A PRACTICAL GUIDE TO DRAFTING COMPUTER CONTRACTS

"The more you sweat in peacetime, the less you bleed in war"
(Chinese proverb)

<u>Contents</u>

1.   **Contract triage**

When you learn to fly you are taught how to land before being taught how to take off. That way you can never be left in a tricky situation. For the same reason I shall start with what to do when you are in a difficult position and then go on to a general explanation of computer contracts.

A.   **The position in which you may find yourself**

There are three main possibilities:

(a)   you and the other side immediately agree on a perfect contract that covers all the points properly (dream on!), or,

(b)   you are offered a somewhat unattractive contract by the other side that is slightly thinner than a telephone directory and does not cover the points properly, or,

(c)   you are offered no contractual terms by the other side and the client expects you to come up with some – instantly

B.   **What to do with an unattractive contract offered to you by the other side**

(a)   DO NOT PANIC! There is a lot that you can do.

(b)   Assess whether the other side is particularly wedded to their contract. It is possible that they themselves regard it as being just as bad as you do, particularly if it has caused problems with other customers in the past. In that case the production by you of a short, easy to read contract written in plain English may be very welcome to them. (Indeed, they may adopt it as their standard form contract in future).

(c)   If they do insist on their own contract, assess whether they will accept any changes to it. If they will not, you have a stark choice – either accept the contract as it is or walk away.

(d)   If they are prepared to accept some amendments and you are under time pressure do not waste your ammunition. Pick out no more than 10 points that you want to change and put them in a supplemental agreement or letter to the other side. Make them sound as reasonable as possible (in order to make it as difficult as possible for the other side to object to the changes).

These are some of the terms you SHOULD try to get in the contract (when acting for the supplier):

(i)   a financial limit on your liability under the contract;

(ii)   an exclusion of any liability for consequential loss ("consequential loss" in these circumstances means significantly more than normal direct loss);

(iii)   where you are selling services, a clear agreement as to when such services are to be paid for by the customer;

(iv)   where there is an international or cross border element in the contract, the law governing the contract and the appropriate jurisdiction (i.e. which country's courts will hear any dispute) must be stated. Such clause is generally found at the end of a contract.

These are some of the terms you SHOULD TRY NOT to have in the contract (when acting for the supplier):

(i)   any agreement where time is stated to be of the essence in relation to your contractual obligations;

(ii)   any agreement to accept liability for consequential loss;

(iii   any agreement requiring you to take out any form of insurance;

(iv)   any agreement which allows the other side to terminate if there is a change in control of your company;

(v)   any agreement in which you must use your "best endeavours" (N.B. on the other hand "all reasonable endeavours" is normally acceptable);

(vi)   where you sell goods or services, any agreement that such goods or services are fit for the customer's purpose or will achieve a particular object (N.B. compliance with your own specification is generally acceptable).

C.   <u>**What to do if no specific contractual terms are offered to you by the other side**</u>

On balance the absence of any specific written terms at all generally benefits the supplier (if there are no terms, how can the customer validly argue that it did not get what it should have received?). In reality, there are never no terms – the law will always imply a skeleton set of terms (e.g. under the Supply of Goods and Services Act) if there are no written terms.

However, it is usually far better to get the other side to contract on your terms than on no written terms at all.

Do no forget that you do not need to have a formal signed agreement. The contractual terms could equally well be contained in either:

(a)   a letter that you send the other side and ask them to sign. (It is not the end of the world if they do not sign it – provided that they do not notify you that they disagree with the terms offered); or

(b)   in a set of standard terms that you notify the other side. As above, if the other side do not reject them then they are deemed to have accepted them.

Ideally you should never be left in a position where you do not have any contract terms to put forward. Prudent suppliers prepare standard contract forms and use them for virtually all their transactions. Customers are unlikely to want to spend a lot of time negotiating every contract that they enter into and so, if the contract offered looks reasonable, they may well sign up to it without question (particularly without reference to either their in-house lawyers or their external solicitors). A number of savvy suppliers now put their standard terms on their website. They can then cross refer to them in their contract documentation which helps with the terms being incorporated legally into their contracts with customers.

Contracts also have a value in managing a client's expectations and reducing "project creep" as much as possible. Reasonable contracts in plain English can be regarded as part of the supplier's marketing.

(D).   **What to do if it all goes wrong**

(a)   DO NOT PANIC! **Very few cases go to court**. What you should worry about more is either not being paid or not receiving the product or service you wanted.

(b)   Once you suspect that there may be a problem **be very careful what you say in writing**. A court will always look at the correspondence that led up to the start of the legal dispute. However, more importantly, so will the other side's legal advisors. If you can convince them that the other side is not in a strong position then they will back off and you will not be troubled further.

(c)   Consider alternative dispute resolution (see www.cedr.co.uk).

(d)   Do everything you can to avoid having to go to court. There are few happy litigants.
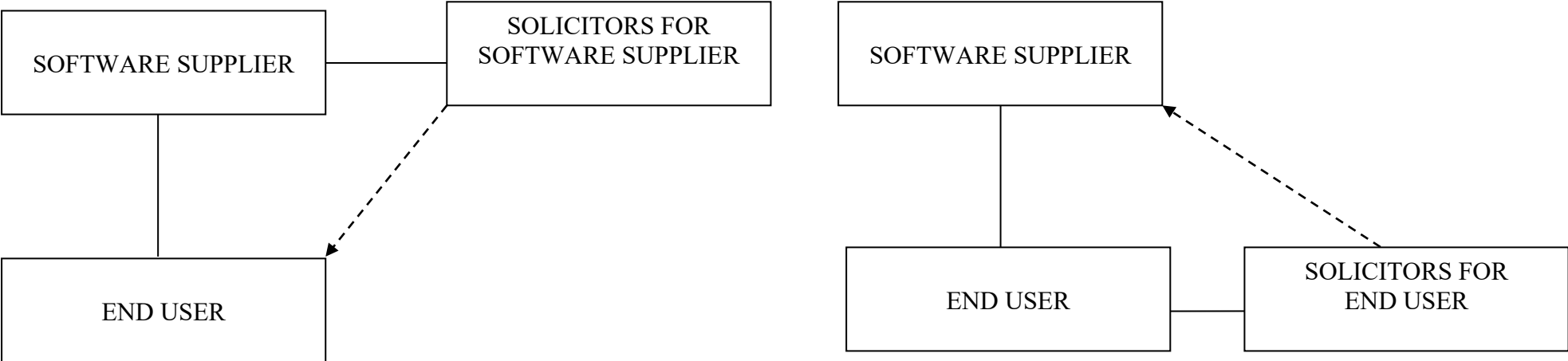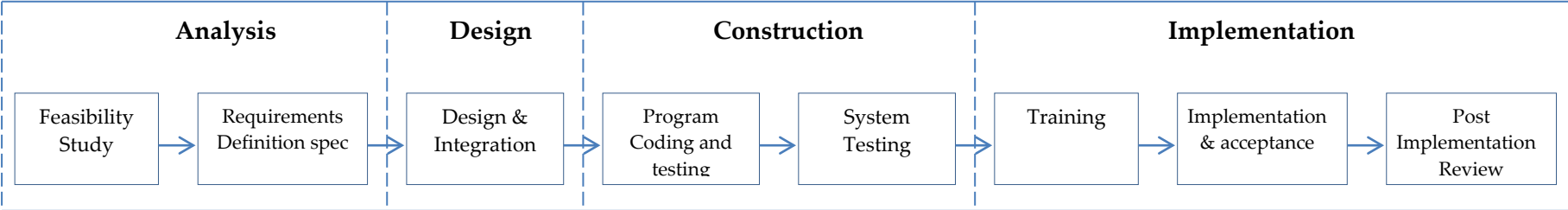
2.   **How to avoid looking stupid**

"A noble man cannot be indebted for his culture to a narrow circle; the world and his native land must act on him" (Goethe)

Computer contracts are often inherently complex. This is partly because of the underlying subject matter and partly because they often deal with new developments. IT IS VITAL THAT YOU HAVE A GOOD UNDERSTANDING OF WHAT IS HAPPENING. No-one is expecting you to be a techie –you are there to document the deal. However, you do not want to receive a call from the client (soon after you have sent the first draft out) saying politely "I don't think that we explained this to you very well…". Do not be afraid of asking emperor's clothes questions at the meeting in which you are instructed. It is perfectly possible that two people from your own client may have differing views of what is being done (this has certainly happened to the writer). That difference may need to be resolved before you can start work. To show, and to check, your own understanding from time to time of what is proposed summarise back to the client what you understand

to be happening. If after the meeting you do not understand something (or you have forgotten because the meeting was now two weeks ago!) ring the client up and check. Do not take a chance in the first draft that you send out.

