
3rd Cirrus Workshop
Vienna Nov. 19th 2013
The Cloud
“IT out of the wall socket?”
Design of cloud contracts right

Ing. Dr. iur. Eike WOLF
Consultant
EuroPriSe certified Data Expert
Bechardgasse 15/8
A 1030 Vienna
eike.wolf@wolf-telecom.at

Content

Subject of Contract

Fulfilment (location, mode, time)

Warranty (even in continuing obligations)

Data protection and Data security as special problem

Availability of Service (Mode and Time of Fulfilment)

Compensation (Exclusion of Liability for Data)

Bankruptcy of Cloud Provider ("To big to fail?")

Subject of Contract

- Is the most important provision of any contract.
- It shall be clear, unambiguous and understandable.
- Both contract parties shall contribute to it.
- A open and frank conversation is necessary for avoiding dissent.
- Client should have a clear intention and description of the subject.
- But even the supplier is asked to explain, what he could provide and what he could not provide
- The most common error: expectations are provoked, which could not fulfilled or they are beyond acceptable price level.
- Logical outcome: impairment of performance → conflict about subject → deterioration of climate → cancellation of contract or litigation about contract

Fulfilment (Location, Mode, Time)

- **Cloud services** are mainly **continuous obligations** which are characterized that a **time dependant conduct is owed**.
- **Location of fulfilment** should be regularly at the **location of the client** or for mobile services sometimes around the world.
- **Mode of fulfilment** is clearly **complete fulfilment**, but any **incomplete fulfilment** is an **impairment of contract performance** and coincide with delay if someone is responsible → **compensation is owed**.
- **Time of fulfilment is mainly immediate** (SLA, availability, functionality) or if **delayed** then possible consequence for impossible fulfilment if someone responsible → **compensation is owed**.

Warranty

- Cloud services are continuous obligations.
- For warranty the rules of tenancy contracts are regularly applied.
- That means warranty for the total contract time.
- For minor imperfections not solved → reduction of contract fee.
- For substantial imperfections → cancellation of contract.
- Imperfection ≠ any fault which is inherent to hardware or software; warranty solves for deviation from the contract.
- Total exclusion of warranty is regularly invalid and illegal
- Warranty is independent of any negligence, if caused by negligence then compensation is owed.
- Scope of warranty should be described.

Data Protection and Data Security as special Problem

- Typical and main subject of cloud service is **Processing of Data**.
- **Limitations of warranty and of compensation** for loss and damage of data **effect the essential subject** of the contract and as concerning the main content of the contract it is **unethical and ineffective by law**.
- **Observe Data Protection** for personal information, Austria, Denmark, Iceland, Italy, Luxembourg, Norway and Switzerland protect legal persons too and any data of a company is **therefore personal information** and as such protected! **Cloud provider** is **processor of data** and the **client** is the **controller of the data** according to Data Protection Law (EU-Dir 95/48/EU) and they are as such both **liable for all imperfections**.
- Clear the **property relation of data** and the **access rights of the client**.
- **Prevent any external executive access to client data** (insolvency law).
- **Requested deletion of personal information** has to be performed **physically** and on **back-up media too**.
- **Observe ISO 270xx and ISO/IEC 29100** (EU-Dir 95/48/EU Art 17).

Availability of Service (Mode and Time of Fulfilment)

- Concerns Location, Mode and Time of Fulfilment
- Clarification necessary by Cloud Provider
 - What is possible and for which costs
 - Who takes over responsibility for which equipment and software
- Provision of acceptable **Down Time**
 - Most frequent Error: not any measurement of down time period agreed
 - Average or maximal operating times per application agreed
- Agreement about methods how to fix a **Down Time** of an application
- Clear subsequent regulation (error message, reaction to error message, escalation)
- Clear financial sanctions for exceeding time limits (SLA)
- Scalability of the offered service

Compensation (Exclusion or Limitation of Liability for Data)

- Limitation of compensation is possible, but be careful how far and for what type of liability.
- Any limitation shifts the balance of the contract and could cause unethical nature (invalidity).
- Limitation acceptable only by balanced return favour.
- Exclusion of liability for financial loss affects in cloud services the main subject of contract and therefore results in the total exclusion of damages and this is invalid for most legal systems.
- The tortfeasor has to proof that he has not caused the damage.
- Illegal provisions in cloud contracts are unethical and can cause compensation.

Bankruptcy of Cloud Provider (“To big to fail?”)

- Bankruptcy of one party could not be excluded, but is seldom fair regulated in contracts.
- Bankruptcy of cloud provider could carry along his clients!
- Especially critical for cloud contracts could be the loss of right of disposal of data. Insolvency administrators have to observe quite different interests than the bankrupt.
- Therefore take care of bankruptcy as far as it is possible by law.
- Data should for all cases remain the property of the client and accessibly for him!
- Used software (including all documentation) should be available by an independent trusted third party or deposited at a trustee.
- Take care of copyright of software.
- Checklists available at: <<http://saas.clusterwien.at/5560585.0> and a complete guide at: <<http://saas.clusterwien.at/5560576.0>

Thank you for your attention!

Any questions?

Example for a SaaS-Service

