Intelligent Architecture for the Data-Driven Business
Cloud Computing
Contracts and Risks

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Overview

• Key legal risks and concerns
• Contractual protections
• Data privacy and security
• Regulatory / legal concerns
• Other risk management strategies
Key Legal Risks and Concerns

- Loss of control, while retaining responsibility and potential liability
  - Transition In
  - Ongoing business operations
  - Transition Out
Contractual Protections

• In general:
  • Need **firm obligations** and commitments regarding performance
  • **Not** goals, targets, objectives, etc.
Contractual Protections

- Transition in (at start of deal)
  - Implementation
  - Data conversion
  - Testing
  - Acceptance
  - “Go live” support
- Again, look for **firm** commitments
Contractual Protections

- Transition out (at end of deal)
  - Extraction or return of data
    - Industry standard format
    - No additional charge
  - Return or destruction of other confidential information
- Assistance and cooperation
Contractual Protections

- Ongoing business operations
  - Basic communications processes
    - Change control
    - Reporting
    - Periodic meetings
      - Operational
      - Executive
  - Escalation / informal dispute resolution
Contractual Protections

• Ongoing business operations
  • Basic services warranty
    • “Vendor shall provide the Service(s) in a timely, professional manner, in accordance with industry standards …”
  • The rare case in which lack of specificity helps the customer
Contractual Protections

- Ongoing business operations
  - Service levels
    - Problem response
    - Problem resolution
    - Availability
    - Application response time
  - Escalation process for unresolved issues
Contractual Protections

• Ongoing business operations
• Service level remedies
  • Automated monitoring / reports
    – vs. only upon request
  • Credits
• Sole and exclusive remedies
  – Need termination right for chronic or recurring failures
Contractual Protections

- Ongoing business operations
  - Term and termination
    - Pricing often tied to length of term
    - Termination for convenience will likely be difficult to negotiate

Possibly consider:
  - Changing term length
  - Termination or exit fee
Contractual Protections

• Limitations of liability
  • Cap on direct damages
  • Exclusion of indirect damages
• Exceptions
  • Breaches of confidentiality
  • Indemnities (including IP indemnity)
  • Gross negligence / willful misconduct
  • Willful abandonment / repudiation
Contractual Protections

• Other potential pitfalls
  • Exclusive remedies
  • Limitations on actions
    • Time in which to bring claims
  • Choice of law and forum
  • Alternative dispute resolution
    • Offshore deals
Data Privacy and Security

Assess Risks:

• What data will be stored?
  – Any personal data?
    • Individuals from what states or countries?
  – Will data be encrypted?

• Where will data be stored?
  – Do you know? Can you limit locations?

• Who will have what rights to data (and derivative data)?

• Who can access data?

• When / how will data be returned?
Data Privacy and Security

Assess Vendors Prior to Contracting

• Data security has become a selling point
  • Investigate and assess:
    • Security measures
    • Failover / availability protection
    • Backups / archiving procedures
    • Disaster recovery plans and processes
Standards / Audits

Applicable standards

- Service Organization Control (SOC) Reports
- SSAE 16 (SOC 1)
  - Replacement of SAS70
  - Examines financial controls at a service organization
- SOC 2 and SOC 3
  - Type 1 vs. Type 2
  - “Trust services principles”
Standards / Audits

Other Applicable standards

• Various ISO standards
  – ISO 9000
    • Quality management
  – ISO 27001
    • Information security management systems

• International standards
  • ISAE 3402
    – Assurance reports on controls at a service organization
Legally Required Disclosures

• Notification by vendor
  – Prior to disclosure
  – Unless prohibited by law

• Duties for vendor to cooperate and assist
  – Additional costs?

• Access to or provision of data
• Retention or preservation of data
Regulatory Concerns

- HIPAA and HITECH
  - Health care
- Gramm-Leach-Bliley
  - Financial services
- Sarbanes Oxley
  - US public companies
- FTC enforcement actions
- State data privacy laws
- Export control regulations
- EU Data Protection Directive
Risk Management Strategies

• Cyber-insurance
  • Does your vendor carry it?
    • Do you?
  • Coverage varies greatly
  • Premiums supposedly decreasing
Risk Management Strategies

• System design
  • Data encryption
    – Encrypted data often not subject to state security breach notification laws
  • Location of data / data elements
    – Can data be spread across databases or locations?
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• Questions?

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