The words used to describe the parties are often not given sufficient attention by the draftsman. Check that the client is comfortable with the words that you suggest be used. One aim must be to avoid the parties names being mixed up. For that reason try to avoid using "Licensor" and "Licensee" (because they can be mixed up easily). The writer avoids the use of the word "Company" as both sides are likely to be limited companies and it can cause confusion to the casual reader. If all else fails use the first word of the company name (or their initials) to describe the parties. Try to use the same language in the contract as the parties use. Say yes to the offer to show you the business plan or proposal (even if it is not going to appear in the contract) as the language in it will give you a better handle of what is going on. Familiarise yourself with the stages of a normal software development life cycle (see below). Finally, "computer program" is <u>not</u> spelled "computer programme"!

SOFTWARE DEVELOPMENT LIFE CYCLE

Analysis		Design	Construction		Implementation		
Feasibility Study	Requirements Definition spec	Design & Integration	Program Coding and testing	System Testing	Training	Implementation & acceptance	Post Implementation Review

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3. **Top 10 list of important issues in computer contracts (from a supplier's point of view)**

1. Parties

   Is the customer good for the money?

   Are we supplying the right company?

2. Term

   How long are we agreeing to do this for?

   How quickly can we (or they) get out of it?

3. Our Obligations

   What are we agreeing to do?

   Can we *actually* do this?

4. Their Obligations

   Have we covered everything we need them to do?

5. Warranties

   What warranties are we giving and for how long?

   (Avoid "fit for purpose" like the plague!)

6. Intellectual Property Rights

   Who owns these?

   Who is allowed to use them and for how long?

7. Termination

   Under what circumstances can the agreement be ended?

8. Limitation of Liability

   Have we limited our liability if there is a "meltdown"?

9. Governing Law

   The most frequent disputes are with the Scots but US Law contains the biggest worries.

10. Schedules

    Have you attached the right schedules? Is there somewhere (either in the schedules or cross referred to in the contract) a detailed description of what

we are supposed to be doing (and not supposed to be doing)? This may be contained in a project proposal.

4.   **General Introduction to IT Contracts**

This section outlines the contents of a contract and lists the matters that should be covered by different types of contract. The appendix lists some of the main points that you should consider.

INTRODUCTION

Pity the unfortunate IT manager. It has been bad enough trying to get the computer project organized. Now, possibly at the last moment, the contracts have arrived, some with print small enough to make the reader go blind. The manager suspects (rightly) that these contracts are one-sided in favour of the supplier, but knows that the project will only proceed if those contracts (or something similar) are signed. How does the manager work out what needs to be done? This section provides a practical framework of help in this situation.

PARTS OF A CONTRACT

The first point to consider is the form that contracts normally take. At its simplest a contract consists of:

i)   the date on which the contract was entered into;
ii)   the names and addresses of those entering into the contract;
iii)   a short description of what the contract is about (generally entitled 'Background', 'Recitals' or even, regrettably, 'Whereas');
iv)   definitions of terms used in the contract;
v)   what the supplier is going to do for you;
vi)   what you must do for the supplier;
vii)   what you must pay the supplier.

Do not forget we are engaged in contract first aid here. If all else fails, concentrate on points (v) and (vii) i.e. what the supplier is going to do for you and what you are expected to pay. Standard terms that are not specific to this individual contract (sometimes called 'boilerplate') are generally grouped together at the end of the contract.

CHECKING OUT THE SUPPLIER

It may seem like an obvious point but make sure that you know who you are dealing with. This will mean, at least, doing a company search. A credit check would do no harm. As the Army maxim has it 'time spent on reconnaissance is seldom wasted'. If you discover that the supplier company was set up last year and has an issued capital of £1 you may like to consider asking for a guarantee of the contract from a

more substantial body. Business is not all about making rational decision on paper. Does your client get good vibes from the supplier? On small things, do they do what they say that they will do? If, for whatever reason, your client does not trust them, consider encouraging them not go ahead with the contract under any circumstances as this may only lead to worry and tears later.

LETTER OF INTENT

As the supplier may need to start work on the project before contracts are signed and, because the negotiation and agreement of the contract terms may take a little while, the supplier may ask for a letter of intent from your client. Alternatively you may like to suggest one so that your client is not pressurised into signing the contracts before you have gone through them properly. A letter of intent is no more than written confirmation from you of your intention to enter into a contract with the supplier. What is critical, however, is that the letter of intent from you to the supplier must contain a statement that the letter is not intended to be contractually binding. Otherwise you may unwittingly enter into a contract earlier than you intended. Where there is a non-binding letter of intent and the supplier, at your request and to save time, starts work on the project, it is reasonable for the supplier to ask to be paid for this initial work carried out regardless of whether the project proceeds or not. There are two important matters to agree. The first is the rate for the job (e.g. a daily rate – work normally starts under a letter of intent on a time and materials basis; the definitive contract may include a fixed price for a specified deliverable). The other is an overall cap on your liability to the supplier for this work. This obligation to pay the supplier should be contractually binding (unlike the rest of the letter of intent).

THE SUPPLIER'S TERMS

There is of course no obligation on you to accept that you will purchase a new computer system on the basis of the supplier's terms.

You could propose your own terms entirely – this is certainly an approach taken by large organizations with extensive experience of computer contracts. However, it is generally better to use the supplier's contract terms (unless they are completely unreasonable) as a starting point and amend them to your satisfaction. It is a good idea to ask for the supplier's proposed terms at as early a stage as possible. Do not wait until you have told them that they have been awarded the contract because they will then know that they have got you over a barrel.

WHAT CONTRACTS ARE THERE LIKELY TO BE?

Any computer system will require the purchase of hardware (the server, PCs, printers, etc.), software (the application software and the operating system software) and services (such as support and maintenance). When computers first started to be used in business life the emphasis was very much on the hardware, which was comparatively unreliable. Later the focus was on the software. Nowadays the

emphasis is much more on the software and services. It is normal to decide upon the software first and then to choose the appropriate hardware. The rest of this section deals with the purchase or licence of individual services or components.

Contracts for consultancy services.

Long before the order for a new system is placed, the client may enter into a consultancy contract, perhaps relating to a feasibility study, analysing requirements, recommending a system to meet those requirements, helping select the appropriate suppliers, or assisting with preparation of an invitation to tender. A large part of the work carried out in the computer industry is under consultancy contracts. The client may need help on a one-off basis or require skills which do not exist within the client's workforce, so there is a need for an outside consultant to carry out the work. Sometimes the consultancy arrangement is dealt with by means of an exchange of letters; a formal consultancy agreement, however, is a better option for both parties.

- **Defining the deliverables.** One of the most important issues that must be dealt with in such a contract is a detailed description of what the consultant is expected to do. If the description is loose or inexact, this can give rise to differences between what the client is expecting to receive and what the consultant is expecting to deliver – which can, predictably, lead to disputes. So defining the nature and quality of the deliverable is particularly important.

- **Payment arrangements.** The payment to the consultant by the client may be on a time and materials, fixed price or estimated maximum price basis. It is an aspect of consultancy that the amount of work required will be uncertain. The disadvantage of a fixed price payment mechanism (as with any other contract) is that the consultant will inevitably include a contingency element in the price quoted. If the consultancy can be broken down into a series of stages, payment against milestones will allow each party to gauge how the work is going.

- **Copyright and confidentiality.** Copyright will almost always be an issue. Broadly speaking, there is a simple choice as to how the parties deal with ownership of copyright in the consultant's work. Either the consultant can assign to the client all intellectual property rights in whatever is produced (provided that the consultant has been fully paid) or the consultant can grant a perpetual licence to the client to use such intellectual property rights for the purposes of the client's business. It goes almost without saying that the consultant should be obliged to keep confidential any information given by the client about its business. It is important to note that if there is no agreement with a consultant about copyright the client does not automatically get ownership of such copyright. It stays with the consultant (although there may also be an implied licence for use of the copyright by the client).

- The problem is that once a consultant has carried out an assignment for one client in an industry, the consultant may be ideally placed to carry out assignments for other competing companies within that same industry. Sometimes, therefore, clients go further and stipulate in the contract that not only must their own information be kept confidential but the consultant must agree not to carry out projects for the client's competitors for a period (perhaps a year) after the work is completed.

- **Insurance.** In order to provide peace of mind to the client, the client may require the consultant to take out professional indemnity insurance. This requirement is becoming increasingly common. This kind of insurance is still relatively inexpensive as in practice, it is rare for claims to be made under such policies.

- **Key personnel.** The client will want to know the identity of the staff who the consultant will be using to carry out the work. It is normal for the client to be able to veto any staff members of whom they disapprove for whatever reason.

- The client will want to retain the right to terminate the consultancy contract if the consultant is guilty of serious misconduct or any other conduct likely to bring the client into disrepute.

Contracts for hardware purchase.

Because computer hardware is so much more reliable than it used to be, contracts for the supply of hardware are not generally contentious. A hardware purchase contract requires the following details:

- a detailed description of the hardware (this is likely to be in a schedule);
- a warranty about the quality of hardware (normally this warranty applies for a year after acceptance of the hardware by the client);
- an obligation to repair or replace;
- delivery dates;
- price;
- acceptance testing;
- future maintenance;
- training.

