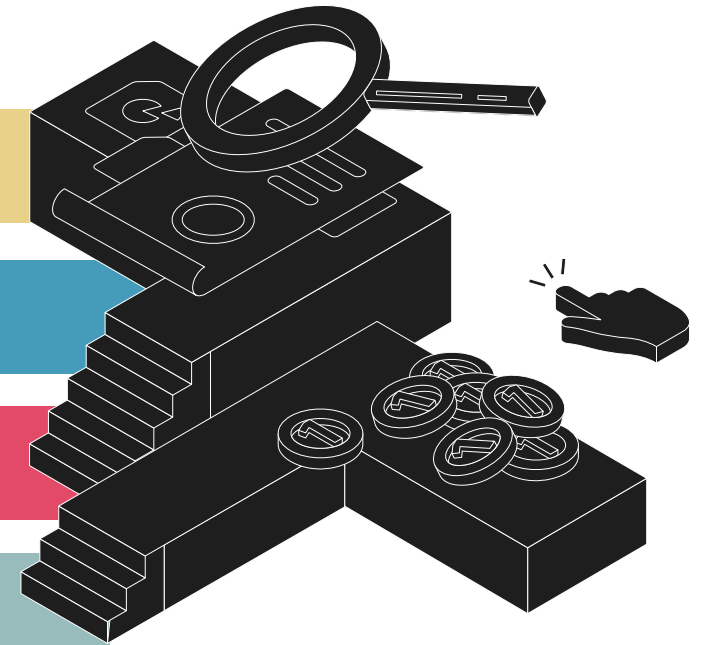
STEP 1 - DEFINE WHAT YOU NEED:
Refer to your GLP to eliminate the guess work

STEP 2 - RECOGNIZE WHAT YOU LOOKING AT:
3rd Party Paper / Your Templates vs Key Element Stacks

STEP 3 - ASSESS DEFICIENCIES:
File note of your issues. Create a review/compliance record

STEP 4 - MAKE PRIORITIZED ADJUSTMENTS:
Consider bargaining profile/localization/commercial etc.

STEP 5 - NEGOTIATE PRIORITIES CONVINCINGLY:
Apply enhanced strategic focus to secure needs

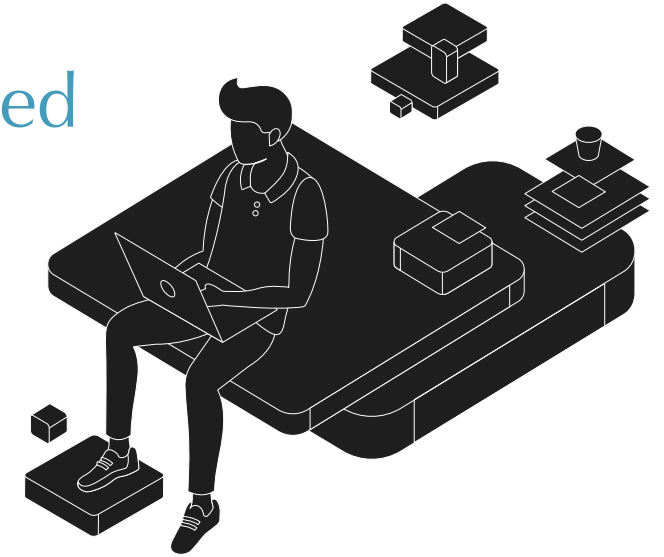


Step 1: Referencing Your Group Legal Policy

- GLP is your North Star
- You must know what your position is on each key contractual term
- Position categories:
 - **NON-NEGOTIABLE:** absolute requirements
 - **ZONAL:** a spectrum that is acceptable
 - **WISHFUL:** nice to have, but not a deal breaker
- As a team – you need to define this
- Without a GLP – your review capability will always be about “art, not science” i.e. it will be defined by subjective, individual intuition

