Negotiating Cloud Services Agreements: Key Issues and Contract Terms for Your Next Technology Acquisition

NEW JERSEY CORPORATE COUNSEL ASSOCIATION

Presented by:
- Ann Gorr, Solutions Analyst, Micro Strategies
- Mary J. Hildebrand, Partner, Lowenstein Sandler LLP
- Bert Kaminski, Assistant General Counsel, Oracle Corporation
- Steve Parker, Assistant General Counsel, Ricoh Americas Corporation

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A CLOUD COMPUTING PRIMER

Ann Gorr
Legal Business Development/Solutions Analyst

85 Bloomfield Avenue
Denville, New Jersey
Phone: 973.625.7721
Email: Legal@microstrat.com

MICRO STRATEGIES
Strategic Solutions. Business Results.

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ALL THINGS OLD BECOME NEW AGAIN
THEORIES/FACTORS IMPACTING CLOUD COMPUTING GROWTH

Moore’s Law

Every 2 years the price of a unit of computer processing power will be reduced by half

Globalization 2.0

- Dotcom Era
- Flattening Forces
- Commercialization of the Web
- Availability of Technology Devices

Globalization 3.0

- Horizontal Advancements in Technology
- Speed of Broadband Access
- Feasibility of Outsourcing

A Cloud Computing Primer
The Last 50 Years

**Mainframe**
No concept of desktop computing or home use

**Client/Server**
PCs at work and at home; better access to data

**Web**
Dial-up access to Internet and home access to work assets; use of web applications

**Virtualization**
Greater IT efficiency through better utilization of resources

**Cloud**
Public and private cloud solutions that drive higher agility, focus, and superior economics

A Cloud Computing Primer
BUSINESS CHALLENGES AND CLOUD ADOPTION

Server Sprawl
Dedicating servers to single applications

Compliance and Security
Often cited as top concerns for IT

70% of IT budgets is spent maintaining inflexible and "siloed" data center equipment

Business Owner
“I can get it better, faster, and cheaper if I work around IT”

Application Developer
“IT slows me down”

Infrastructure Complexity
The average $1 billion company maintains 48 disparate financial systems and uses 2.7 ERP systems
CONCEPTS IN CLOUD COMPUTING

- Elasticity
- Scalability
- Shared Resources
CLOUD COMPUTING SERVICES

**Infrastructure As A Service (IaaS)**
- Storage
- Virtual Machines
- Servers

**Platform As A Service (PaaS)**
- Web Servers
- Databases
- Development Tools

**Software As A Service (SaaS)**
- CRM
- Social Media
- Email
- Virtual Desktop

A Cloud Computing Primer
CLOUD COMPUTING UTILIZATION

Value Visibility to End Users

- **SaaS**
  - End Users

- **PaaS**
  - Application Developers

- **IaaS**
  - Network Architects

A Cloud Computing Primer

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CLOUD COMPUTING SERVICES & RESPONSIBILITIES

**IAAS**
- Infrastructure (as a Service)
  - Applications
  - Data
  - Runtime
  - Middleware
  - OS
  - Virtualization
  - Servers
  - Storage
  - Networking
  - You Manage

**PAAS**
- Platform (as a Service)
  - Applications
  - Data
  - Runtime
  - Middleware
  - OS
  - Virtualization
  - Servers
  - Storage
  - Networking
  - Vendor Manages

**SAAS**
- Software (as a Service)
  - Applications
  - Data
  - Runtime
  - Middleware
  - OS
  - Virtualization
  - Servers
  - Storage
  - Networking
  - Vendor Manages
CLOUD COMPUTING SERVICES EXAMPLES

- **IAAS**
  - Amazon EC2
  - RackSpace
  - GoGRID
  - Oracle
  - Terremark
  - SkyNet

- **PaaS**
  - Windows Azure
  - Google Apps Engine
  - Authentic8
  - Heroku
  - Symplified

- **SaaS**
  - SalesForce
  - Office 365
  - LinkedIn
  - GMAIL
  - MapQuest
  - GoToMeeting

A Cloud Computing Primer
CLOUD COMPUTING – PUBLIC VS. PRIVATE

Private Cloud
- Hosted at a Service Provider Site
- Supports One Client/Customer
- Does Not Utilize Share Infrastructure
- Connectivity Over Private Network/Fiber/Internet
- Provides High Level of Security