Problems can arise if the hardware is not large enough for anticipated demand, and with the integration of hardware (such as servers and printers) which may have been supplied by different suppliers. In many cases the cost of the hardware is not a large percentage of the total system cost. As profit margins on hardware are relatively low the software supplier may be relaxed about whether the client obtains the hardware from the software supplier or from a third-party supplier. It is always worth asking the software supplier to quote for supplying the hardware as they may have better bargaining power than you would have on your own. At the end of the day, the two

most important matters in a contract for hardware are to check that there is an exact description of what you are buying and that there is an obligation on the supplier to repair or replace it if it does not work properly.

Contracts for hardware maintenance.

Hardware maintenance is more of a commodity than software maintenance and there are likely to be more alternative suppliers for the maintenance of hardware (and so prices are keener). There are two different types of hardware maintenance – preventive maintenance and corrective maintenance. Preventive maintenance covers the regular testing of the hardware (e.g. once every six months) before any problem is reported. Corrective maintenance deals with faults as and when they arise, normally in response to a service call from the client.

With corrective maintenance the key element is the response time – how quickly will the supplier start to respond to the problem once it is reported? This is generally within a fixed number of working hours. For example, an engineer may have to arrive at the site no more than eight working hours after the problem has been reported by the client. This does not mean that the engineer will solve the problem within eight hours – merely that a start will be made to try to solve it. Sometimes online diagnosis is used: the client's hardware is linked by telecommunications to the supplier who can solve the fault at a distance. (The impetus for online diagnosis came from the US where the distances were so great it was often not practicable to send an engineer in person.) Payment for hardware maintenance is generally made in advance on a monthly or quarterly basis. The annual amount varies but can often be between 10% and 15% of the list price of the hardware. Other points that will normally be covered in a hardware maintenance contract include a right for the supplier to:

- make an additional charge for frivolous or unnecessary call outs;
- increase the charges from time to time, perhaps in accordance with a recognised index (such as the Consumer Price Index);
- refuse to cover equipment which is more than five years old or which is past its reasonable working life.

The client will be under an obligation to:

- pay for corrections that are not caused by the equipment itself (e.g. faults arising from electrical fluctuations);
- notify the supplier of problems promptly after they arise (so that time does not make them worse);
- allow the supplier reasonable access to the equipment.

Contracts for software licences.

At its simplest, any contract for software should allow you to use the software in the way that you envisaged without the risk that anyone can come along later and say

either that you can not use it any more or that you have got to pay more money. It follows, therefore, that one of the first checks that you should do is to confirm that the software supplier either owns the copyright in the software or has the right to license it to you. It is a feature of the computer industry that software is often licensed to end-users by organizations other than the actual owner (for example it may be sub-licensed by a distributor or channel partner). You should not put up with oblique answers to your demand for evidence that the supplier can license the software to you. They should be able to produce it immediately.

At this point you may wonder why a licence agreement is necessary at all. Why can the supplier not simply sell you the software? The supplier is not actually selling you ownership of the software (because they would like to continue to license it to other people). The licence is only a permit for you to use the software for your own purposes. This leads onto the next important point. You must check in the licence agreement to whom the software is licensed and for what purpose. Is the software to be licensed to your particular company or can it be used by the whole of your group (in which case the software supplier will want more money)? Alternatively, is the software to be restricted to a limited number of users and, if more than that number use it, then do you have to pay an additional licence fee? This is one of the oldest tricks in the software supplier's book. They allow the client to sign up for a very limited number of users and then the supplier makes a considerable profit from the additional users which will almost inevitably be required by the client later. The supplier, of course, responds that this simply reflects the extra use (and, as a result, commercial benefit) that the client is making of the software.

It is also possible that at some time in the future the client may want to outsource its computer operations. Consequently, provision for the transfer of the licence from the client to an outsourcing company should be made in the original software licence agreement.

Contracts for software maintenance.

No software of any complexity is ever free from errors. The older the system the more likely that it will need maintenance. Furthermore, if a system is installed in a rush (e.g. to meet a particular deadline) then it is likely not to have been tested properly and so require more attention after it has been installed. In some ways, future charges for maintenance are the icing on the cake for software developers. If they can generate sufficiently wide sales of the software then support fees can be guaranteed for years to come. It is important for managers to be aware of this as three-quarters of a budget for software may be for future software maintenance. The client is well advised to check how wide the maintenance supplier's client base is (the wider the better) and to look at where the offices are from which the supplier will be providing the support (and how many people will be providing such support). The maintenance contract will almost certainly be prepared by the supplier. Some of the most common provisions are discussed below.

- **Charging arrangements.** Sometimes the cost of the software licence is bundled with the first year's maintenance charges. One interesting point is from when the support charges should run. Some clients argue that they should start from the end of the warranty period for the software. However, it is now generally accepted that they should begin from acceptance of the system, as warranty and support are separate matters.

- **Scope of maintenance services.** Maintenance or support will normally cover the investigation by the supplier of errors in the system reported by the client as well as updated documentation and telephone or, more frequently nowadays, online advice. It will, in most cases, cover updates to the software (but not necessarily new versions of the software). The client may want to categorize different kinds of problems into those that could be critical for its business and those that are no more than an irritation and could be dealt with next time a new version of the software comes out. The supplier's response time will be different depending on the severity of the problem. The supplier will not normally commit to a fix within a particular period – only that they will start to fix it within a particular time.

- **Exclusions from scope.** The maintenance supplier will also be keen to list in the contract what maintenance does _not_ cover. Most of these exceptions are reasonable. They generally include problems arising from changes to the software made by people other than the supplier, incorrect use of the software by the client or events beyond the control of the maintenance supplier such as hardware failure, fluctuation of electrical supplies or accidents. Normally, the maintenance supplier will still seek to help the client where the exceptions apply (indeed there should be a contractual obligation to do so). However, the supplier may want to make an additional charge for such work and will not guarantee any particular recovery time. From the supplier's point of view it becomes difficult to manage support if the client base is using a number of different versions of the software. Consequently, the supplier normally restricts support to the latest two versions of the software and will refuse to support earlier versions.

- **Increase in charges.** The client will want to ensure that the maintenance charges will not rocket up.

  One means of doing this is to tie the maintenance charges to a percentage of the list price of the software (e.g. 10–15%) but of course the supplier has control over the list price. Alternatively, any increase in maintenance charges can be tied to a recognised index. Clients sometimes suggest the Consumer Price Index.

  However, suppliers (who know that increases in salaries have been historically greater than increases in retail prices) prefer to tie them to an earnings index. There is some logic in this as the bulk of the supplier's expenses are salaries.

- **Payment arrangements.** Payment is almost invariably made in advance. In the past, it was for a year but now it is more commonly paid three months or a month in advance. This is so that if the supplier goes into liquidation the client will not have overpaid very much and the client can also swiftly withhold the payment of maintenance charges if there is a problem with the service provided.

- **Termination.** It is important for the client to look at the termination clauses of the contract offered by the supplier. The client will want to know how much notice they have to give to end the maintenance contract. This is often three or six months. It is a good idea for the client to ask the supplier to commit on its part to supply maintenance (if the client wants it) for the potential life of the software (e.g. five years).

Contracts for software development.

Software will often need to be customised for the client by the supplier. However this is really only a tinkering with the main programs. In certain circumstances, it may be necessary for the client to commission new software because there is no existing software that meets the client's needs. Contracts for software development are complex and it is wise for the client to seek professional advice both about the specification for the software and the contract under which the software will be written. This is all the more important because software development projects have a reputation for taking longer, and for costing more, than originally forecast. Consequently background research by the client into the proposed supplier is particularly worthwhile. Pricing for the project will be either fixed price or time and materials. Payments will normally be made conditional upon project milestones being reached. The client will seek to ensure the quality of the software product delivered by the supplier by requiring acceptance tests of the software and a warranty from the supplier that the product will be in accordance with the agreed specification. A thorny question is whether the client should own the copyright in the software program produced. At first glance, it might be thought that this should obviously belong to the client who has paid for it. However, all the client needs is to use the software; the client needs neither to own it nor to develop it further. There is a benefit to the client in the supplier having an incentive to carry out further development of the software program and license it to other clients. The original client does not then pay the total cost of all the subsequent fixes and has the benefit of the faults reported by other users. If the supplier becomes insolvent then the client needs access to the source code of the software in order to maintain it. For this reason the client should require the supplier to put a copy of such source code in escrow with an independent third party so that it is available if required (see section 8 dealing with escrow letters). The supplier will normally provide a warranty that defects in the software reported within a particular length of time after the start of its use will be rectified. This is frequently 90 days after acceptance of the software by the client.

Service level agreements.

Service level agreements (**SLAs**) are critical to the computer industry but they are rarely fully understood. Under an SLA, a supplier undertakes to supply a service to a client at a particular level.

Perhaps because so few lawyers have a reasonable working knowledge of the computer industry, SLAs are often drawn up by the participants without legal advice.