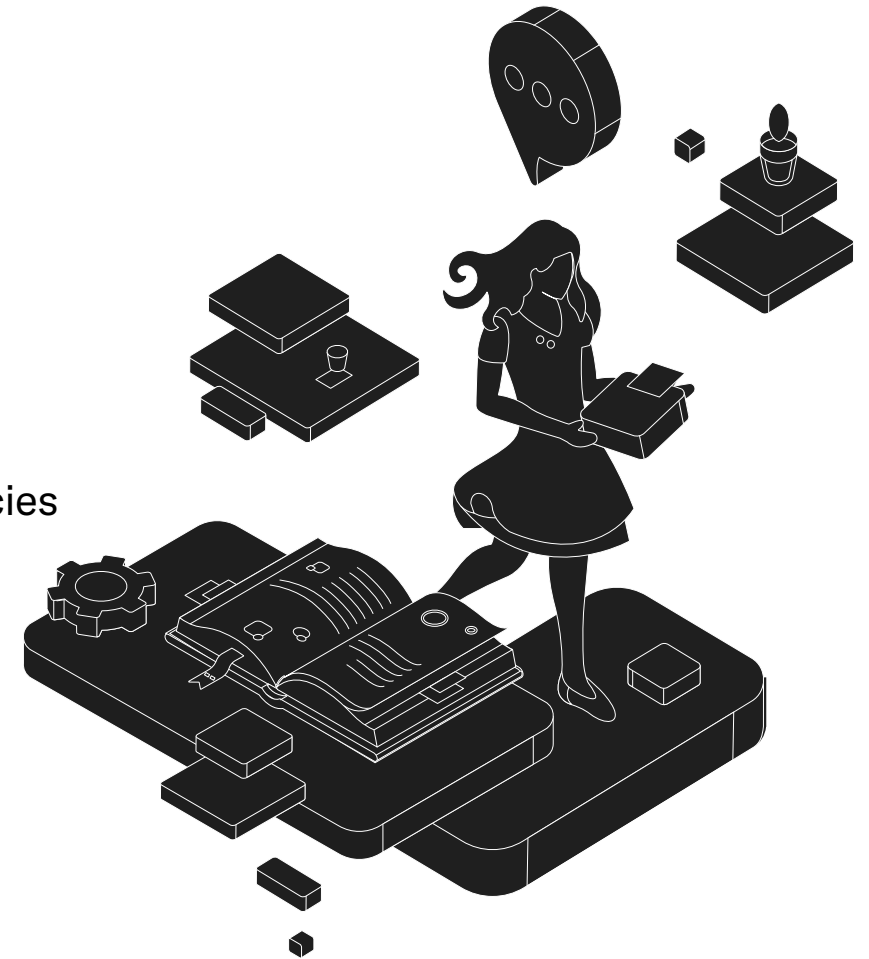
Step 2: Efficiently assess what has been Proposed

- Step 2 is about reviewing the draft
- This is best done by killing out the “white noise”
- Declutter & simplify the complexity of the review
- Run your review – at the clause element
- We call this the **“Contract Block Review System”**
- Utilize “Stacks” to order your review – i.e. logical dissections of clause into recognizable parts
- Note: legal tech tools can help (e.g – A.I. based contract review solutions)



Step 3: Assess Positional Deficiencies

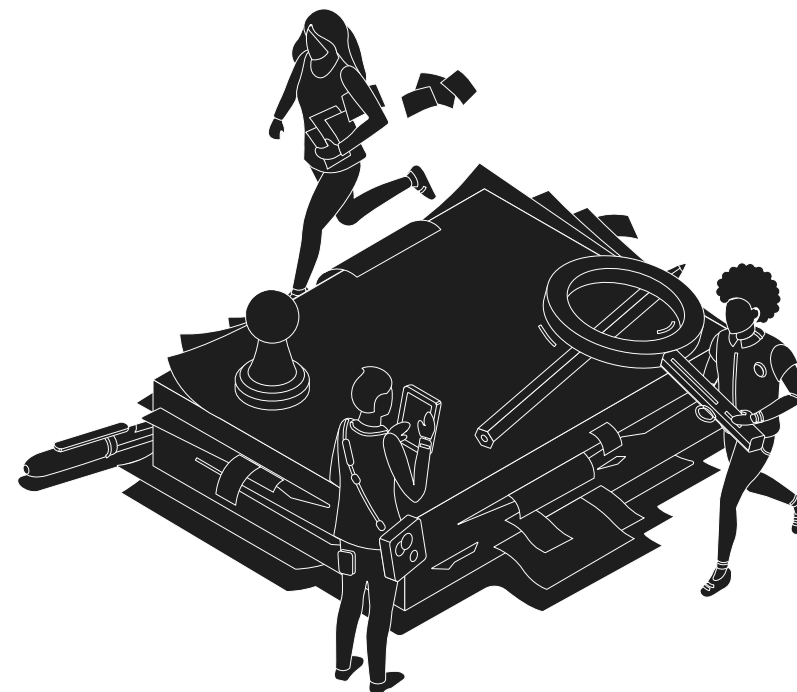
- Review b/c primarily a “comparative” exercise
- Reduce the dependence on “art” and embrace “science”
- We want “X, Y and Z”. Do we have them?
- Consistent, high-quality reviews from all team members
- Produce essential compliance record – record the deficiencies
- This process becomes increasingly efficient



