Days of 'one-size-fits-all' cloud contracts are numbered, report finds

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Combined legal and market factors may force online companies to offer more flexible contract terms, suggests new research from Queen Mary, University of London.

The paper examines how and why companies providing IT services over the internet, also known as cloud computing, have begun to negotiate standard contract terms to better meet cloud users' needs, minimise operating risks and address legal compliance obligations.

The research, by the Cloud Legal Project at the Centre for Commercial Law Studies at QM, is primarily based on in-depth interviews with global and UK cloud providers, cloud users, law firms and other market players.

The report found that the top six types of cloud contract terms most negotiated were:

- Provider liability
- Service level agreements
- Data protection and security
- Termination rights and lock-in/exit
- Unilateral amendments to service features
- Intellectual property rights

"These are the key contractual issues of concern to users in the cloud

market at this relatively immature stage of cloud adoption," explains Professor Christopher Millard, lead academic on the Cloud Legal Project (CLP).

Standard 'one-size-fits-all' terms are often weighted in favour of the provider, and many are potentially non-compliant, invalid or unenforceable in some countries, the project found.

Many providers do not take into account that users, especially in Europe, have regulatory or other legal obligations and may need to demonstrate compliance to regulators.

Professor Millard adds: "To remain competitive, providers may have to be more aware of user concerns, more flexible in negotiations, and more willing to demonstrate the security and robustness of their services.

"In the middle or low value markets, choice is still limited, and many contract terms are still inadequate or inappropriate for SME users' needs, as they may lack the bargaining power to force contract changes."

According to the research, there are signs of market development. Where large users have negotiated amendments and thereby helped educate providers about user concerns, these changes are likely to filter down to the middle market at least. Changes to providers' standard terms may also filter up from regulatory action affecting the consumer market.

CLP research consultant, Kuan Hon says: "The findings suggest that more customer-friendly terms are being demanded by large cloud users such as governments and financial institutions, and being offered or agreed by niche specialist providers and market entrants - making contract terms a source of competitive advantage."

The paper also discusses other legal risk issues, such as providers' lack of

transparency about data security, location and management. Providers' exclusion of liability in their terms, particularly for outages and data loss, was generally the biggest issue for users surveyed.

Conversely, providers have argued that customers want to 'have their cake and eat it'; seeking the cheapest services while requesting the highest levels of assurances in contract terms and conditions.

"Forcing providers to accept more liability and incur the expense of upgrading their infrastructure, while keeping prices low, may undermine market development," Professor Ian Walden, from CLP, warns.

Apart from contract terms, users may need to take other practical measures to protect their businesses online, including data encryption or backing up data internally or to another cloud service, note the researchers.

Professor Walden explains: "Many cloud providers, particularly those offering free services, do not offer back-ups or assume liability for data losses as part of their basic package. Ignorance of cloud structures, with their multiple potential failure points, may result in risks not being addressed."

Users may need to consider what functions should be migrated to cloud and on what basis, such as starting with pilots only, conducting risk assessments, and implementing internal controls.

Researchers suggest multiple approaches are emerging, with a fragmentation of the market, rather than a 'de facto' cloud model. Market participants may be developing a range of cloud services with different contractual terms, priced at different levels and embracing standards and certifications that aid legal certainty and compliance, particularly for SME users.

More information: The paper, Negotiating Cloud Contracts – Looking at Clouds from Both Side Now, is available for free download via the Cloud Legal Project website: www.cloudlegal.ccls.qmul.ac.uk or cloudlegalproject.org/Research

Provided by Queen Mary, University of London

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