A service level agreement should cover:

- The service required (i.e. what the client wants and what the supplier is prepared to commit to supply);
- Quality standards (i.e. the standards or levels the supplier must achieve), such as host/terminal response times, batch processing times, 'uptime', or processor availability, by specifying what? when? how? and by whom?
- Deliverables (e.g. regular reports);
- The consequences of failing to meet service procedures or standards (e.g. compensation in the form of service credits);
- Procedures for the client to monitor performance of obligations by the supplier;
- Procedures for change control (i.e. changing part of the service that is being provided by the supplier under the agreement);
- Terms dealing with access to, and security of, the client's site and data;
- A procedure for disaster recovery (either upon a system failure or a catastrophe);
- The agreed frequency of meetings between the client and the supplier to review the supplier's performance of the agreement, properly minuted with subsequent action plans and awards of priority.

Ideally, an SLA should be a self-enforcing agreement within a continuing relationship. There should be no need for either side to litigate and changes required should be dealt with through a change control procedure. In some ways the process of creating the SLA is as valuable as the agreement itself. SLAs can be between different businesses or between different parts of the same organization (such as the IT department and its users). Facilities Management Agreements, Software Maintenance Agreements and Managed Data Network Agreements are all examples of SLAs. Alternatively, the SLA may be one aspect of a larger agreement for services, i.e. it may be the schedule that stipulates how well the services have to be provided and what happens if the supplier does not provide this.

What form should a service level agreement take?

At its weakest, an SLA may be a simple oral understanding, documented by an exchange of letters. The best form is a formal legal agreement with the technical procedures and specifications annexed as separate schedules.

What happens if the terms of a service level agreement are broken?

If the breach is fundamental, the party not in breach will be entitled to terminate the agreement and sue for the loss suffered as a result of the breach. In other circumstances there will be a system for measuring breach and apportioning cost. These systems range from an event-based system (i.e. if ... then ...) to a more sophisticated system of 'failure points' (i.e. if there are more than five examples of ... then ...). The functions of such compensation systems vary from simply drawing attention to a problem to compensation for loss. Compensation for loss is difficult to quantify and, if it is excessive, will be unenforceable by a court. In practice, the right to withhold payment is a valuable weapon. The end (or slowing down) of payments by the client into the supplier's accounts department is likely to put pressure on the supplier.

Escalation clauses are undervalued and should be more widely used. These provide for a problem to be escalated up the various tiers of management on both sides if it cannot initially be resolved. Even the best SLA does not last for ever and there must be a procedure for orderly termination and (if necessary) migration from the supplier's system to another system.

The failure to include such clauses was a frequent weakness of early SLAs. Migration is critically important in relation to facilities management contracts and, as a rule of thumb, a year is generally allowed for this. The supplier should also be required to provide all reasonable assistance to the client with the migration to another system.

Contracts relating to cloud computing

Cloud computing is sometimes called software as a service. It will continue to revolutionise the computer industry over the next few years (see separate section of these notes).

APPENDIX: MAIN POINTS OF AN IT CONTRACT

Read this on its own if you have not got enough time to read the rest of this section.

But read it carefully.

i)   Make sure that you know exactly what you want and what is achievable because if you do not know, then you are not going to get the contract right. (Among the most common causes of computer project failure are unclear client requirements and unrealistic client expectations.)

ii)   Make sure that all the prospective suppliers sign a confidentiality agreement with you. If you are going to give them a detailed functional specification of what you want and information about your business you do not want there

to be any question of that confidential information being obtained by your competitors.

iii) Beware of falling into the trap of entering into a contract before you intend to. There are no legal formalities in this country about entering into a computer contract, so make sure that all pre-contract correspondence is headed 'subject to contract'. If you leave discussions about a written contract incomplete (e.g. lots of draft contracts sent between you and the supplier but nothing ever signed) then a court is likely to take the last undisputed draft as being the basis of the contract between you and the supplier.

iv) If a particular point is important to you make sure that you get it in writing from the supplier. It may well be that an aspect that is critical to you is not dealt with in the supplier's draft contract at all. If so, you must, for evidence's sake, get it in writing from the supplier. An ordinary letter from the supplier is sufficient provided that it is either referred to in the main contract or, possibly, included as a schedule or as an attachment. If the supplier drags its heels and, despite repeated requests from you, refuses to confirm a point in writing, you should write to the supplier saying that you are only entering into the main contract on the basis that this point is agreed. If the matter ever goes to court the production of your letter will be of great assistance to your case.

v) Make sure that you get the supplier to agree to supply support and maintenance for the products purchased for a decent length of time, e.g. five years. You do not want the supplier cancelling support after a couple of years just when your new system is working well. Note that you do not have to commit to take the support and maintenance for five years – ideally your commitment should be on a year by year basis. It is just that the supplier agrees to make the support available to you for at least five years if you want it.

vi) Make sure that you order enough training. One of the most common reasons for the failure of a computer project is inadequate training. It is sadly all too common that, if there is an overspend in other areas, the amount budgeted for training is cut. As a rule of thumb, roughly 20% of a project's cost should be spent on training. If it is substantially less than that you should ask why.

vii) Make sure that the procedure for acceptance testing is known and agreed. If this has not been sorted out in the contract, how are you going to stop a bad system from being installed? In the past, the test data was generally supplied by the client; nowadays it is more acceptable for it to be provided by the supplier.

viii) Make sure that you can get access to the source code of the software programs supplied if the supplier either goes into liquidation or stops supporting the software. Ideally, this source code should be deposited with

an independent third party (eg the NCC or a solicitor – see the draft escrow letters in section 8) and kept updated by the supplier as each new version comes out.

ix)   Finally, never forget that the contract is a delivery mechanism for ensuring that a project is completed in the right way at the right time by the right person and for the right price. No more, no less.

5.   **GENERAL INTRODUCTION TO CLOUD COMPUTING**

What is Cloud Computing?

Cloud computing is the supply of IT services via either the internet or an intranet. The services may provide IT infrastructure, software platforms or software applications but in each case these services are hosted remotely and accessed over the internet through a customer's web browser, as if they were installed locally on the customer's computer.

The deployment of IT services in this way has been enabled by both the evolution of sophisticated data centres ('server farms') and widespread access to improved bandwidth. In cloud computing the IT services tend to be hosted on machines across a wide range of locations but, from the customer's perspective, they simply originate from the 'cloud', otherwise known as the internet.

The cloud model means that customers can access, from any computer connected to the internet (whether a desktop PC or a mobile device), a multitude of IT services rather than being limited to using locally installed software and also being dependent on the storage capacity of their local computer or network.

Cloud computing is a model of IT service provision that is growing exponentially. It is estimated that one third of all revenue generated in the software market today relates to the delivery of cloud computing services.

The Services in the Cloud

The multitude of IT services available over the internet include familiar web-based email services such as Windows Live Hotmail (Microsoft), Yahoo Mail, Gmail (Google), GMX Mail, AIM Mail (AOL), Gawab.com and the search engine facilities Google, Bing (Microsoft), Yahoo, Dogpile and Alta Vista. They also include the social networking services such as Facebook, Twitter, Friends Reunited, Bebo, Flickr, OneWorldTV, YouTube, MySpace, FledgeWing and LinkedIn, which provide chat, instant messaging and file sharing services and some of which play an increasingly important role as business marketing tools. As a general rule, these services are provided free of charge and are widely used.

There are also a range of paid for business-orientated IT services. These are provided by suppliers including Google, Microsoft, Amazon, Apple, Salesforce.com and Tempora. They offer a suite of services to assist with business management, for

example, Google offers Google Docs for word processing, Business Gmail for emails, Google Calendar for diary management and Google Sites for website management. Google also offers different editions of its applications for different sectors (education, governmental and non-for profit).

Amazon Web Service (AWS) offers its Elastic Compute Cloud or 'EC2', enabling users to rent space on Amazon's own computers from which to run their own applications.

Rackspace is one of many providers (including Amazon) of data storage services. Tempora provides a timesheet system for creative agencies and professional service firms and Salesforce provides customer relationship management solutions. There are also cloud computing solutions for supply-chain management (Intelex), transportation management services (TWM Systems) and payroll services (Able Internet).

The trend of IT suppliers adopting the cloud delivery model is encouraged by businesses such as CloudShare, which enables suppliers of orthodox IT systems to provide their systems as a service over the internet to customers without the need for recoding.

The Evolution of Cloud Computing

Long before the term was coined, software suppliers were providing services to their customers from remote servers via internet-enabled computers. This was called Application Service Provision (**ASP**) and was the original platform of IT service delivery to emerge from the convergence of computing and communications in the mid 1990s. However, the ASP model differed from modern day cloud computing. Firstly, it involved more complicated initial installation and configuration at the customer end than is typically involved with today's on-demand cloud services. Secondly, it originated as a means of providing software on a one-to-one basis rather than on the one-to-many basis of cloud computing, where one provider has many users. Consequently, ASP lacked the huge advantage that cloud computing enjoys, of being very scalable, as discussed later in this chapter.

Around 2001 the concept of Software as a Service (**SaaS**) emerged. This described software delivery on a one-to-many (multi-tenant) basis revolving around network-based access to software managed from a central location rather than at each customer's site. This removed the need for customers to install patches or upgrades, and involved customers accessing applications remotely via the internet. SaaS is another way of referring to those cloud computing services that involve the supply of software.