Step 4: Context Adjustments = Business Enabling

- Not every negotiation is the same
- Understanding/applying “differentiators” is key*
- Typical Differentiators: jurisdiction, language, sector, BU, market position, etc
- Underpins “business enabling” and “commercial advice”
- What is the Business demanding vs objectively recognizing your circumstances

***Caveat:** it is healthy to limit differentiators where possible!

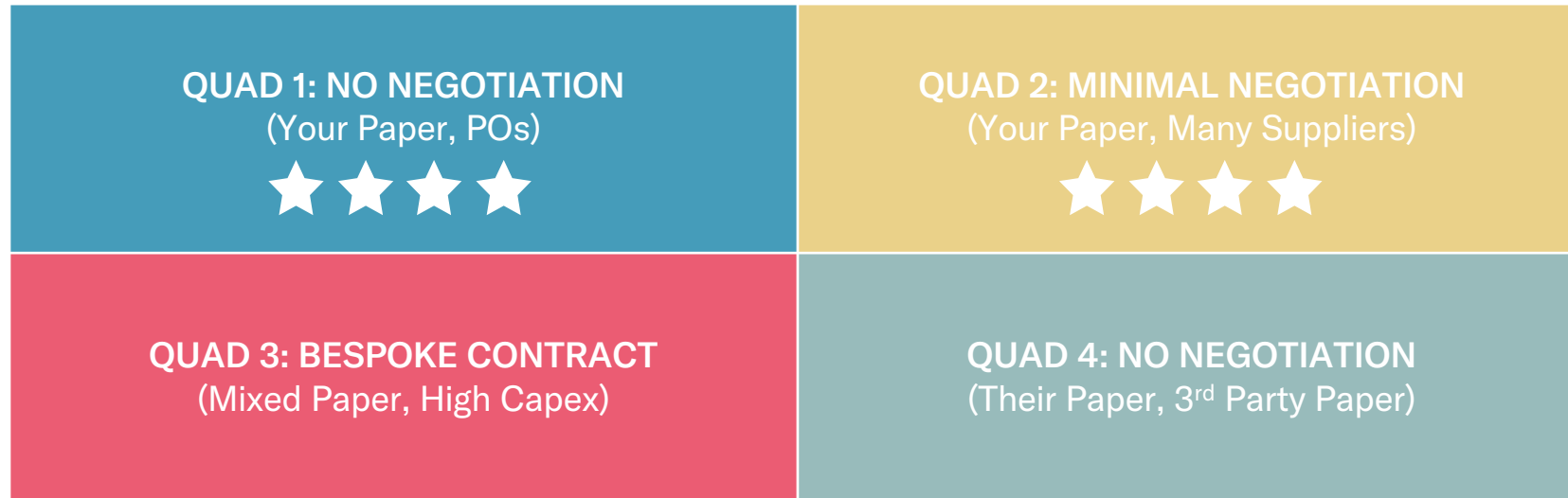


Step 5: Negotiation Strategy (Part 1)

- Will always be the same - secure what you need by reference to the agreed context
- **Critical:** Steps 1-4 will ensure what is needed is “prioritized” and “proportionate”
 - 3 touch points back to the business: GLP / the SBU / the deal
- Obviously – continue to optimise negotiation capabilities:
 - a) **FOCUSED ISSUES:** commercial/business enabling
 - b) **TEAM COORDINATION:** run a well-oiled machine (1 pager)
 - c) **DEAL MOMENTUM:** leverage deal momentum
 - d) **PLAYBOOKS:** anticipate likely counterparty arguments and tactics
 - e) **NEGOTIABILITY PROFILE:** leverage deal-specific negotiability profile

Step 5: Negotiation Strategy (Part 2)

- **NEGOTIABILITY PROFILE:** leverage negotiability profile





Spotlight: Contract Block Review



Block Review System – How To:

1. DEFINE YOUR CRITICAL CLAUSE STACK:

- Break down key clause into conceptual components
- Your stack should cover the full spectrum of potential enquiry

1. PAINT THE CLAUSE (DECLUTTER/SIMPLIFY):

- Achieve a conceptual/visual segmentation of key issues
- Don't try to tackle every aspect of the indemnity/liability simultaneously!

