



## Checklist: Cloud Computing Agreement

crosslaw's checklists | Date : 21 November 2015 | Version 1.4 | Tags :  ICT Law

### Johan Vandendriessche

Johan is partner and heads the ICT/IP/Data Protection practice. He combines a broad technology sector approach with an in-depth experience in ICT projects and procurement, outsourcing, data protection and compliance.

✉ [j.vandendriessche@crosslaw.be](mailto:j.vandendriessche@crosslaw.be) | ☎ +32 486 36 62 34



### François Coppens

François is senior associate at Crosslaw. He specializes in the law of new technologies and the Internet with a focus on ICT contracts, e-commerce, copyright and licensing.

✉ [f.coppens@crosslaw.be](mailto:f.coppens@crosslaw.be) | ☎ +32 499 40 99 90



## Introduction

*This checklist offers a general overview of contractual issues related to drafting, reviewing or negotiating cloud computing agreements. To render this checklist applicable to all forms of cloud computing, some issues related to specific cloud services are not included in this checklist. It should therefore not be considered exhaustive.*

### General

- Title of the agreement (the title is only indicative)
- Identification of the parties
  - Name and legal form
  - Address or registered offices
  - Company identification number (0xxx.xxx.xxx) (trade register number or other unique identification number in case of foreign companies, if available)
  - Register of Legal Entities
  - VAT number (BTW BE0xxx.xxx.xxx)
- Identification of the signatory
  - Name
  - Title
  - Verify the authority of the signatory
- Preamble
  - Description of the parties
  - Description of the purposes of the parties to the agreement



- Signature or Acceptance of the Agreement
  - Verify the mechanism that leads to acceptance of the contractual conditions: signature or “click-wrap” mechanism
    - Signature
      - Verify the identity of the signatory, the signature and the date
      - Sign as many original counterparts as there are parties (mention the number of counterparts in the agreement)
      - Check the page numbering (continuous)
      - Initials on every page are not legally required, but they are useful (it confirms that each page was read and accepted and protects against exchanging pages)
    - “Click-wrap” mechanism
      - Acceptance mechanism
      - Evidence issues with “click-wrap” agreements

## ☑ Definitions and Interpretation

- Definitions
  - Verify the use of the definitions
    - Are all definitions in use
    - Are capitalized terms properly used
    - Avoid making unnecessary or circular references between definitions
  - Specific definitions?
    - Definitions may validly derogate from the usual meaning of a word (e.g. a word may be given another meaning in a definition)
  - References to glossaries (e.g. ITIL definitions)
    - Verify the accuracy of the reference (e.g. which version of a glossary)
- Interpretation rules
- Hierarchy of the contract documents
  - Principle
  - Exceptions?

## ☑ Scope of the Agreement

- Description of the scope of the agreement
  - Cloud deployment model
    - Private Cloud
    - Public Cloud
    - Hybrid Cloud
    - Community Cloud
  - Cloud computing services
    - IaaS (Infrastructure as a service)
    - PaaS (Platform as a service)
    - SaaS (Software as a service)
    - Some cloud service providers (CSPs) provide additional descriptions (e.g. SECaas – Security as a service, BaaS – Back-up as a service, ...)
- Beneficiaries (e.g. a group of companies)?
  - Definition of beneficiaries
  - Formal adoption by each beneficiary?

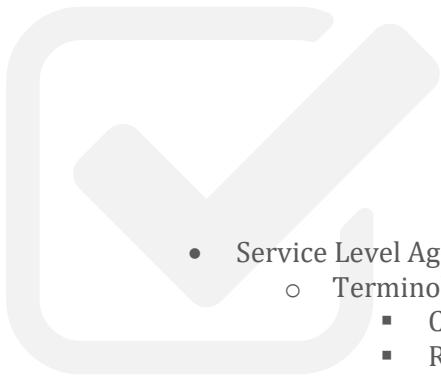
- Provisions for multijurisdictional application of the agreement?
- Several or joint liability?