The term SaaS is useful as it highlights the principal difference between the internet-based model of software provision and the more orthodox licence and installation-based model. The latter involves a customer being granted a licence to use a software package, while the former involves the provision of a web-based service under a service level agreement (SLA). There are considerable differences between a

software licence and a contract for services and, so, the important clauses in a cloud computing contract for services are dealt with later in this chapter.

As well as the term SaaS there are now the terms DaaS (database as a service), IaaS (infrastructure as a service) and EaaS (everything as a service), which are used to describe the provision of non-software related cloud computing services.

Cloud Formations

The cloud environment is subdivided into public, private, hybrid and community clouds. Public clouds are those in which services are available to the public at large over the internet in the manner already described in this chapter.

A private cloud is essentially a private network used by one customer for whom data security and privacy is usually the primary concern. The downside of this type of cloud is that the customer will have to bear the significant cost of setting up and then maintaining the network alone.

Hybrid cloud environments are often used where a customer has requirements for a mix of dedicated server and cloud hosting, for example, if some of the data that is being stored is of a very sensitive nature. In such circumstances the organisation may choose to store some data on its dedicated server and less sensitive data in the cloud. Another common reason for using hybrid clouds is where an organisation needs more processing power than is available in-house and obtains the extra requirement in the cloud. This is referred to as "cloudbursting". Additionally, hybrid cloud environments are often found in situations where a customer is moving from an entirely private to an entirely public cloud setup.

Community clouds usually exist where a limited number of customers with similar IT requirements share an infrastructure provided by a single supplier. The costs of the services are spread between the customers so this model is better, from an economic point of view, than a single tenant arrangement. Although the cost savings are likely to be greater in a public cloud environment, community cloud users generally benefit from greater security and privacy, which may be important for policy reasons.

There is also a version of this model in which members of a community cloud carry out processing tasks for each other using the spare capacity within their own computing resources.

Even if an organisation carries out all its data processing within the cloud, it is prudent for that organisation to avoid keeping all its data in the cloud with a single provider. Best practice would involve keeping a backup either in-house or with a separate cloud provider.

Silver Linings and Thunder Clouds

The benefits of and drawbacks to cloud computing are as follows:

<u>ADVANTAGES</u>

Cost savings

Where the services are not provided free (paid for by advertising), the payment model for cloud computing services is usually a rental arrangement based on monthly subscription charges (per user/'seat') or a 'pay as you use' system. This means that there is no large up front payment, as there would be with the purchase of a licence in the orthodox software licence model. Although there may be an initial setup or configuration fee, this is usually very low by comparison.

The monthly subscription or 'pay as you use' charges will usually include support and maintenance fees which would be significantly higher in the orthodox software licence model. Also, customers do not need to invest as much in secure servers, as hosting is provided by third party data centres and included in the subscription or 'pay as you use' charges.

The 'pay as you use' system is of particular benefit to an organisation with peaks and troughs in its demand for computing resources. It is cheaper than paying for exclusive use of enough resources to meet peak demand when it is not required, as is the case where all computation is carried out by an organisation in-house.

Finally, as cloud computing services do not represent a capital expenditure, customers lose less if they switch suppliers.

These cost advantages make cloud computing an attractive option for all sizes of business. For example, some multinational businesses use cloud computing services to benefit from the ability to carry out certain tasks wherever in the world it is cheapest to do so at that particular time of day.

Free trials

Most suppliers offer the opportunity to trial their product for a period without charge. This is made easier by the supplier's ability to shut off access at the end of the period and provides them with the opportunity to 'hook' the customer. This business model is sometimes referred to as a 'freemium'.

Easily scalable

Both the monthly subscription and 'pay as you use' charging models make it easy for the amount of service being provided to be increased or decreased. Should a customer want to increase the number of 'seats' included in its subscription to Tempora or the amount of megabytes of storage space rented from Rackspace, this

can be done easily. The supplier simply provides access to additional users or increases the storage space available in exchange for higher monthly payments by the customer. The scalability of the cloud computing model makes it especially attractive to growing businesses and organisations with varying levels of demand for computer resources (e.g. where an organisation's website receives higher volumes of visitors at certain times of year).

Flexibility

As the services are web based (and with the advent of mobile devices) customers can access the services from almost any location in the world. This can enable employees to access important business tools while they are on the move. For example, the employee can fill in a Tempora online timesheet whilst on a train, providing the rest of the business with access to that data in real time, where previously this had to wait until the employee returned to the office.

Maintenance and support

The supplier will usually offer initial and ongoing support services. However, remote hosting of the services makes the process of maintaining and supporting the services less intrusive for the customer. The supplier can handle backups, updates and upgrades automatically and remotely without visiting a customer's site.

This will generally mean that maintenance and support can be carried out more quickly. However, it does mean that the service may necessarily be interrupted. There is no doubt that cloud computing removes at least some of the need that customers have had in the past for expertise in, or control over their own technology infrastructure, as it is now available "in the cloud".

Data security and storage capacity

For the majority of businesses, the data security and data storage capacity offered by remote servers or data centres is far superior to that which can be afforded in-house.

Environmentally friendly

It has been suggested that data centres are a 'green' alternative to in-house computing and this is a hotly debated topic. This is because servers in very large server farms typically run at around eighty per cent capacity, while an in-house server might run at five percent capacity, to allow for peaks in resource demand; and a server running at five percent capacity uses only slightly less energy per hour than one running at eighty percent, while doing 16 times less computation. Nevertheless, it is probable that the existence of cheap and more easily accessible cloud computing architectures has increased the overall demand for computation, outstripping the energy-efficiency gains that have been made in server farms. One option is to choose a supplier that uses a data centre that makes use of solar technology or wind cooling, or a data centre that is based in an area where local electricity comes from a

renewable energy resource.

Internet reliability

Clearly where IT services are provided over the internet, lack of internet access will also render those services inaccessible. Where those services are business critical this can be a major problem. However, as internet access improves this should be a diminishing concern. Also, it should be remembered that there is no guarantee of uninterrupted service even with locally hosted software applications or data storage, which can be rendered inoperable by defects or bugs.

Dependence on the supplier

With cloud computing the customer is dependent on the supplier for day-to-day access to the IT services rather than just for support and maintenance. If the supplier is in financial trouble, is reliant on an unstable sub-contractor or is involved in litigation, its ability to provide the services may be affected. These issues could leave the customer without access to business critical systems.

However, dependence on a third party supplier is a common concept for most businesses and the usual risk assessment should be carried out. Due diligence checks on the supplier may disclose whether it is, for example, in financial trouble and references can be sought from existing or past customers. The best security against these problems is to include certain measures in the contract, as is set out later in this chapter. Ultimately, if in doubt, the customer may need to choose an alternative supplier.

As part of supplier selection, the customer should consider what steps will be required to switch suppliers if this proves necessary. For example, what termination notice periods apply, how the customer's data will be retrieved from the supplier-controlled servers and what level of migration assistance is available from the supplier. Furthermore, it is prudent to establish what level of interruption to business would be caused by switching suppliers. This is best done by identifying how long it would take to get up and running with an alternative supplier.

Some cloud computing suppliers also provide IT services in the orthodox licence model. Where this is the case it may be possible to agree that failure of the cloud computing service would trigger an orthodox licence of the software.

Finally, there are also data protection and security concerns associated with cloud computing and these are discussed in more depth below.

Data Protection and Security

The servers used by suppliers of cloud computing services to host their customer data can be located anywhere in the world. Where personal data controlled by the

customer is transferred by the supplier to a third party server, it can be difficult for even the supplier to know exactly where that data is stored. Customer data may even be spread over a network across different territories. This raises concerns for the customer as European Union regulations place responsibility for ensuring compliance with data protection laws on the customer (data controller), even where the supplier (data processor) has immediate control of that data.

This means that, when a European-based business uses cloud computing services, it is liable for any failure by the supplier to process that customer data in accordance with EU data protection legislation. Such a breach could occur, for example, if the supplier (with or without its knowledge) were to process (store) data in a country outside the EEA (EU countries plus Norway, Iceland and Liechtenstein) or where the supplier is not signed up to the Safe Harbor Principles, not subject to an exemption or where that data has not been transferred under a contract stipulating compliance with EU data protection rules.

If there is any question over whether a supplier's procedures comply with the EU data protection legislation, clarification can be sought from the Information Commissioner.

As a data controller, the customer is required by the data protection legislation to carry out due diligence before it appoints a supplier to process customer data. This due diligence should establish that the supplier adopts procedures that comply with data protection requirements. Furthermore, the customer is under an obligation to continue to monitor the supplier's procedures to ensure that they remain compliant.

It is also necessary for customers to notify individuals that their personal data may be transferred to third parties, outside the EEA, in order that such processing is fair and lawful.
The customer's obligations extend in addition to protecting personal data from unlawful processing including accidental loss or destruction and unauthorised alteration or disclosure. As a result, it is important that customers are notified by their supplier of any security breach involving their data.