3. REVIEW COMPLETENESS/ADEQUACY OF THE STACK LAYER:

- If present – is it adequate
- Reference points should be set out in the GLP
= achieves certainty of review every time



Achieving Review Efficiency : Critical clause review stacks

LIABILITY STACK: (PUBLIC +R)	INDEMNITY STACK (BELTS +R)
Physical Loss	Beneficiaries
Uncapped Matters	Exceptions: (e.g. no fault)
Bars (procedural) on bringing claims	Linkage: b/w event & loss
Limitation of Remedies (LDs, SLAs, Other)	Triggering Events
Indirect Loss	Scope of Indemnity
Caps on Liability	
+ Related Issues	



Contract Block Review: Liabilities



“The total liability of each party under the Merchant Agreement towards the other party for breach of contract, tort or under any other legal theory in any calendar year is limited to an amount equal to the total Processing Fees paid by the Merchant to XXXX during the previous full calendar year (or if no Services were provided in the previous calendar year, the total Processing Fees paid in the initial 12 months of the term of the Merchant Agreement). For the avoidance of doubt, the limitation of liability does not apply to breach of the Merchant Agreement regarding non-payment of invoices or to the service level credit as specified in the Extended SLA.

Neither party shall be liable for breach of contract, tort or under any other legal theory for any indirect or consequential loss (including for loss of profit, business, contracts, revenues or anticipated savings, or damage to good name) or special damages;

Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:

- (i) intent, gross negligence, death, fraud or personal injury
- (ii) breaches of the DPA;
- (iii) third party claims to which Clause 12 applies; or
- (iv) breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards. “

“The total liability of each party under the Merchant Agreement towards the other party for breach of contract, tort or under any other legal theory in any calendar year is limited to an amount equal to the total Processing Fees paid by the Merchant during the previous full calendar year (or if no Services were provided in the previous calendar year, the total Processing Fees paid during the initial 12 months of the term of the Merchant Agreement). For the avoidance of doubt, the limitation of liability does not apply to the Merchant’s liability under the Merchant Agreement regarding non-payment of invoices or to the service level credit as specified in the Extended SLA.”

6 line sentence

Neither party shall be liable for breach of contract, tort or under any other legal theory for any indirect or consequential loss (including for loss of profit, business, contracts, revenues or anticipated profits) or to good name) or special damages;

Poorly drafted terminology

Asymmetric risk allocation

Neither XXXX nor YYY to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for the following reasons:

9 line paragraph

- (i) intent, gross negligence, death, fraud or personal injury
- (ii) breaches of the DPA;
- (iii) third party claims to which Clause 12 applies; or
- (iv) breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards. “

AWFUL!

Caps on Liability

“The total liability of each party under the Merchant Agreement towards the other party for breach of contract, tort or under any other legal theory in any calendar year is limited to an amount equal to the total Processing Fees paid by the Merchant to XXXX during the previous full calendar year (or if no Services were provided in the previous calendar year, the total Processing Fees paid in the initial 12 months of the term of the Merchant Agreement). For the avoidance of doubt, the limitation of liability does not apply to breach of the Merchant Agreement regarding non-payment of invoices or to the service level credit as specified in the Extended SLA.

Neither party shall be liable for breach of contract, tort or under any other legal theory for any indirect or consequential loss (including for loss of profit, business, contracts, revenues or anticipated savings, or damage to good name) or special damages;

Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:

- (i) intent, gross negligence, death, fraud or personal injury
- (ii) breaches of the DPA;
- (iii) third party claims to which Clause 12 applies; or
- (iv) breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards.“

Caps on Liability

“The total liability of each party under the Merchant Agreement towards the other party for breach of contract, tort or under any other legal theory in any calendar year is limited to an amount equal to the total Processing Fees paid by the Merchant to XXXX during the previous full calendar year (or if no Services were provided in the previous calendar year, the total Processing Fees paid in the initial 12 months of the term of the Merchant Agreement). For the avoidance of doubt, the limitation of liability does not apply to breach of the Merchant Agreement regarding non-payment of invoices or to the service level credit as specified in the Extended SLA.