## ☑ Duration and termination

- Duration of the agreement
  - Signature date vs. effective date
  - Determined vs. undetermined duration
  - Specific rules for frame agreement and work/purchase orders
- Conditions precedent / conditions subsequent
- Termination modalities
  - Termination for convenience
    - By the customer
      - Indemnity
      - Notice Period
    - By the supplier/service provider
      - Indemnity
      - Notice Period
  - Termination for breach / cause
    - By the customer
      - Which causes?
      - Which conditions?
      - Which formalities?
    - By the supplier/service provider
      - Which causes?
      - Which conditions?
      - Which formalities?
- Consequences of termination
  - Usually no impact on rights and obligation accrued prior to termination
  - Continuing obligations?
  - Restitution or destruction of client data
  - Retransition / termination assistance
    - Defined?
    - Remuneration?

## ☑ Service

- Description of the services
  - Specifications?
  - Standards?
  - Quality of the services
- Nature of the obligations
  - Effort based obligations ('middelenverbintenissen' / 'obligations de moyens')
    - Reasonable effort obligations
    - Best effort obligations
    - Specific description of the level of effort?
  - Result based obligations ('resultaatsverbintenissen' / 'obligations de résultat')
  - Specific interpretation rule in relation to the nature of the obligations?



- Service Level Agreement (SLA)
  - Terminology
    - Clear?
    - Reference to standard definitions (e.g. ITIL glossary)
    - Clear and measurable description of the quality indicators ('KPI')
    - Reference period (daily, weekly, monthly, ...)
  - Nature of the SLA commitment
    - Effort obligations
    - Result obligations
  - Reporting
    - Frequency and form
    - Access to underlying data?
  - Service credits
    - Extent of the service credits
    - Pro-active compensation?
    - 'sole remedy'?
- Use of the services
  - Which limitations are imposed in relation to the use of the cloud computing service?
  - Internal use only?
  - Purpose?
  - 'Acceptable use policy' (AUP)
- Evolution of the services (particularly important with SaaS)
- Support and maintenance?
  - Interval
  - Modalities
- Suspension of obligations ('*exceptio non adimpleti contractus*')
  - Unilateral or reciprocal?
  - Conditions?
    - Nature of the breach
      - Material breach
      - Any obligation or specific obligations only?
      - Proportionality?
    - Prior formalities?
      - With or without notification?
      - Grace period?
  - Explicitly excluded?
    - If nothing is mentioned, common law principles apply
  - Financial impact
    - Continued payment duty?
    - Costs in relation to lifting this measure?

## Price and payment

- Price mechanism
  - One-off costs (e.g. configuration or transition)
  - Recurring costs – how are these determined?
  - Additional service costs in 'time & materials' or fixed price?
- Taxes

- Invoicing modalities
  - Additional obligatory mentions (e.g. PO number)?
  - Sanctions in case of missing information
  - Electronic invoicing
- Payment modalities
  - Manner of payment
  - Payment period
  - Sanctions in case of late payment
    - Late payment interest
    - Damages
    - Suspension of the agreement?
    - Which formalities?
- Price evolution
  - Unilateral modification by the supplier/service provider (with termination option)?
  - Price review mechanism (e.g. indexation?)
  - Benchmarking (practical?)

## ☑ Data Security, Confidential Information and Personal Data

- Confidentiality
  - Confidentiality and purpose limitation with regards to the use of confidential information
  - Security obligation
  - Data breach notification obligation
  - Rules regarding onward internal and/or external disclosure of confidential information
  - Confidential information must remain property of the discloser
- Specific Data Security rules for specific information?
- Data Protection
  - Limitation of data processing by data processor
  - Choice of data processor
  - Security obligations
  - Data breach notification obligation
  - International data flows
  - Law applicable to the data processing activity
    - May differ from the law applicable to the contract
    - Impact?
- Data ownership and restitution obligation
- Audit rights / certification requirements
  - Audit rights?
    - Scope
    - Recurrence
    - Formalities
    - Costs



- Certification
  - Certification duty?
    - Scope?
    - Review option
    - Certificate
  - Certification process (including recurring re-certification audits)