Public Cloud
- Hosted at a Service Provider Site
- Supports Multiple Clients
- Often Utilizes Shared Infrastructure
- Supports Info Exchange Over Internet
- Suited for information that is not sensitive
- Less Expensive than Private Cloud
PUBLIC VS. PRIVATE CLOUD COMPUTING

A Cloud Computing Primer
PRIVATE VS. PUBLIC CLOUD COMPUTING

It's cloud dedicated to you.
BENEFITS & RISKS OF CLOUD COMPUTING

Cloud Computing

Scale and Cost

Security

Lock-in

Encapsulated Change Management

Choice and Agility

Lack of Control

Reliability

Next-Generation Architectures
Gartner’s Trends and Statistics in Cloud Computing

2012
- Cloud Computing was the top technology trend
- 20% of businesses will own no IT assets and will conduct business solely in the cloud

2013
- Mobile phone will take over PCs as the most common Web access device worldwide

2014
- Over 3 Billion of the world’s adult population will be able to transact electronically via mobile or Internet technology

A Cloud Computing Primer
If your law firm’s management asked for your advice regarding moving key applications to the cloud, would you be in favor of this strategy?

**IT Professional Responses**

- **46%** Not in Favor of a Cloud Solutions
- **45%** Supportive of Cloud Solution Strategy
- **9%** No Opinion
In general, has your opinion on cloud computing changed in the last year?

Opinions on Cloud Computing

- More Positive: 52%
- More Negative: 10%
- No Change: 38%
When do you think cloud computing will overtake on-premise computing in the legal services industry?

**Cloud Computing vs. On Prem as Standard Model**

- **19%** within 3 years
- **38%** within 5 years
- **24%** within 10 years
- **16%** within 15 years
- **3%** never
IT PROFESSIONALS ANNUAL REPORT 2012
TRENDS AND STATISTICS IN CLOUD COMPUTING

Are you using public cloud services (like GMail, HotMail, DropBox, etc) for professional purposes without the approval or knowledge of your firm?

Using Public Storage for BYOD

- 82% No
- 18% Yes
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11.4 You confirm and warrant to Google that you have all the rights, power and authority necessary to grant the above license.
### What Services/Applications Are Suitable for the Public Cloud?

<table>
<thead>
<tr>
<th>Application/Process</th>
<th>Suitable</th>
<th>Not Suitable</th>
<th>No Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telephony</td>
<td>63%</td>
<td>5%</td>
<td>7%</td>
</tr>
<tr>
<td>Email</td>
<td>61%</td>
<td>48%</td>
<td>11%</td>
</tr>
<tr>
<td>Storage</td>
<td>58%</td>
<td>35%</td>
<td>5%</td>
</tr>
<tr>
<td>HRS</td>
<td>50%</td>
<td>33%</td>
<td>14%</td>
</tr>
<tr>
<td>EDD</td>
<td>47%</td>
<td>34%</td>
<td>19%</td>
</tr>
<tr>
<td>Lit Support</td>
<td>46%</td>
<td>38%</td>
<td>16%</td>
</tr>
<tr>
<td>CRM</td>
<td>43%</td>
<td>34%</td>
<td>8%</td>
</tr>
<tr>
<td>DMS</td>
<td>42%</td>
<td>41%</td>
<td>8%</td>
</tr>
<tr>
<td>PMS</td>
<td>42%</td>
<td>22%</td>
<td>15%</td>
</tr>
</tbody>
</table>
What Cloud Services Issues Still Need To Be Addressed?

<table>
<thead>
<tr>
<th>Issues/Concerns</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Security/Client Confidentiality</td>
<td>81%</td>
</tr>
<tr>
<td>Location of Data</td>
<td>43%</td>
</tr>
<tr>
<td>Compliance &amp; Regulatory Issues</td>
<td>42%</td>
</tr>
<tr>
<td>Performance</td>
<td>33%</td>
</tr>
<tr>
<td>Compatibility/Integration with other software</td>
<td>31%</td>
</tr>
<tr>
<td>Vendor Lock In</td>
<td>27%</td>
</tr>
<tr>
<td>Governance</td>
<td>21%</td>
</tr>
<tr>
<td>Transition Costs</td>
<td>15%</td>
</tr>
</tbody>
</table>
## Reaping the Benefits of Cloud Computing