Indirect Loss

Neither party shall be liable for breach of contract, tort or under any other legal theory for any indirect or consequential loss (including for loss of profit, business, contracts, revenues or anticipated savings, or damage to good name) or special damages;

Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:

- (i) intent, gross negligence, death, fraud or personal injury
- (ii) breaches of the DPA;
- (iii) third party claims to which Clause 12 applies; or
- (iv) breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards.“

Caps on Liability

“The total liability of each party under the Merchant Agreement towards the other party for breach of contract, tort or under any other legal theory in any calendar year is limited to an amount equal to the total Processing Fees paid by the Merchant to XXXX during the previous full calendar year (or if no Services were provided in the previous calendar year, the total Processing Fees paid in the initial 12 months of the term of the Merchant Agreement). For the avoidance of doubt, the limitation of liability does not apply to breach of the Merchant Agreement regarding non-payment of invoices or to the service level credit as specified in the Extended SLA.

Indirect Loss

Neither party shall be liable for breach of contract, tort or under any other legal theory for any indirect or consequential loss (including for loss of profit, business, contracts, revenues or anticipated savings, or damage to good name) or special damages;

Uncapped Liability

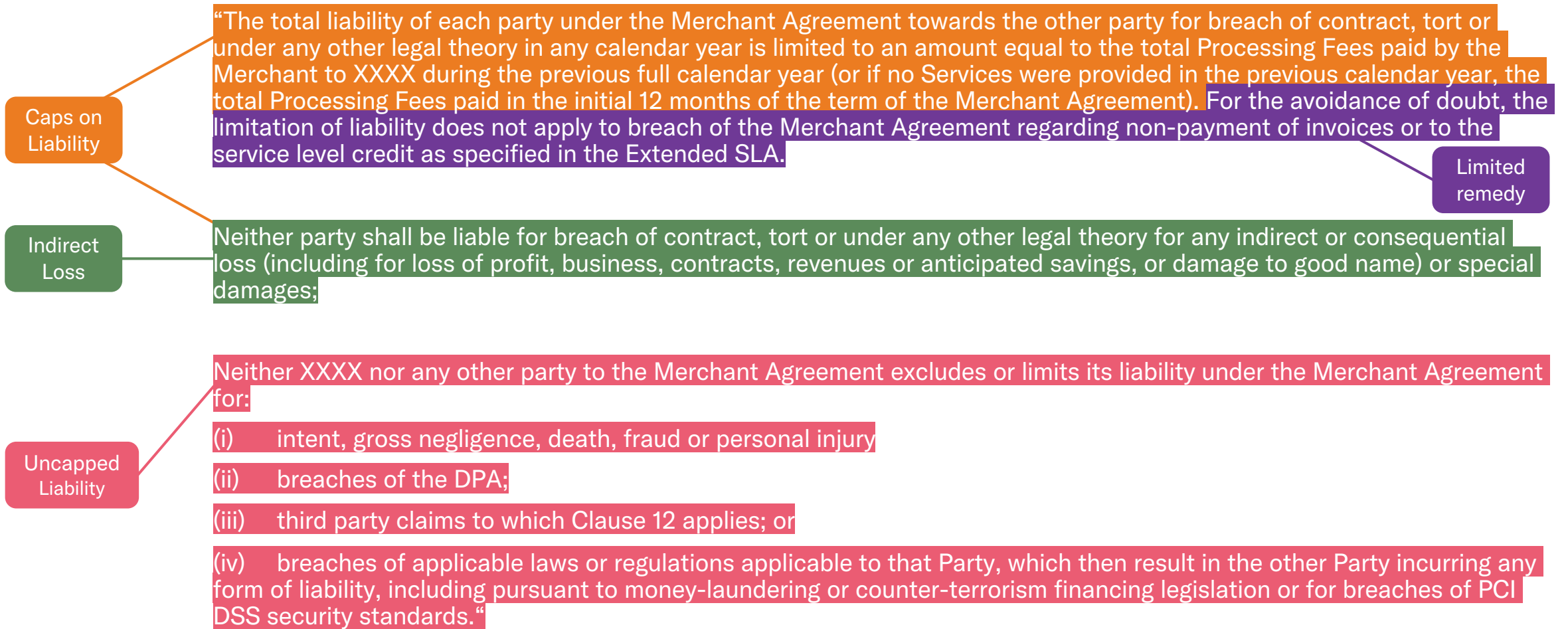
Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:

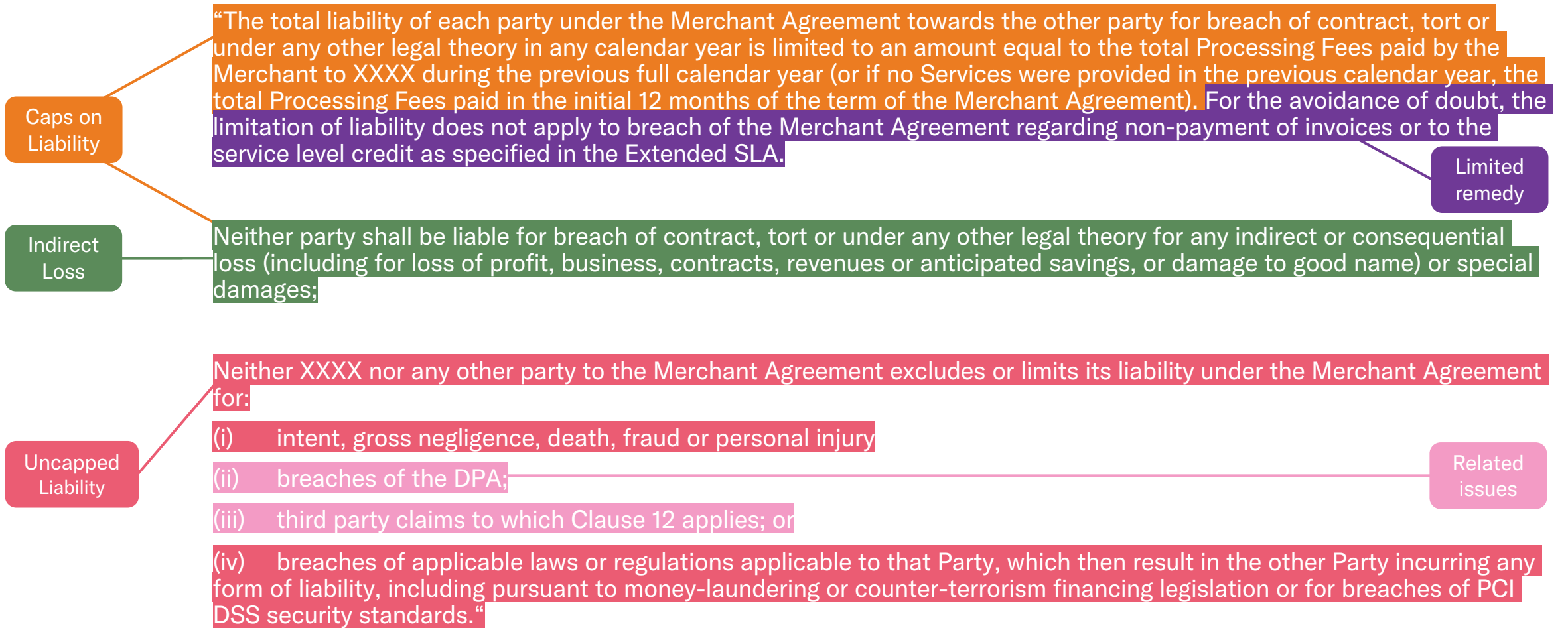
(i) intent, gross negligence, death, fraud or personal injury

(ii) breaches of the DPA;

(iii) third party claims to which Clause 12 applies; or

(iv) breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards.”





WHAT WE HAVE:	WHAT OUR GLP REQUIRES:
<p data-bbox="461 396 772 436"><i>Unlimited Liability:</i></p> <p data-bbox="461 486 1289 615">Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:</p> <ol data-bbox="461 665 1421 1100" style="list-style-type: none"><li data-bbox="461 665 1360 748">1. intent, gross negligence, death, fraud or personal injury<li data-bbox="461 753 901 793">2. breaches of the DPA;<li data-bbox="461 799 1421 839">3. third party claims to which Clause 12 (IPR) applies; or<li data-bbox="461 845 1421 1100">4. breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards. “	

WHAT WE HAVE:	WHAT OUR GLP REQUIRES:
<p><i>Unlimited Liability:</i></p> <p>Neither XXXX nor any other party to the Merchant Agreement excludes or limits its liability under the Merchant Agreement for:</p> <ol style="list-style-type: none"> 1. intent, gross negligence, death, fraud or personal injury 2. breaches of the DPA; 3. third party claims to which Clause 12 (IPR) applies; or 4. breaches of applicable laws or regulations applicable to that Party, which then result in the other Party incurring any form of liability, including pursuant to money-laundering or counter-terrorism financing legislation or for breaches of PCI DSS security standards. “ 	<p><i>GLP - Unlimited Liability:</i></p> <p>Contract should clearly state that neither party should limit liability in the following areas:</p> <ol style="list-style-type: none"> 1. death or personal injury caused by negligence or willful or reckless misconduct; 2. any fraud or fraudulent misrepresentation; 3. any gross negligence or willful misconduct; 4. any liability which cannot be lawfully excluded by law; 5. in the case of the Supplier, a breach of Clauses [●] (IPR) 6. Breach of Confidentiality 7. Breach of DP obligations 8. Tax indemnity obligations 9. any liability arising under Clause [●] (Indemnities).