## ☑ Liability and Insurance

- Liability regime
  - No clause concerning (limitation of) liability = unlimited liability
  - Unilateral or reciprocal
  - Limitation (identical or not) applicable to both parties?
- Limitation of liability
  - Nature of the breach
  - Amount of damages
  - Nature of the damages
- Exclusion of 'indirect and consequential damages'?
  - Definition
  - List
  - List of damages that are qualified as direct damages
- Cases of unlimited liability?
  - Infringement of confidentiality obligations
  - Infringement of intellectual property rights
  - Infringement of data protection obligations
  - Other?
- Expiry period for claims ("barred")?
  - Unilateral or reciprocal
- Indemnity for third party claims
- Insurance obligation
  - Minimum amount or unspecified "reasonable" amount
  - Quality requirements with regards to the insurance company
  - Copy of insurance certificate (to be made available upon first request)
  - Notification of changes to the insurance coverage
  - Waiver of recourse from the insurance company?

## ☑ Unforeseeable circumstances

- Force Majeure
  - Scope
    - Definition, list or reference to law or case law?
    - Large or restricted notion
  - Notification obligation
  - Termination option
    - Period
    - Which party?
  - Duty to mitigate consequences
- 'Hardship' clause

## ☑ General Warranties

- Supplier/Service provider
  - Fitness for purpose
  - Document client specifications?
  - Legal and/or technical specifications and/or standards?
  - Compliance with tax and social law obligations (LIMOSA, ...)
  - Compliance with applicable law and regulations
  - Ownership or licence of tools / equipment used for the provision of the services
  - Absence of harmful code (virus, Trojan horse, time-bomb ...)
  - Explicit limitations or exclusions?
- Client
  - Use of the service in a manner compliant with applicable law
  - Use compliant with reasonable expectations
  - Use compliant with 'Acceptable Use Policy'
    - Contents of AUP?
    - Is the AUP compatible with the legal obligations of the client?
  - Warranty in relation to data protection
  - Warranty in relation to the absence of harmful code
- Remedies?
  - Repair
    - Absolute duty?
    - Relative duty ('substantially conforming to')
  - Reimbursement
  - Termination of the agreement
  - 'Sole remedy' or other remedies?

## ☑ Notifications

- Form
- Language
- Recipients
- Evidence rules?

## ☑ 'Boilerplate' Clauses

- Non-solicitation
  - Unilateral or reciprocal
  - Scope
  - Duration
  - Penalty
  - Exceptions?
- Severability clause
  - Consequences of invalid or unenforceable clauses?
  - Negotiation obligation?
  - Replacement obligation?
- Personal nature of the agreement (*'intuitu personae'*)?

- Assignment and subcontracting
  - Permitted?
  - Formalities
  - Joint liability in case of assignment or subcontracting
  - Specific regime for intra-group transactions
  - Specific rules for M&A related transactions
- Publicity and references
  - Permitted?
  - Formalities?
  - Use of logos and trademarks
- Capacity of the parties
- Entire agreement clause
  - General conditions?
  - Pre-contractual documents?
  - Enforceability is largely dependent on applicable law and jurisdiction
- No waiver
- Amendments

## Dispute Resolution, Applicable Law and Jurisdiction

- Dispute resolution
  - Escalation procedure for disputes
  - Possibility to initiate proceedings pending dispute resolution?
- Binding third party decision (financial and/or technical issues)
- Applicable law
- Jurisdiction
  - Courts
  - Alternative dispute resolution
    - Mediation
    - Arbitration

---

*All rights reserved. You are permitted to read, download and copy this checklist for your own personal use and to provide it to third parties free of charge, provided that it is not altered in any way. This checklist is provided for general information purposes only and may not be construed as legal advice. You should be aware that laws, regulations and case law may have changed since the date of the publication.*

*crosslaw is a civil partnership under the form of a limited liability company (CVBA/SCRL) – company number 0534.697.355 – Register of Legal Entities of Brussels*