Chapter 96
Key Legal Issues with Cloud Computing:
A UK Law Perspective

Sam De Silva
Manches LLP, UK

ABSTRACT

The chapter considers the key legal issues with cloud computing, including: (1) liability for service failure; (2) service levels and service credits; (3) intellectual property issues; and (4) jurisdiction and governing law.

INTRODUCTION

Cloud computing is designed to offer on-demand access to a flexible IT facility at reduced cost. This is attractive to a customer with pressures on budgets and possible uncertainty about predicting its IT requirements. However, cloud computing also carries certain additional risks. The chapter considers the key legal issues with cloud computing including:

- Liability for service failure;
- Service levels and service credits;
- Intellectual property issues; and
- Jurisdiction and governing law.

Data protection issues are also relevant for cloud computing. However, given the complexity of the subject matter and the coverage which would be required to explain the issues, data protection is beyond the scope of this chapter.

In this chapter the service providers who are providing the cloud services are referred to as service providers and the customer is the party in receipt of the benefit of the cloud services.

This chapter is based on the law as at 1 December 2011.

EXISTING RESEARCH

There has been only a limited amount of research and writing from a UK law perspective on the topic of general legal issues related to cloud computing (with the exception of data protection). Whilst there are numerous short articles (less than 5 pages) on this topic (Tayyip 2011), the number of detailed articles and studies are limited. Marchini

DOI: 10.4018/978-1-4666-6539-2.ch096

has explored the legal issues, covering such areas as security in the cloud, data protection, service levels, and contractual issues (Marchini 2011). Kemp and Anderson have considered the legal issues in respect of cloud based service contracts (Kemp and Anderson 2010). In addition there has been a survey of a different number of service providers comparing their terms and conditions (Bradshaw, Millard and Walden 2010). There has been a considerable amount of research in relation to data protection issues and cloud computing (Hon, Millard and Walden 2011a). In a KPMG survey on cloud computing, 51% of participants expressed that legal issues were a key risk area (Chung and Hermans 2010).

LIABILITY FOR SERVICE FAILURE

Background

Liability provisions are, without doubt, the most contentious and fiercely negotiated provisions in almost any technology contract (and cloud computing contracts are no exception). The most obvious reason for this approach is the immediate financial impact that contractual failures have on the businesses that they support and, crucially, the extent to which the resulting financial damage is out of proportion to the level of fees being paid under the cloud computing contract itself. Both customers and service providers seem to vary enormously in the extent to which they expect the other party to accept liability or seek to exclude liability, respectively. Customers are keen for the service provider to be "on the hook" for the potential damage which can be caused by the failure of a business critical IT service or system. Service providers, on the other hand, argue with some justification that it would only be a matter of time before they were out of business if they accepted unlimited liability on every transaction.

Liability under Contract

Under contract law, a contracting party is entitled to damages for reasonably foreseeable losses that were caused by the other party's breach of the contract. Damages are the money that a court decides is to be paid by one person to another person as compensation for loss or damage sustained by that other person in consequence of the actions or omissions of the first person (Chitty and Beale 2011). The object of an award of damages is to place the wronged party in the position they would have been in had the contract been performed (*Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1).

Generally, there are two types of losses arising from a breach of contract: direct losses and indirect losses.

Direct Loss

Direct losses are:

- Losses which arise naturally from the breach; or
- Losses that arise that would reasonably have been considered to be in the contemplation of the parties as a probable result of the breach.

In summary, if losses do not arise "naturally," or where not reasonably contemplated by the parties at the time the contract was made as a probable result of the breach, then they are not recoverable. These losses are generally categorised as indirect or consequential losses (see below).

Exclusions of Liability: Indirect or Consequential Loss

Service providers will usually argue that an exclusion of consequential or indirect loss is needed