<table>
<thead>
<tr>
<th>Cloud Adoption Benefits</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flexibility/Agility</td>
<td>55%</td>
</tr>
<tr>
<td>More Mobility</td>
<td>54%</td>
</tr>
<tr>
<td>Business Continuity</td>
<td>52%</td>
</tr>
<tr>
<td>Scalability</td>
<td>47%</td>
</tr>
<tr>
<td>Cost Savings</td>
<td>40%</td>
</tr>
<tr>
<td>Ease of Implementation</td>
<td>21%</td>
</tr>
<tr>
<td>Focus on Core Business</td>
<td>18%</td>
</tr>
<tr>
<td>Going Green</td>
<td>13%</td>
</tr>
</tbody>
</table>
SCOPE OF CLOUD SERVICES

BERT G. KAMINSKI
ASSISTANT GENERAL COUNSEL
ORACLE NORTH AMERICA COMMERCIAL LEGAL
BRIDGEWATER, NJ
908-547-6207
BERT.KAMINSKI@ORACLE.COM
Scope of Cloud Services

- What’s Driving Cloud Adoption?
- Why Cloud Computing and IT Outsourcing are not the same
- Ownership of Intellectual Property in the Cloud
- Overview of Scope of Security in Cloud Contracts
- Term and Termination
WHAT'S DRIVING CLOUD ADOPTION?

GLOBALIZATION
Internet saturation growing at 8% annually

DATA EXPLOSION
4300% data generation increase by 2020

RISE OF MOBILITY
Smartphone shipments to top 1B annually by 2016

SOCIAL IS BUSINESS
13+ million business pages on Facebook

MODERNIZE TO SURVIVE
Productivity costs up 70-75% w/ legacy within 7 years
**Cloud is Different than IT Outsourcing**

### Traditional IT Outsourcing

- Custom built solutions
- Designed to meet customer specific requirements
- Highly negotiated contracts
- Long diligence and negotiation lifecycle
- Each transaction has unique:
  - Allocation of responsibilities
  - Scope and deliverables
  - Service Levels
  - Financials (*e.g.*, pricing, profitability, costs, investments, etc.)
  - Transfer of assets

### Cloud Services

- Standardized solutions based on predefined platforms and applications, characterized by:
  - On-demand self service
  - Broad network access
  - Resource pooling
  - Rapid elasticity
- Standard offerings not negotiable
- Offerings are designed to maintain currency with latest industry technology, but not to individual customer requirements
- Standard contract documentation for the service offerings

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Scope of Cloud Services
**Cloud is Different than IT Outsourcing**

<table>
<thead>
<tr>
<th>Traditional IT Outsourcing</th>
<th>Cloud Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Formal central /procurement type process:</td>
<td>▪ Informal acquisition by business users:</td>
</tr>
<tr>
<td>– Driven by corporate IT decision-makers</td>
<td>– Driven by self-managed, online purchased by users based on line of business need</td>
</tr>
<tr>
<td>– Sold to by vendor’s sales channel</td>
<td>– In response to immediate need or for short term use</td>
</tr>
<tr>
<td>– Evaluation of business case and interoperability</td>
<td>– No formal compliance requirements</td>
</tr>
<tr>
<td>– Purchase by formal contracting method, term-by-term negotiation</td>
<td></td>
</tr>
<tr>
<td>– Often compliance/policy driven</td>
<td></td>
</tr>
</tbody>
</table>

Scope of Cloud Services
WHAT’S DRIVING CLOUD ADOPTION?