Permanent data loss should not be a major concern from huge server farms like those of Google, Amazon, IBM and Microsoft. These and other data hosting providers, with the latest security technology and back up systems, are in reality less likely to lose data than an individual is likely to lose a laptop or flash memory stick. However, as already mentioned, cloud computing customers should still keep backup copies of their data.

Important Clauses in a Cloud Computing Contract for Services

The agreement between supplier and customer is essentially a normal contract for services but with particular emphasis on the areas set out below. Although the contract will normally be on the supplier's standard terms, click-wrapped and difficult to negotiate, the customer may wish to insist on an amendment in respect of

those issues below that are of most concern or, where this is not possible, to find an alternative supplier.

Service Rental

The supplier should grant the customer a non-exclusive right for either a certain number of authorised users to access its service, or for the customer to use a certain amount of computation resource (e.g. data storage). In exchange, where a per-seat model is used, the customer should be prohibited from allowing more users than a subscription permits to access the service, and should be obliged (as far as is reasonable) to prevent unauthorised access to the services by a third party organisation.

The supplier should be required to provide the specified maintenance and support services during the specified hours, subject to agreed maintenance windows. There should be a clear statement of the services, support and maintenance to be provided.

It should be noted that some suppliers of free cloud services (paid for by advertising) provide no support or maintenance to the customer.

Customer Obligations

The customer should be required to provide all necessary cooperation to the supplier in performing the service. It is important for the supplier that it is not responsible for service failure where the customer does not adhere to the supplier's maintenance specifications (e.g. regarding the customer's internal networks or communication links).

Additionally, the customer should be required to use the service in accordance with the supplier's instructions and be prohibited from transferring viruses to the website from which the services are provided.

Supplier Obligations

The supplier should be obliged to perform the service with reasonable care and skill and to use commercially reasonable endeavours to correct any non-performance promptly.

The supplier should avoid giving warranties that the service will be uninterrupted, error free or will meet the customer's requirements. This is necessary because suppliers are usually relying on third party hosting providers who operate on low margins and will themselves, therefore, give few, if any, warranties to the supplier. The supplier's warranties should do no more than mirror those provided by any third party provider. If possible the supplier should also try to establish that the service may be subject to limitations and delays as a result of its reliance on external communication systems.

Data Processing, Protection and Security

It is of vital importance to the supplier that it establishes in the contract for services that it will be the data processor and that the customer will be the data controller in relation to all customer data.

It should also be set out that the customer owns all data received by the supplier in the course of providing the services and that the customer should be responsible for the accuracy of that data.

The supplier should seek to set out that in the event of any loss or damage of customer data, the sole remedy available to the customer will be the supplier's commercially reasonable endeavours to restore that data from its latest backup copy (maintained in accordance with the specified backup policy).

The customer should seek the supplier's agreement to comply with a specified data protection and security policy, which mirrors the obligations of a data processor under the Data Protection Act. The customer may even seek an indemnity from the supplier in case of any breach of the DPA but this may be difficult to obtain. If any data protection or security breach does occur the supplier should be required to provide the customer with details of that breach immediately.

The supplier should also insist that the customer ensures it is entitled to transfer any personal data to the supplier (including that data subjects have given any necessary consent). Furthermore, the supplier should obtain the customer's agreement that the supplier may transfer and store customer data outside the EEA.

For customers that do not wish their data to be transferred outside the EEA, there are some suppliers that will promise to keep their data within that geographic area. However, as already mentioned, there is some question over how a supplier can make this guarantee in respect of the data it processes, and the customer (as data controller) should remember that it has ultimate responsibility for its own data.

It is worth noting that a further economic model for cloud computing services involves the supplier generating revenue from secondary uses of the customer's data (e.g. the sale of that data for marketing purposes). As a result, the customer should ensure it is aware of and happy with the purposes for which the supplier may use its data.

Indemnities

The customer should indemnify the supplier against any loss it suffers in connection with the customer's use of the services. The supplier should grant an indemnity to the customer in respect of any intellectual property rights claim that is made against the customer regarding its use of the service.

Limitation of Liability

The supplier should insist on a liability cap that reflects the value of the contract and insist on the customer accepting sole responsibility for results obtained from the use of the service. Furthermore, the supplier may seek to exclude liability for any loss of profits suffered by the customer or any loss or corruption of data whilst the customer may wish to hold the supplier liable for these losses. The supplier should also exclude liability for delays or loss resulting from the transfer of data over communications networks.

Customers should always be aware that where the supplier's liability is severely limited, in relation to business critical services, the customer may be left without an effective remedy in the case of a serious service breakdown.

Service Levels

As with any agreement for services the devil is in the detail and comprehensive service level provisions are essential in clarifying the parties' expectations of how the cloud service will be performed. The service level provisions will normally be set out in a schedule to the main contract and should cover the following:

Service availability

A certain level of uptime will be achieved by the supplier (e.g. 99.9%). This is normally measured on a monthly basis but excluding downtime resulting from planned maintenance.

The supplier will carry out backups of the customer data that it or a third party hosts as part of the service. The backups should take place both incrementally (daily) and fully (each week) and in the case of data loss the supplier will restore the customer data from the latest backup.

Maintenance

General defect corrections and updates in the service must, where possible, be carried out during scheduled maintenance windows.

Emergency maintenance must take place outside predefined normal business hours subject to notice from the supplier (e.g. 6 hours). Emergency maintenance during business hours will count as downtime for the purposes of measuring service availability.

The supplier should use all reasonable endeavours to avoid unscheduled downtime for maintenance.

The supplier must ensure that the service accessed by the customer's users operates within reasonable response times. In particular, the time taken for the web pages on which the service is delivered to load, using a properly configured computer and the prescribed communications line, will not exceed a certain amount of time (e.g. 3 seconds).

Support

The supplier must provide a predefined support package (including where appropriate by telephone, email or in person) in relation to general enquiries and fixing of service defects reported by the customer. The support must be provided in accordance with predefined targets for responding to and resolving problems of varying levels of priority. The supplier must also comply with escalation procedures where these targets are missed. Finally, the supplier must monitor the service 24/7/365 in order to identify when maintenance is required.

Of course service levels will have more effect where they are linked to predefined service credits that will apply where the service levels are not met.

Cloud Control

There is currently little regulation specific to cloud computing but as we move towards an environment of dependence on IT services provided over the internet at the flick of a switch (sometimes referred to as "utility computing") some commentators have remarked that more regulation will be necessary. This is particularly the case as there are major difficulties with suing suppliers for loss of service. After all, we are used to seeing other utility providers regulated.

Conclusion

Cloud computing usage will increase rapidly in the future. With the internet becoming more reliable and with more advanced encryption technologies being developed, the concerns over internet connectivity, data security and protection are likely to subside. As a result businesses will increasingly be able to take advantage of the benefits offered by this unstoppable trend in IT service provision. The cloud is not going to be blown away.

6. **Pre-Contract Questionnaire For Cloud Computing**

QUESTIONS THAT YOU SHOULD ASK YOURSELF BEFORE SPEAKING TO THE PROPOSED CLOUD COMPUTING SUPPLIER

What, exactly, are we trying to do?

"Our plans miscarry because they have no aim. When you don't know what harbour you're

aiming for, no wind is the right wind" (Seneca)

Is cloud computing suitable for our business?

How mission-critical is this data to us?

If the cloud computing supplier disappeared could we survive?

Are our competitors moving into the cloud?

QUESTIONS THAT YOU SHOULD ASK THE PROPOSED CLOUD COMPUTING SUPPLIER

About the Supplier itself

Which company will we contract with?

What is its net worth?

How long have you been doing this?

Can you give us the details of three of your existing customers who we may contact

for a reference?

About your service to us

Have you outlined clearly and sufficiently what you will do for us? (i.e. what service levels do you offer?)

What happens if you do not do this?

Can we receive service credits or other compensation if your service levels are not achieved?

Can you change terms and conditions at will and, if so, how will we know they have changed?

If we want to use a different supplier, how much notice do we have to give you to go?

If you do not want to supply us how much notice do you have to give us? Is that period of time sufficient for us to find another supplier? How do we avoid a "ragged tail"?

How secure will our data be?

How do we get our data back at the end of the contract (i.e. how easy will it be for us to transfer our data from the current provider, in a format we can use, should the arrangement end)?

What arrangements are there for back up and data restoration?

What arrangements are there for disaster recovery?

Hosting

Will you be carrying out the hosting yourself? If not, who will and where will our data be hosted?

Who else (if any) will have access to our data where it is hosted?

What law governs the place where the data is held?

Data Protection

Does your proposed contract contain an agreement by you that you will:

   (1) only deal with our data on our specific instructions, and,

   (2) use reasonable security measures to protect our data?

Will any personal data be transferred outside of the EEA?

General

What is the financial cap on your liability?

What will the new service cost (compared to current IT costs)?

What is the governing law of the contract?