Contract Block Review: Indemnities



“If any claims for damages, costs and expenses are asserted against Merchant by third parties asserting that these third parties are the owner of any rights regarding the Software and/or systems of XXX, XXX shall indemnify Merchant without delay from these third-party claims, including Merchants reasonable costs of its legal defence, and offer Merchant the necessary assistance in its legal defence.”

Each party shall indemnify and hold the other party harmless from any claim (including legal fees) brought against that party by any third party (expressly including Scheme Owners and Acquirers and their claims for payments of Fines) as a result of the first party’s breach of the terms of the Merchant Agreement, applicable laws and/or the Scheme Rules applying to the Payment Methods used by Merchant.”

Beneficiaries

“If any claims for damages, costs and expenses are asserted against Merchant by third parties asserting that these third parties are the owner of any rights regarding the Software and/or systems of XXX, XXX shall indemnify Merchant without delay from these third-party claims, including Merchants reasonable costs of its legal defence, and offer Merchant the necessary assistance in its legal defence.”

Each party shall indemnify and hold the other party harmless from any claim (including legal fees) brought against that party by any third party (expressly including Scheme Owners and Acquirers and their claims for payments of Fines) as a result of the first party’s breach of the terms of the Merchant Agreement, applicable laws and/or the Scheme Rules applying to the Payment Methods used by Merchant.”

Beneficiaries

“If any claims for damages, costs and expenses are asserted against Merchant by third parties asserting that these third parties are the owner of any rights regarding the Software and/or systems of XXX, XXX shall indemnify Merchant without delay from these third-party claims, including Merchants reasonable costs of its legal defence, and offer Merchant the necessary assistance in its legal defence.”

Each party shall indemnify and hold the other party harmless from any claim (including legal fees) brought against that party by any third party (expressly including Scheme Owners and Acquirers and their claims for payments of Fines) as a result of the first party’s breach of the terms of the Merchant Agreement, applicable laws and/or the Scheme Rules applying to the Payment Methods used by Merchant.”

Exceptions

Not applicable here

Beneficiaries

“If any claims for damages, costs and expenses are asserted against Merchant by third parties asserting that these third parties are the owner of any rights regarding the Software and/or systems of XXX, XXX shall indemnify Merchant without delay from these third-party claims, including Merchants reasonable costs of its legal defence, and offer Merchant the necessary assistance in its legal defence.”

Linkage

Each party shall indemnify and hold the other party harmless from any claim (including legal fees) brought against that party by any third party (expressly including Scheme Owners and Acquirers and their claims for payments of Fines) as a result of the first party’s breach of the terms of the Merchant Agreement, applicable laws and/or the Scheme Rules applying to the Payment Methods used by Merchant.’

Exceptions

Not applicable here

Beneficiaries

“If any claims for damages, costs and expenses are asserted against Merchant by third parties asserting that these third parties are the owner of any rights regarding the Software and/or systems of XXX, XXX shall indemnify Merchant without delay from these third-party claims, including Merchants reasonable costs of its legal defence, and offer Merchant the necessary assistance in its legal defence.”

