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AI Meets the Market: AI Procurement and Legal Considerations

While generative artificial intelligence ("AI") (AI that creates outputs based on user inputs, such as text, images and other media) often steals the spotlight, the use of AI is prevalent behind the scenes of businesses worldwide. AI is employed across a range of business functions, including in sales and marketing, procurement, inventory management, logistics and customer service, among others.

Global regulators are taking note of the rapid rise in AI capabilities and adoption and have introduced frameworks and legislation to ensure its responsible and ethical use. Existing laws—such as the EU AI Act—boast significant penalties for non-compliance, with fines of up to €35 million or 7% of a business's global turnover in the most serious cases. Given the potential for such steep financial consequences, ensuring compliance with applicable AI laws is essential. At the same time, AI development and training projects themselves often require significant temporal and monetary investment. As a result, many businesses either choose to outsource AI functions or procure AI models and systems developed by third parties, which introduces an additional legal risk unless appropriate due diligence is conducted, and the necessary contracts are carefully drafted considering the relevant risks.

Once a business identifies the use case it seeks to address through outsourced or third-party AI systems/models, it is critical to adequately vet, analyze, and assess both the vendors' contracts and their terms, and the AI model itself to evaluate the technical capabilities, security, robustness, legal compliance, and other potential risks and liabilities. Ultimately, the intended use case will dictate the most significant contractual terms. However, some important considerations include: the rights and obligations related to both the inputs and outputs of the AI model or system, whether the intended use case may require additional contractual provisions for legal compliance, intellectual property ownership and infringement provisions, and indemnification obligations.

To assist with responsible AI procurement, the Community of Practice on the Procurement of AI has published and continues to update EU model contractual clauses, which are peer reviewed by experts. These clauses support compliance with the EU AI act and may also be helpful in the United States, where similar classification systems and regulatory concerns are emerging.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.