7. Forms of Contracts offered by Cloud Suppliers

Master Services Agreement (MSA) or **Terms of Service** (ToS). This describes the overall relationship between the customer and the cloud provider. It contains the commercial terms and legal clauses such as choice of law and disclaimers. If there are other documents forming part of the overall agreement it normally incorporates them by reference.

Service Level Agreement (SLA). This describes the level of service the cloud provider aims to deliver together with any mechanism for compensating the customer if the actual service falls short of that.

Acceptable Use Policy (AUP). This document lists the permitted (or, more commonly, forbidden) uses of the service.

Privacy Policy. This outlines the cloud provider's approach to using and protecting the customer's personal information. Although usually termed a "Privacy Policy" it often has terms relating to data protection.

8. Specimen Computer Contract Precedents

DRAFT ESCROW LETTER TO BE SENT BY THE SOLICITORS ACTING FOR A SUPPLIER TO AN END USER

[Date]

Dear Sirs

We act for **[•]**

Our client has licensed you to use the [•] programs and has agreed to provide [support/maintenance] for such programs. It has also deposited with us a disk containing the source code version of such programs ("**the Disk**") and has authorised us to release the Disk, subject to the terms of our undertaking in this letter, for the limited purpose of your continued licensed use and maintenance of the software. (Please note that we do not carry out any verification of the data contained on the Disk).

We undertake to hold the Disk in safe custody and to keep it in confidence and to release it to you on the happening of any of the following events:-

1.   if our client shall convene a meeting of its creditors or if a proposal shall be made for a voluntary arrangement within Part 1 of the Insolvency Act 1986 or a proposal for any other composition, scheme or arrangement with (or assignment for the benefit of) its creditors or if it shall be unable to pay its debts as they fall due within the meaning of section 123 of the Insolvency Act 1986 or a receiver or similar officer is appointed in respect of all or any part of the business or assets of our client or if a petition is presented or a meeting is convened for the purpose of considering a resolution or other steps are taken for the winding up of our client or for the making of an Administration Order (otherwise than for the purpose of an amalgamation or reconstruction); or

2.   if our client ceases to [support/maintain] the programs described above in breach of its contract with you.

Our obligations under this letter shall cease 10 years after the date of this letter.

Yours faithfully

DRAFT ESCROW LETTER TO BE SENT BY THE SOLICITORS ACTING FOR AN END USER TO A SOFTWARE SUPPLIER

[Date]

Dear Sirs

We act for **[•]**

You have licensed our client to use the [•] programs and have agreed to provide [support/maintenance] for such programs. You have also deposited with us a disk containing the source code version of such programs ("**the Disk**") and have authorised us to release the Disk, subject to the terms of our undertaking in this letter, for the limited purpose of our client's continued use and maintenance of the software. (Please note that we do not carry out any verification of the data contained on the Disk).

We undertake to hold the Disk in safe custody and to keep it in confidence and to release it to our client only on the happening of any of the following events:-

1.   if you shall convene a meeting of your creditors or if a proposal shall be made for a voluntary arrangement within Part 1 of the Insolvency Act 1986 or a proposal for any other composition, scheme or arrangement with (or assignment for the benefit of) your creditors or if you shall be unable to pay your debts as they fall due within the meaning of section 123 of the Insolvency Act 1986 or a receiver or similar officer is appointed in respect of all or any part of your business or assets or if a petition is presented or a meeting is convened for the purpose of considering a resolution or other steps are taken for your winding up or for the making of an Administration Order (otherwise than for the purpose of an amalgamation or reconstruction); or

2.   if you cease to [support/maintain] the programs described above in breach of your contract with our client.

Our obligations under this letter shall cease 10 years after the date of this letter.

Yours faithfully

STRATEGIC ALLIANCE

FRAMEWORK AGREEMENT

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Between:-

1.   [   ] of [   ] ("   "); and

2.   [   ] of [   ] (the "**Alliance Partner**")

Background:-

(A)   [   ] specialises in developing and providing support for [   ] primarily within the [   ] industry sector.

(B)   [   ] wishes to form long term, strategic alliances with organisations whose products and/or services are complementary to those of [   ].

(C)   The Alliance Partner has agreed to enter into a Strategic Alliance Framework Agreement with [ ]

We agree to the terms attached

Signature ....   Signature ....

For and on behalf of [   ]   For and on behalf of the Alliance Partner

Position ....   Position ....

Dated: ....   Dated: ....

Terms:-

1. **Interpretation**

    In this Agreement and in the Schedules to this Agreement (which form an integral part of this Agreement) the following words shall have the following meanings:-

    "**Products**"   the products described in Schedule 1.

    "**Services**"   the services described in Schedule 1.

    "**Strategic Alliance Plan**" the parties' joint plan for future cooperation as set out in Schedule 2.

    "**Territory**"   the targeted accounts, industry sector or geographical area described in Schedule 1 in which the parties will concentrate their efforts under this Agreement.

2. **Relationship**

    Under this Agreement the parties may work together in a number of different ways. The parties agree that the relationship between them will be laid down at the start of any commercial opportunity and will be confirmed in writing signed by each party. This could include:

    2.1 *One Party Lead Contractor*

         Where one party acts as lead contractor with overall responsibility for a project the terms governing the relationship between the parties are set out in Schedule 3.

    2.2 *Joint Partners*

         Where the parties work as joint partners the parties will enter into an agreement for the supply of its services to customers. The terms governing the relationship between the parties in these circumstances are set out in Schedule 4.

    2.3 *Joint Venture Company*

         The parties may from time to time set up a joint venture company to run a project. The terms governing the relationship between the parties in these circumstances are as set out in Schedule 5.

3. **Confidentiality**

    3.1 Each party shall treat as confidential all information obtained from the other and shall not disclose such information to any person other than

its employees, agents or sub-contractors where such disclosure is required for the performance of the party's obligations under this Agreement. This clause shall not extend to information which was already in the lawful possession of a party prior to this Agreement or which is already public knowledge or becomes so subsequently (other than as a result of a breach of this clause) or which is trivial or obvious.

3.2   Confidential information provided by one party to another is solely for the internal use by the other for the purposes of this Agreement. Following termination of this Agreement the parties will return promptly to the other all copies of confidential information. Where appropriate the parties may sign additional confidentiality agreements with the other in the other's standard form for specific commercial opportunities.

4.   **Development/Demonstration of Products**

From time to time the parties may require access to each other's products for development or demonstration purposes or to fulfil their obligations to their customers or under this Agreement. The terms governing the relationship between the parties in these circumstances are set out in Schedule 6.

5.   **Authority of each party**

Neither party has any authority to enter into any agreement with, or commitment to, others on behalf of the other party or in its name.

6.   **Representations about Products or Services or Reference Sites**

Neither party will make any representation about the other's products or services which are not contained in the other's published specifications and materials relating to them without the other's specific agreement. Neither party will use any reference sites of the other without the other's prior consent.

7.   **Strategic Alliance Plan**

Each party shall market and promote each other's Products and Services in accordance with the Strategic Alliance Plan. Each party shall use its reasonable efforts to keep the other informed of matters relevant to the marketing of Products and Services under this Agreement. The parties agree that at least once a year they will both review the operation of this Agreement and update the Strategic Alliance Plan. Neither party shall make any announcement about this Agreement or its association with the other party without the other party's consent which shall not be unreasonably withheld.

8.   **Technical Assistance**

The parties shall provide each other with the technical assistance set out in Schedule 7.

9.   **Intellectual Property**

The parties acknowledge each other's (and other group members') rights to all intellectual property relating to their Products and Services and agree to take no action which might adversely affect such rights. Neither party shall use the other's logos or trademarks without the other's prior written consent.

10.   **Indemnity**

Each party indemnifies the other to the extent that its own Products supplied under this Agreement infringe the intellectual property rights of third parties enforceable within the Territory provided that the indemnifying party is notified in writing of a third party claim promptly. The indemnifying party may obtain the right for continuing use or modify the product so that it no longer infringes or substitute products of similar capability.

11.   **Warranties**

The parties warrant that they will carry out their respective obligations under this Agreement with reasonable skill and care. They also warrant that unless otherwise made clear they either own the intellectual property rights in their own products or have a valid licence to sublicense the products to the other party or to customers as set out in this Agreement.

12.   **Anti-Bribery and Anti-Corruption**

12.1   The parties shall:-

(a)   comply with all applicable laws, regulations, codes and sanctions relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 (**Relevant Requirements**);

(b)   not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;

(c)   [comply with the Anti-bribery Policy annexed to this Agreement as may be updated from time to time (**Relevant Policy**);]

(d)   have and shall maintain in place throughout the term of this agreement its own policies and procedures, including but not

limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements, the Relevant Policy and will enforce them where appropriate;

(e) promptly report to each other any request or demand for any undue financial or other advantage of any kind received by either party in connection with the performance of this agreement;

(f) immediately notify each other if a foreign public official becomes an officer or employee of either party or acquires a direct or indirect interest in either party (and each party warrants that it has no foreign public officials as officers, employees or direct or indirect owners at the date of this agreement);

(g) within one month of the date of this agreement, and annually thereafter, certify to the other party in writing signed by an officer of the party, compliance with this clause by the party and all persons associated with it. Each party shall provide such supporting evidence of compliance as the other may reasonably request.