- No infrastructure management
- Reduced operational management
- Rapid implementation and deployment
- Lower upfront and total costs
- Elastic / Scalable
- Reduced IT complexity
- Use of industry-leading technology and innovation
- Security “by default”
- Manage and mine “Big Data”
- Emergence of BYOD; ubiquity of mobile devices
SCOPE OF CLOUD SERVICES

- Contract scope is:
  - Based on standardized solutions
  - Reflected in standard service documents and contracts
  - Includes standard and optional capabilities, features and functions

- “Service description” or “services specification” rather than a statement of work
SCOPE OF CLOUD SERVICES

- Often the service scope is described in a single document
  - Service Level Objective Policy
  - Change Management Policy
  - Support Policy
  - Disengagement (or Termination) Policy
  - System Resiliency and Disaster Recovery Service Policy
  - Security Policy
  - Privacy Policy
Scope of Cloud Services

- Service descriptions may define:
  - Provisioning and management processes (such as capacity planning)
  - Types and quantities of system resources (such as storage allotments)
  - Customer obligations
SCOPE OF CLOUD SERVICES

- Application features may be described in separate product documentation

- Professional services may be required to set up and configure the service, via a separate professional services order/SOW

- Cloud policies are subject to change, and services are subject to modification
  - To reflect changes to infrastructure, security, technical configurations, application features
  - Changes generally should not result in a material reduction in the level of performance or availability of the service
**Scope of Cloud Services**

- Service Provider’s use of data
  - to monitor and administer the services, to resolve service requests and to address deficiencies in product and service offerings
  - for publication of statistical data related to performance, operation and use of cloud services
    - This should not identify customer or include customer production data or PII
  - aggregated data for security and operations management, to create statistical analyses, and for research and development purposes
    - This should not identify customer or include customer production data or PII
- Certain SaaS cloud services may provide customers with statistical analyses designed to optimize their use of the service
Ownership of Intellectual Property

- Typically not an issue in Cloud transactions
  - It is almost never appropriate for a customer to own IP in connection with a standardized, mass market cloud solution
  - Cloud service provider owns all aspects of the Cloud, including professional service configurations, set ups etc.

- Customer remains the owner of what it provides:
  - Customer provided or developed applications (e.g., in PaaS, IaaS)
  - Customer provided data (e.g., SaaS, Paas, IaaS)

- Third parties may own:
  - Data (e.g., DaaS)
  - Other third party components of the Cloud
THIRD PARTY TERMS MAY APPLY

- Data owned by third parties may include:
  - Social media data
  - Financial data
  - Medical and health sciences industry data
  - Real estate data
  - Talent management data (*e.g.*, *resumes*)

- Third party terms may include:
  - Pass through terms by cloud service provider to end user, for specific third party components and functions
  - Separate licensing terms
SCOPe OF SECURITY

- A contract is not a substitute for appropriate due diligence of the cloud provider!
- Responsibility for security and privacy related compliance cannot be outsourced to a service provider

Therefore:
- Conduct appropriate due diligence and selection of service providers
- Ensure that security standards are reflected in contractual clauses
- Monitor performance of service providers to the security standards
SECURITY IS INTEGRAL TO SCOPE OF SERVICES

- The scope of services should include a framework of security and describe applicable security practices
  - Description of the technical, organizational and administrative controls used by the service provider to deliver the services
  - Data center operations may align to ISO/IEC 27002, ITIL or CMM standards

- The scope of security related obligations must reflect the respective roles and responsibilities of each party in the service provider arrangement
COMPONENTS OF SCOPE OF SECURITY

- Physical controls and logical controls
- Encryption, masking, data anonymization
- Account access and access controls; passwords
- Network security and intrusion detection
- Data retention, backup and recovery
- Incident response
- Production vs. Non-Production instances
- Use of subcontractors by cloud provider
- Security certifications
- Audits
EVALUATION OF SERVICE PROVIDER’S INTERNAL CONTROLS

- Service providers can demonstrate adequacy of controls and safeguards for hosting and processing of customer data through recognized auditing standards:
  - Statement on Standards for Attestation Engagements (SSAE) 16 /
  - International Standard on Assurance Engagements (ISAE) 3402
    - BUT NOT the SAS 70 (*Statement on Auditing Standards No. 70*), which is no longer a current auditing standard
TERM OF CLOUD SERVICES

- Duration of cloud services is based on a defined (and finite) term
  - not a perpetual license
- For certain services, the term may be month to month
- For more complex cloud services, a minimum period may apply (*e.g.*, one year, three years)
- Note that auto-renewal may apply
TERMINATION FOR CONVENIENCE

- By customer
  - For simpler cloud services, but not for complex services
  - Minimal early termination fees (or none)
  - The costs of the implementation itself may discourage rapid changes by cloud customer

- By service provider
  - If the service is discontinued
  - Notice period required

Scope of Cloud Services
QUESTIONS??