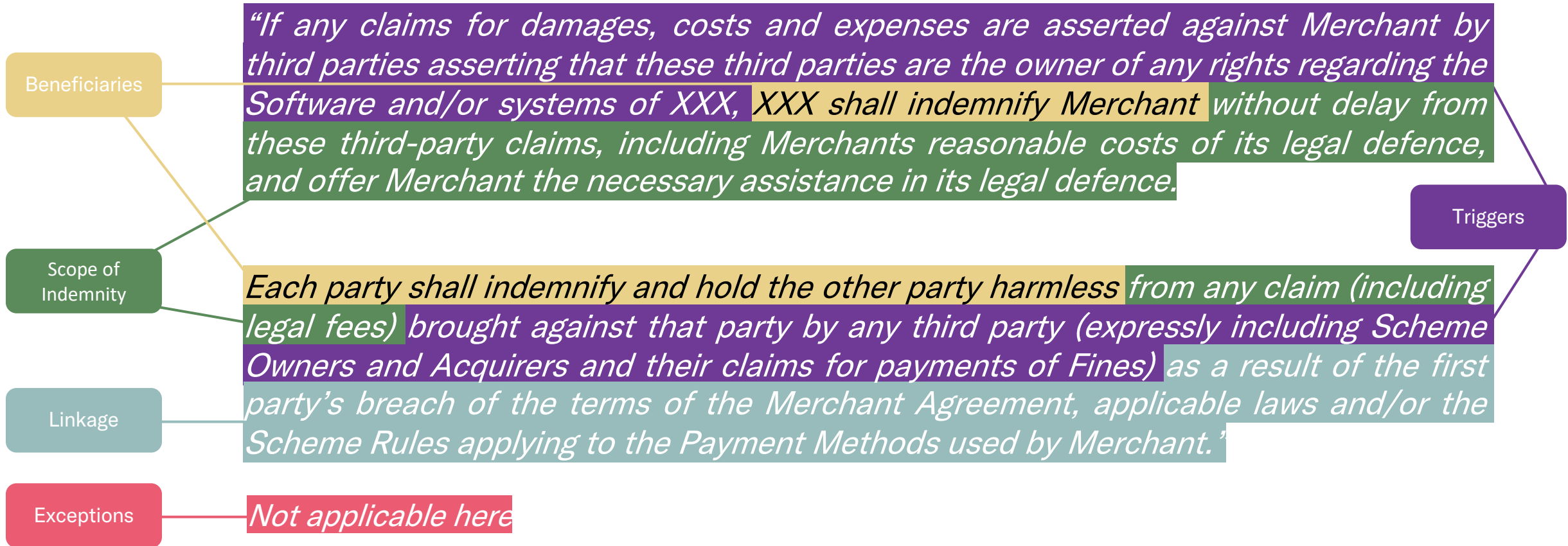
Triggers

Linkage

Each party shall indemnify and hold the other party harmless from any claim (including legal fees) brought against that party by any third party (expressly including Scheme Owners and Acquirers and their claims for payments of Fines) as a result of the first party’s breach of the terms of the Merchant Agreement, applicable laws and/or the Scheme Rules applying to the Payment Methods used by Merchant.’

Exceptions

Not applicable here



WHAT WE HAVE:	WHAT OUR GLP REQUIRES:
<p>Beneficiaries:</p> <p><i>XXX shall indemnify Merchant...</i></p>	<p><i>GLP – Indemnities</i></p>

WHAT WE HAVE:	WHAT OUR GLP REQUIRES:
<p>Beneficiaries:</p> <p><i>XXX shall indemnify Merchant...</i></p>	<p><i>GLP – Indemnities</i></p> <p>Indemnities should be secured in favor of the following:</p> <ol style="list-style-type: none">1. Our contracting entity2. Our affiliates entities3. Our shareholders4. Our board of directors5. Indemnity should benefit our sub-contractors



Advantages of the model



Advantages of “process” based review / negotiation:

- **LESS ART MORE SCIENCE:** review becomes far more scientific – less about the individual
- **CONSISTENCY & QUALITY:** review KPIs b/c assured
- **CAPACITY MULTIPLIER:** process enhances the capacity of all team members
- **REVIEW SCALABILITY:** capacity for review scales
- **ENABLES DELEGATION:** sophisticated reviews conducted by all levels
- **COMMERCIALITY:** factor in three institutional touch points (GLS, Scenario, Deal specifics)
- **COMPLIANCE RECORDS:** Step 3 findings – a detailed record of your review
- **TECHNOLOGY READY:** review workflow is technology ready
- **GREATER EFFICIENCY:** prioritized and proportionate negotiations take less time
- **Client Bonds:** review process strengthens client relationships



Next Steps



How to Put this Theory into Practice:

- Commit to developing the supporting infrastructure
- Most of it is already in your heads
- Stacks: Confirm your conceptual review Stacks – or use ours
- GLP: Define Group Legal Policy for each layer of the stack
 - This is just a checklist
 - Should take you 4 weeks to develop for these 2 Big 6 issues
 - Obviously, start with the “80%” first
- Localization Scenarios: Develop localization profiles (where applicable – SBU, country, local law, etc)
- Roll out review tools/department resources e.g. Playbooks / Checklists / Training





Q&A