12.2 Each party shall ensure that any person associated with it who is performing services [or providing goods] in connection with this agreement does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the other in this clause (**Relevant Terms**). Each party shall be responsible for the observance and performance by such persons of the Relevant Terms, and shall be directly liable to the other party for any breach by such persons of any of the Relevant Terms.

12.3 Breach of this clause shall be deemed a material breach entitling the other party to terminate this Agreement in accordance with clause 15.

12.4 For the purpose of this clause, the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this clause a person associated with a party includes but is not limited to any subcontractor of the party.

13. **Term**

The Agreement shall start on the date of this Agreement and (subject to earlier termination in accordance with its terms) shall continue for a period of [   ] years and then until terminated by one party giving to the other not

less than [   ] months' written notice to expire no earlier than the end of the initial period.

14.   **Change in Control**

Either party shall be entitled to terminate this Agreement by 30 days' written notice to the other if there shall be a change in control of the other (unless prior written approval of such change in control has been given by the first party, in which event such entitlement to terminate shall cease.) Such notice may only be given within 2 months after the change in control ("**control**" for these purposes shall have the definition given to such term in Section 840 of the Income and Corporation Taxes Act 1988).

15.   **Termination**

15.1   Either party shall be entitled to terminate this Agreement immediately by written notice to the other if:-

(a)   that other party commits any breach of any of the provisions of this Agreement and, in the case of a breach capable of remedy, fails to remedy the breach within 30 days after receipt of a written notice giving full particulars of the breach and requiring it to be remedied;

(b)   an encumbrancer takes possession or a liquidator, receiver, administrator trustee or similar officer is appointed over any of the property or assets of that other party;

(c)   that other party convenes a meeting of or proposes or makes any voluntary arrangement with its creditors or becomes subject to an administration order;

(d)   that other party passes a resolution for winding up or goes into liquidation (except for the purposes of amalgamation or reconstruction and in such manner that the resulting company effectively agrees to be bound by or assume the obligations imposed on that other party under this Agreement) or a Court shall make an order to that effect;

(e)   anything analogous to any of the foregoing occurs in any jurisdiction in relation to that other party; or

(f)   that other party ceases or threatens to cease to carry on business or substantially the whole of its business.

15.2   For the purposes of this clause a breach shall be considered capable of remedy if the party in breach can comply with the provision in question in all respects other than as to the time of performance (provided that time of performance is not of the essence).

15.3 The rights to terminate this Agreement given by this clause shall be without prejudice to any other right or remedy of either party in respect of the breach concerned (if any) or any other breach.

16. **No Partnership**

Nothing in this Agreement shall constitute a partnership between the parties.

17. **No Assignment**

This Agreement is personal to the parties neither of whom may assign any of their rights or obligations under this Agreement without the prior written consent of the other party.

18. **Costs**

Except as set out in the Strategic Alliance Plan each party shall be responsible for all of its own costs incurred in connection with this Agreement and in performance of its obligations under this Agreement.

19. **Severability**

In the event of any clause contained in this Agreement being declared invalid or unenforceable by a final instrument or decree by consent or otherwise (of a court or other tribunal or authority of competent jurisdiction) all other clauses or parts of this Agreement shall remain in force.

20. **Limitation of Liability**

In no event shall either party be liable to the other for any special loss or any indirect or consequential loss of any nature (including, without limitation, any economic loss or other loss of business, revenue, profit, goodwill or anticipated savings), whether arising in contract, tort, negligence, breach of statutory duty or otherwise, and whether or not the possibility of such loss arising on a particular breach of contract or duty has been brought to the attention of such party at the time of making this Agreement.

21. **Employment Restriction**

During the term of this Agreement and for a period of 6 months following its termination for any reason, neither party will employ or offer employment in a similar capacity to any person employed by or acting on behalf of the other who was assigned to provide services in connection with this Agreement at any time in the 12 months preceding termination.

22. **Disputes**

If any dispute arises out of this Agreement the parties will attempt in good faith to negotiate a settlement. If the matter is not resolved by negotiation,

the parties will refer it to mediation in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure. (See www.cedr.co.uk). Unless the parties agree on the choice of mediator within 7 days of one party nominating a proposed mediator in writing to the other, the mediator shall be appointed by CEDR at the request of either party. If the parties fail to agree terms of settlement within 42 days of the start of the first meeting held under such procedure, the dispute may be referred to litigation by either party. [Nothing in this clause shall prevent or delay either party from seeking injunctive relief in any court in respect of any infringement of intellectual property or from issuing proceedings to recover any undisputed debt or from joining the other party to any proceedings issued against the first party by a third party].

23. **Force Majeure**

Neither party will be liable to the other for any delay or default in the performance of its obligations due to any cause or circumstance beyond its reasonable control, including but not limited to any industrial dispute.

24. **Entire Agreement and Variations**

This Agreement constitutes the entire agreement between the parties, and supersedes any previous understanding or agreement, express or implied. Each party confirms that it has not relied upon any representation not recorded in this Agreement inducing it to enter into this Agreement, provided always that nothing in this Agreement shall absolve any party from liability for any pre-contractual statement made fraudulently. No variation of this Agreement shall be valid unless it is in writing, refers specifically to this Agreement and is duly executed by the authorised representatives of both parties on or after the date of this Agreement.

25. **Announcements**

Neither party shall make any press or other public announcement concerning any aspect of this Agreement without the prior consent of the other.

26. **Further Assurance**

The parties to this Agreement shall execute all such documents and do all such things as may be reasonably required to give effect to the terms of this Agreement.

27. **Third parties**

A person who is not a party to this Agreement may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999.

28. **Waiver**

No forbearance or delay by either party in enforcing its rights under this Agreement will prejudice or restrict the rights of that party, and no waiver of any such rights or of any breach of any contractual terms will be deemed to be waiver of any other right or of any later breach.

29. **Notices**

Any notice given under this Agreement by either party to the other shall be in writing and shall be delivered personally or by first class post (if posted in the country of the addressee) or by airmail (if posted outside the country of the addressee). In the case of first class post delivery shall be deemed to take place three working days after the date of posting. In the case of airmail delivery shall be deemed to take place seven working days after posting. Notices shall be delivered or posted to the addresses of the parties given above or to any other address notified in substitution and in accordance with this clause on or after the date of this Agreement.

30. **Counterparts**

This Agreement may be entered into in any number of counterparts and by the parties to it on separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute one and the same instrument.

31. **Governing Law**

This Agreement shall be governed by English law and the parties irrevocably submit to the exclusive jurisdiction of the English Courts.

SCHEDULE 1

A. **The Products**

(of [   ] or the Alliance Partner)

B. **The Services**

(of [   ] or the Alliance Partner)

C. **The Territory**

(targeted accounts, industry sector or geographical area)

SCHEDULE 2

STRATEGIC ALLIANCE PLAN

[This will cover matters such as

- *whether the relationship is exclusive or not*

- *the initial marketing plan*

- *shared costs*

- *pre-sales activities*

- *training*

- *implementation guidelines*

- *branding*

- *procedure for informing the other party of demonstrations of Products or Services]*

SCHEDULE 3

ONE PARTY LEAD CONTRACTOR - RESPONSIBILITIES OF PARTIES

[This will cover matters such as

- *pricing and protection of margins*

- *currency*

- *relationship and interaction with customer*

- *lead generation and ownership*

- *demonstrations of Products and Services*

- *collateral*

- *bid responsibilities and support]*

SCHEDULE 4

JOINT PARTNERS – RESPONSIBILITIES OF PARTIES

[This will cover matters such as

- *pricing and protection of margins*

- *currency*

- *relationship and interaction with customer*

- *lead generation and ownership*

- *demonstrations of Products and Services*

- *collateral*

- *bid responsibilities and support]*

SCHEDULE 5

JOINT VENTURE COMPANY

[This will cover matters such as

- *name*

- *incorporation*

- *main objects*

- *shareholdings*

- *directors*

- *company secretary*

- *registered office*

- *share structure*

- *management*

- *financing*

- *restrictions on trading*

- *ownership of intellectual property rights*

- *secondees from either party*

- *deadlock provisions*

- *a list of actions that the company may not take without the approval of both parties]*

SCHEDULE 6

DEVELOPMENT/DEMONSTRATION OF PRODUCTS – RESPONSIBILITIES OF PARTIES

[This will cover matters such as

- *the location of demonstration suites*

- *standard or bespoke demonstration*

- *costs of bespoke demonstration*

- *provision of demonstration hardware and support*

- *demonstration collateral*

- *demonstration activity reports*

- *demonstration upgrades]*

SCHEDULE 7

TECHNICAL ASSISTANCE

[This will cover matters such as

- *the provision of technical products and services*

- *hardware requirements*

- *technical documentation*

- *scope of use of Products by other party and each party's point of contact for technical assistance]*