BERT G. KAMINSKI
ASSISTANT GENERAL COUNSEL
ORACLE NORTH AMERICA COMMERCIAL LEGAL
BRIDGEWATER, NJ
908-547-6207
BERT.KAMINSKI@ORACLE.COM
CONTENT, CONFIDENTIALITY & DATA PRIVACY IN THE CLOUD

MARY J. HILDEBRAND
PARTNER, TECH GROUP

Lowenstein Sandler

Email: mhildebrand@lowenstein.com
Phone: 973.597.6308
CONTENT, CONFIDENTIALITY & DATA PRIVACY IN THE CLOUD

- What Content are you willing to entrust to a Cloud Provider?
- Where is the line between a guarantee of absolute confidentiality and commercial reality?
- There’s Something for Everyone in the Current Debate Over Applying Data Privacy Law to the Cloud: What are best practices?

THEREIN LIES OUR CONVERSATION!!
CONTENT IN THE CLOUD

What Content Will You Entrust to Cloud Providers?

- Confidential Business & Financial Information
- Intellectual Property (patent, trademark, copyright & trade secrets)
- Personal Data
- Other?
CONTENT IN THE CLOUD

The Contract

- Ownership & Control
- License
- Data Aggregation: Pros & Cons
- Infringement
- Export Controls
- Transborder Data Transfer
- Right to Monitor/Audit
- Compliance with Applicable Laws
WHAT’S SO SPECIAL ABOUT CONFIDENTIALITY IN THE CLOUD?

- Perceived Risk may Exceed Actual Risk … Diligence Matters!
- Specific Service Environment
- Restricted Access
- Bind Cloud Provider, Employees & All Sub-Providers
- Specifications for Return or Destruction of Personal Data (including secure erasure)
- Require Data Security Breach Notification
DATA PRIVACY IN THE CLOUD: WHERE CONTENT, CONFIDENTIALITY & THE LAW COLLIDE

- “When an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities.” US v. Jacobson, 466 U.S. 109 (1984)
- “It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties...This approach is ill suited to the digital age.” US v. Jones, 565 U.S. __, 132 S. Ct. 945 (2012)(Sotomayor concurrence in a “slip opinion”)

Electronic Communications Privacy Act:
- ECPA (18 USC §2510-2522) enacted in 1986 To Address Privacy Concerns in the Wake of Jacobson
- Failed to keep pace with changing technology
DATA PRIVACY IN THE CLOUD: WHERE CONTENT, CONFIDENTIALITY & THE LAW COLLIDE

United States
- Fragmented Compliance Structure &
- Industry & Issue Specific Legislation

Federal Law
- Health Insurance Portability & Accountability Act of 1996 (42 USC §1320-d)
- Gramm-Leach-Bliley Act (15 USC §6801-6809)
- COPAA (15 USC §6501-6506)
- FTC Section 5 (15 USC §45)
  - Unfair and deceptive trade practices
  - For Deception -- No requirement to demonstrate actual harm to consumers
DATA PRIVACY IN THE CLOUD: WHERE CONTENT, CONFIDENTIALITY & THE LAW COLLIDE

State Laws

- Jurisdictional Basis: Residence of the Individuals that Provided Personal Data
- Apply Across Industries
- Govern Data Sharing with Service Providers & Other Third Parties
- Emphasize Data Security & Data Breach Notification
- No commonality regarding the data covered, security requirements or notice obligations in the event of a data breach
- Massachusetts, California, Texas, and many others
US PATRIOT ACT

- Enacted in October 2001 in Response to “9/11”
- Authorized the US government to use investigative tools previously limited to Organized Crime for Terrorism Cases
- Under long standing law, the US government already had the right to compel disclosure of company data stored outside the US so long as the corporation (or its US based subsidiary) had “possession, custody, or control,” over the data stored abroad
- US & Foreign Customers of US Cloud Providers Still Protected by Doctrine of Probable Cause/Notice & Opportunity to Challenge in Court (notice may be withheld to protect national security)
US PATRIOT ACT

