Hot Topics in Technology Transactions

Presented by: Robert J. Scott

*www.**ScottandScottllp**.com*

Speaker

Robert J. Scott

Cloud Computing Trends

- Forrester Research estimates the cloud market will reach $191 billion by 2020 with cloud applications leading the growth ahead of cloud platforms and cloud services.[1]

- Cloud adoption not only reduces costs but increases workforce flexibility, improves customer service and enhances data analytics. [2]

- Gartner Says Worldwide Cloud Infrastructure-as-a-Service Spending to Grow 32.8 Percent in 2015 [3]

[1]The Public Cloud Market Is Now In Hypergrowth: Sizing The Public Cloud Market, 2014 To 2020 (Forrester Research, April 24, 2014)

[2] 2014 KPMG Cloud Survey Report

[3] Gartner Press Release May 2015

Key Provisions in Cloud Contracts

- Intellectual property ownership

- Insurance and indemnity requirements—especially for intellectual property infringement

- Regulatory compliance

- Subcontractor liability for third party services or software

- Effect of termination—return of customer data

- Service failure corrective action plan

RISKS

Business Continuity Risks

- Service Interruption
- Post-termination Data Rights

Regulatory Compliance Risks

- Data Privacy and Security Statutes

Intellectual Property Risks

- Use and Disclosure of Information
- Ownership of Software
- IP Ownership at Termination

Liability Risks

- Risk Balancing

Business Continuity Risks

Service Interruption

- Define service levels, metrics, and remedies in the SLA

Termination of the Agreement

- Ensure data is owned by and returned to customer in a usable format upon termination

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Intellectual Property Risks

Use and Disclosure of Information

- Ensure both parties understand the nature of the data stored in the cloud
- Specifically personally identifying information and trade secrets

Intellectual Property Ownership

- Define ownership of any software customizations
- Exclusivity of customizations during term of engagement

IP Ownership at Termination

- Work for hire or vendor-owned code

Regulatory Compliance Risks

Industry-specific Regulation

- FTC Red Flags Rule – Financial
- Gramm-Leach-Bliley Act – Financial
- HIPAA & HITECH – Healthcare
- PCI Compliance – Payment Systems

Broad Regulation

- State Data Privacy

Key Legal Issues: Indemnification

- What indemnification is the vendor offering?

- How do proposed terms compare to vendor contracting policies and procedures?

- Customers often use insurance to cover risks that would normally be addressed in indemnification provisions

Liability Risks

Risk Balancing

- Vendors disclaim all liability—this is unacceptable to the customer
- Insurance as a tool for risk balancing
- Indemnity as a tool for risk balancing

Striking the Balance

- Specifically address liability issues regarding data risks
- Risk should be commensurate with the value of the cloud service

Key Legal Issues: Limitation of Liability

- Calculating maximum liability

    - Usually tied to payments made under the agreement
    - Carve-outs – certain claims are not subject to the cap

- Liability risks related to security incidents

Recent Cases

Oracle vs. Mars

Adobe vs. Levy Group

Xerox vs. Cincom

Xerox vs. Aptean

Risk Mitigation Strategies

- Require vendors to legally assume all liabilities associated with the service
- Specify insurance coverage requirements including forensics, breach response, regulatory response and consumer claims.
- Use indemnity provisions to protect against liability
- Edit limitation of liability provisions that would limit access to coverage

Questions?

Contact Information

Robert J. Scott, Esq.

Managing Partner

rjscott@scottandscottllp.com

(214) 999-2902

Scott & Scott, LLP.
1256 Main Street, Suite 200
Southlake, TX 76092
www.scottandscottllp.com