



# Cloud computing contracts often have poor terms: survey results

May 2011

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***"What would you think of an accountancy firm that said it would disclose your draft tax return to third parties if it felt that was in its best business interests?"***  
*That's the sort of thing allowed by many cloud computing contracts, according to a recent survey. Moving from legacy to cloud services involves weighing up risks and benefits. One issue to consider is the strength of cloud contracts and what can be done about that.*

Two other examples of comparable clauses are given by the survey's authors:<sup>1</sup>

*"If you hired a storage unit, would you be perturbed to find the company's standard terms disclaiming all liability for loss or damage to your property whilst in their custody, irrespective of cause?"*

*"If you hired a car, how would you react if the rental company told you to check its web site regularly for any changes to permitted daily mileage?"*

*"Corporations sign up to agreements for cloud computing services on similar terms every day"* say the authors of the survey by the Cloud Legal Project at the University of London. The survey of 27 cloud providers' contracts shows that, contrary to carefully negotiated agreements in a

legacy world, cloud contract terms are often firmly against customer interests. (For example, service levels are typically weak). So much so that this is a significant negative factor in weighing up whether to run with cloud computing where terms are so negative. Of course there are advantages too, as we outline in our CIO article, *The case against cloud computing...revisited*.<sup>2</sup> Decisions on cloud computing are not just about contracts. But then most corporates wouldn't do legacy outsourcing without carefully negotiating terms with the supplier, so why is this different?

The survey authors conclude:

*"Cloud computing is an immature and rapidly-developing market. Many customers may find a mismatch between their*

1. S Bradshaw, C Millard and I Walden, 'Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services' [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1662374](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662374). The report is summarized by its authors in their article, *Watching Cloud Contracts Take Shape* (Computers and the Law: January 2011). The quotations in this article are taken from that article.

2. <http://www.wigleylaw.com/Articles/LatestArticles/the-case-against-cloud-computing-revisited/>. See also our other articles on cloud computing: *Cloud computing –privacy and security legal issues*, <http://www.wigleylaw.com/Articles/LatestArticles/cloud-computing---privacy-and-security-legal-issue/>; *Security in the cloud*, <http://www.wigleylaw.com/Articles/LatestArticles/security-in-the-cloud/>; *Public sector procurement and cloud computing*, <http://www.wigleylaw.com/Articles/LatestArticles/public-sector-procurement-and-cloud-computing/>; *Cloud computing: regulatory anti-trusts and solutions*, <http://www.wigleylaw.com/Articles/LatestArticles/cloud-computing-regulatory-anti-trust-risks-and-so/>; *Cloud computing for public sector lawyers*, <http://www.wigleylaw.com/Articles/LatestArticles/cloud-computing-for-public-sector-lawyers/>; *Cloud computing; the reality; government procurement; regulation/anti-trust*, <http://www.wigleylaw.com/Articles/LatestArticles/cloud-computing-the-reality-government-procurement/>.

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*expectations (driven, perhaps, by the 'hype' regarding cloud computing) and the reality of terms offered by providers. Cloud services' flexibility and value for money often comes at the cost of a more arms' length relationship between customer and provider than in traditional outsourcing contracts, as reflected in many of the T&Cs analysed. As cloud computing services develop further, they may, like more traditional clouds, prove both highly varied in shape and subject to sudden changes – including changes in their T&Cs"*

Can corporates get cloud providers to change their terms? There are signs this will change, but there are 3 key challenges:

- Many of the cloud providers are US based where there is more of a culture of pro-vendor terms. But this is changing as locally-based providers increasingly offer cloud computing. They may be prepared to offer more favourable terms, and that may force the multinationals to up their game. One of the potential catches, however, is that a local provider may offer, say, a SaaS service but contract upstream with an offshore PaaS provider (to host their SaaS service) with weak terms or reliability. Ultimately the local corporate customer could still get stuck. This emphasises the need for corporates to check out the full solution with backup and other arrangements.
- Unlike a normal outsourcing scenario, where a single failure is more common, a cloud problem is more likely to simultaneously affect multiple customers. Therefore limiting liability is more critical for the cloud provider given the scale of exposure.
- Standardisation is a key aspect of cloud computing efficiencies and cost savings. Cloud computing is moving more to a power utility-like model. Negotiating one-off arrangements moves away from the benefit of one-size-fits-all.

However, the reality is that many approaches will need tailored services. A good example where change was negotiated is the Los Angeles City Council's 2009 contract with Google for email services, data storage, etc. Given its size, the Council was able to negotiate much more favourable terms such as service levels, liabilities, etc. We expect that larger corporates increasingly should be able to do this, especially if they include desired terms such as service levels in their RFPs (when there are still competitive tensions). Additionally, expect gold, silver and bronze levels of service to evolve, where customers pay more for the gold service with stronger terms. But the position may remain challenging for longer for SMEs as they have little leverage.

The reality is that, if cloud providers don't provide stronger terms, they will lose business. Many corporates still question the value of cloud computing and lousy terms is one further factor against this solution. These factors should drive overall improvements including contract terms.

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