- EU Cloud Providers with a presence in the US (or subsidiary in the US) may be subject to US jurisdiction and be required to disclose personal data on foreign data subjects
- US has signed over 50 “Mutual Legal Assistance Treaties”
- Enhance the Exchange of Information & Judicial Cooperation
DATA PRIVACY IN THE CLOUD: WHERE CONTENT, CONFIDENTIALITY & THE LAW COLLIDE

European Union: Recent Attention to Cloud Computing & Data Privacy

- WP 29 Opinion on Cloud Computing (opinion 05/2012 of July 1st, 2012) (WP 196)
- “Unleashing the Potential of Cloud Computing in Europe” (COM 2012, 529/2 of September 2012)

EU Perspective:

- EU Data Protection laws govern when the Cloud Client or the Cloud Provider is in the EU
- Guarantee Compliance with Applicable Data Privacy Laws
- “No Excuse”
DATA PRIVACY IN THE CLOUD: WHERE CONTENT, CONFIDENTIALITY & THE LAW COLLIDE

International Transfers of Personal Data from the EU to the Cloud

- Model Contracts (*undergoing revision for cloud computing in 2013*)
- Binding Corporate Rules (*not yet available*)
- Safe Harbor (*intact for now; however, may not be appropriate if the Cloud Provider data center is outside the US*)
Working Party 29: Raising the Contract Bar

- Process Data Strictly in Accordance with Instructions
- Specify Purpose of Processing & Types of Data Processed
- Facilitate Data Subject’s Rights
- Timely, Reliable Access; Data Integrity; Portability & Isolation
- Third Party Verification Process
- Include details on the “extent and modalities” of instructions regarding data privacy and security, including SLAs

- Establish basis for international transfers of Personal Data (e.g., Safe Harbor, Model Clauses)
- Compliance with applicable national and international laws
- Right to Monitor; Logging and auditing of processing of Personal Data
- List of Processing Locations (special provision re: changes)
- Consent required for all sub-processors, with right to terminate for changes to sub-processors
DATA PRIVACY IN THE CLOUD: BEST PRACTICES

- Discount the Myths
- Recognize that Data Privacy Laws Do Not Allocate Commercial Responsibility or Liability
  - Data Breach
    - Indemnification
    - Limit of Liability
    - Comparative Negligence
  - Cloud Providers
    - Potential Liability to Data Subjects
    - Customer’s Customer
Data Privacy in the Cloud: Best Practices

- No Excuse!
- Diligence: There Are Still No Shortcuts
- Location of Servers
- Subcontractors/Sub-Processors
- Verification/Audit
Data Privacy in the Cloud: Where Content, Confidentiality & the Law Collide

- Legal Landscape is Fragmented
- Commercial Norms are Still Evolving
- US Laws & WP 29 Opinions create a challenging environment for companies in the US and the EU to select Cloud Providers outside their jurisdictions
- Cloud Environment is Cost-Effective & Scalable
- Companies Want to Conduct Business in the Cloud, Including Across Borders, so Stay Tuned!
Thank you for your attention!

Questions Welcome

Mary J. Hildebrand
mhildebrand@lowenstein.com
973-597-6308
SLA’S, SERVICE SUSPENSIONS AND LIABILITY ISSUES

STEVE PARKER
ASSISTANT GENERAL COUNSEL
RICOH AMERICAS CORPORATION
FIRST DISCLAIMER:
“These remarks are my own and do not necessarily represent the views of my employer.”

SECOND DISCLAIMER:
My Company is sometime a “Seller” of cloud services. When negotiating a sale to you, I will repudiate anything said this morning that could be used against me!
WHAT KIND OF LEGAL "ANIMAL" IS SAAS?

As one large Seller clearly acknowledges:

“IBM Software as a Service ("IBM SaaS") – offerings IBM makes available to Customer remotely through the Internet providing access to (i) functionality of Programs, (ii) infrastructure, and (iii) technical support. IBM SaaS is not a Program [i.e., not a license] but may require Customer to download enabling software in order to use it.”

IBM International Passport Advantage Agreement v7

Because Cloud Services entail a significant outsourcing component, it is crucial to examine the performance standards that the Seller offers.
IF THE CLOUD IS DOWN, YOU PAID FOR NOTHING!

- SLA’s Need to Cover:
  - Traditional software “Support” issues
    - helpdesk,
    - severity levels,
    - resolution times
  - Availability
  - Performance
(SLAs) - AVAILABILITY

Generally Stated as a % of “UPTIME”, e.g., 99.something %

- GAMING THE NUMBERS!
  
  - How much normal systems maintenance is permitted and when?
  
  - Measured over 24 hours or Business Hours?
  
  - Averaged over a month or a calendar quarter?
  
  - Force majeure – what should be excluded from normal definitions?
SLAs - PERFORMANCE

PERFORMANCE MEASURES VARY DEPENDING UPON THE PURPOSE OF THE APPLICATION

- Latency is a typical measure:
  - How quickly does the application software process a request?
  - How is response time defined?
  - Get input from a client “technologist”

- Another example – large data uploads
  - SLA might be maximum batch upload time
SLAs – DISASTER RECOVERY/DATA RESTORE

- Frequent data back ups are crucial and should be specified in the agreement
  - Even with frequent back ups, a slice of data may be lost

- If Data is lost, how soon will it be restored from backup
  - The issue of system outage and restore is a topic for the Severity Level 1 response/resolution dialogue
SLAs – DISASTER RECOVERY/DATA RESTORE

- Does the Seller have a formal disaster recovery plan?
  - P.S. Does the seller maintain a second instance of the application and data in a different data center?

- Sellers may be reluctant to give an open ended “Restore” SLA – too many variables

- To mitigate risk, obtain a download of the data to your own systems periodically
SLAs - REMEDIES

TYPICAL REMEDY IS A (SMALL) CREDIT AGAINST FUTURE FEES

- To encourage compliance, make it large enough to “sting”
  - Scoping the size of the credit to the harm cause to Buyer is not likely to be accepted
- Seller will make this the exclusive remedy for system non performance
  - Loss of normal contract default remedy
  - Counter with a “three strikes and out” provision (or two or five, the market varies)
- Who is responsible for monitoring outages – Buyer or Seller?
  - Is the cloud system capable of providing the metrics?
- Buyers should request real time notice of system outages
SUSPENSION OF SERVICES

MOST CLOUD AGREEMENTS WILL PERMIT THE SELLER TO SUSPEND ACCESS TO THE SYSTEM IN CERTAIN INSTANCES

- Violation of Seller’s “Acceptable User Policy” (AUP)
  - Over broad – most relevant to consumer style applications

- Compliance with law, especially court orders

- In order to prevent harm to the system or other users

- Buyers should attempt to limit to emergent situations
BALANCING THE NON PAYMENT/SUSPENSION RISK

Seller will insist upon suspension for non payment of fees

- Difficult to balance – both parties have a legitimate interest

- Use a fair dispute resolution mechanism to close the issue

“We shall not exercise Our rights under Section 6.3 (Overdue Charges) or 6.4 (Suspension of Service and Acceleration) if You are disputing the applicable charges reasonably and in good faith and are cooperating diligently to resolve the dispute.”

salesforce.com Master Subscription Agreement. Section 6.5 Payment Disputes.
LIABILITY ISSUES – THE RUBBER MEETS THE ROAD

• Pick your fights!
  • How critical is the application?
  • How sensitive is the data?
  • How much money is at stake?
  • What is the relative bargaining position of the parties?

“The move to a cloud services provider, however, should only be undertaken after the company has reviewed the data and processes it seeks to outsource to the cloud, and the controls it desires to maintain over those data and processes. ... The company may determine that mission-critical processes, or proprietary or confidential information, may not be appropriate for migration to anything other than a private cloud.” - Legal Considerations in Migrating to the Cloud, Classen and Delacruz, ACC Docket, December 2011.
LIABILITY ISSUES – AN EVOLVING DISCUSSION

“Big players will create standards for security and governance .... A premium will be charged based on the degree of accountability demanded.”


AS WITH ANY COMMERCIAL CONTRACT, LIABILITY WILL PLAY OUT ACROSS SEVERAL PROVISIONS:

1. Warranty Disclaimers, esp. no responsibility for data loss
2. Indemnities
3. Limitations on remedies (i.e., consequential damages)
4. Limitations on damages
A DIGRESSION - WHAT DID THE SELLER OFFER REGARDING DATA SECURITY?

1. Breach of Confidentiality
   - Watch the standard of care and include Content
   - But … would hacking trigger a breach?

2. Contractual Covenant, e.g.
   “Seller shall establish and maintain commercially reasonable administrative, physical and technical safeguards against the destruction, loss, alteration or unauthorized access, use or disclosure of Buyer Content.”
   If so, what is the performance standard or triggering event?
   - Material failure to comply with the covenant (breach of contract)?

3. Liability for Seller’s gross negligence or intentional misconduct?

4. An industry certification, e.g., SASE 16 (SAS 70)?
…. OR CAVEAT EMPTOR?

“IBM implements and maintains practices and procedures, which may be revised periodically, regarding the systems used to host and operate the IBM SaaS. These practices and procedures are designed to reduce the vulnerability of our systems to accidental loss, unlawful intrusions, unauthorized access, disclosure or alteration, or wrongful conduct that may interfere with, misappropriate, or otherwise damage the Content or Customer's use of the IBM SaaS. A description of the practices and procedures applicable to the IBM SaaS, including applicable technical and operational measures, is available to Customer upon request. **Customer is responsible for determining whether these practices and procedures are appropriate to meet Customer's requirements.** By using the IBM SaaS, Customer acknowledges its acceptance of the IBM practices and procedures and their adequacy for Customer's purposes. Except as specifically provided in the Security Practices for the IBM SaaS, IBM makes no representations or warranties regarding any security functions or that the IBM SaaS or Customer's content are secure from any intrusions or wrongful conduct.”  *IBM SaaS Terms of Use, IBM Smart Cloud for Social Business. Section 13.4 Security Practices.*

SLA's, Service Suspensions and Liability Issues
LIABILITY – WHAT SHOULD BE INDEMNIFIED?

FROM THE SELLER’S PERSPECTIVE

- Misuse of its IP, breach of confidentiality and violation of the license
- Export violations by Buyer
- Infringement caused by Buyer Content

FROM THE BUYER’S PERSPECTIVE

- 3rd party infringement claims attributable to the Seller’s technology
- Breach of confidentiality, esp. as to Content
- Data loss, theft or alteration … at least 3rd party claims
LIABILITY – LIMITATION OF REMEDIES

CONSEQUENTIAL DAMAGES WILL BE GENERALLY EXCLUDED, BUT WHAT ARE THE EXCEPTIONS? (P.S. AS THE BUYER, MAKE THESE PROVISIONS BI LATERAL)

- High Stakes Issue: For mission critical systems, loss of use results in the inability to conduct business!
- Indemnified matters generally?
- Breach of confidentiality?
- General breach of security covenants or data loss?
- Data breach notification and remediation costs?
- With the larger Sellers, a Buyer (particularly a small Buyer or on smaller deals) will see little relief.
LIABILITY – LIMITATION OF DAMAGES

SELLER WILL PROPOSE TO LIMIT TOTAL DAMAGES TO FEES FOR USE OF THE SERVICE (3 to 12 months)

- This may not reflect the overall investment, e.g., cost of professional services to implement the solution
- Depending upon criticality of the application and/or sensitivity of the data, this may not adequately reflect the Buyer’s risk
- What should be excluded from any damages cap?
  - Same suspects as for consequentials (indemnified matters, confidentiality, security)
  - Consider special ‘not to exceed’ caps for sensitive matters, particularly data security
  - Breach notification and remediation costs may need special treatment
MARKET INTELLIGENCE

A few Cloud Services agreements as posted on the Web:

IBM smart cloud

Success Factors (SAP)

CA Technologies

Box.net
   https://m.box.com/static/html/terms.html

Salesforce.com
   http://www.salesforce.com/assets/pdf/misc/salesforce_MSA.pdf

SLA's, Service Suspensions and Liability Issues
QUESTIONS??

STEVE PARKER
ASSISTANT GENERAL COUNSEL
RICOH AMERICAS CORPORATION
Thank You For Your Participation!

NEW JERSEY CORPORATE COUNSEL ASSOCIATION

- Ann Gorr, Solutions Analyst, Micro Strategies
- Mary J. Hildebrand, Partner, Lowenstein Sandler LLP
- Bert Kaminski, Assistant General Counsel, Oracle Corporation
- Steve Parker, Assistant General Counsel, Ricoh Americas Corporation