Enterprise Cloud, and the Impact of the Hyperscalers

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So what is “enterprise cloud”?

- **Not a “one size fits all” model; need to account for:**
- **“Hyper scalers” (e.g AWS, Microsoft, Google)**
- **Major SaaS solutions (ERP in the Cloud etc)**
- **Niche SaaS offerings**
- **Cloud enabled/service provider fronted contracts (e.g with IBM, Atos etc)**

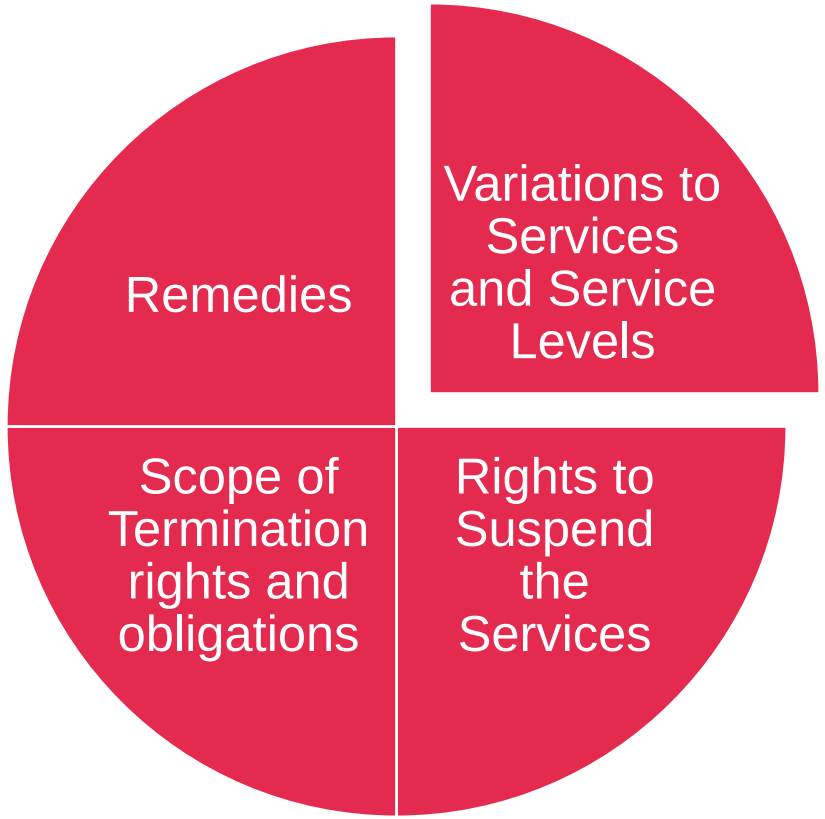
Structural Challenge to Negotiations

- Relative bargaining strengths
- Technical and organisational inflexibility
- Often based on a low cost model with limited bandwidth for negotiation
- Contract standardisation
- Low level of focus on “the legals”

Result = a lot LESS negotiation than major customers are used to!!

The Key Challenges with the Hyperscaler Terms

Negotiations Tend to Focus on Four Key Areas



Outcome of these discussions likely to be different to what you might have expected in a "traditional" outsource contract!

Variations to the Services, Service Levels and Terms

Variations to the Services, Service Levels and Terms

- The Supplier Rationale:

We maintain a "one to many" service delivery solution, which means that we are able to offer you (the customer) a more cost effective and flexible solution. We will need to make changes to the services over time in order to reflect changes in law or regulation, or so as to ensure that our service continues to reflect the needs of the market. It would not be practical or realistic for us to have to get the consent of each of our customers in order to be able to make such changes. However, you can trust us not to exercise these rights capriciously or unreasonably, as if we were to do so, we would rapidly lose our customers

Variations to the Services, Service Levels and Terms

- So it's all about **trust….**

Variations to the Services, Service Levels and Terms

- Key “battlegrounds”:
  - Must changes to the services be “additive” only?
  - What rights does the customer have if it doesn’t approve of the changes made?
  - Are there any limitations to the changes which can be made to the SLA?
  - What other contract clauses can be changed, e.g
    - Any of the cloud terms?
    - AUP terms only?
    - Data Protection related terms?

Suspension Rights

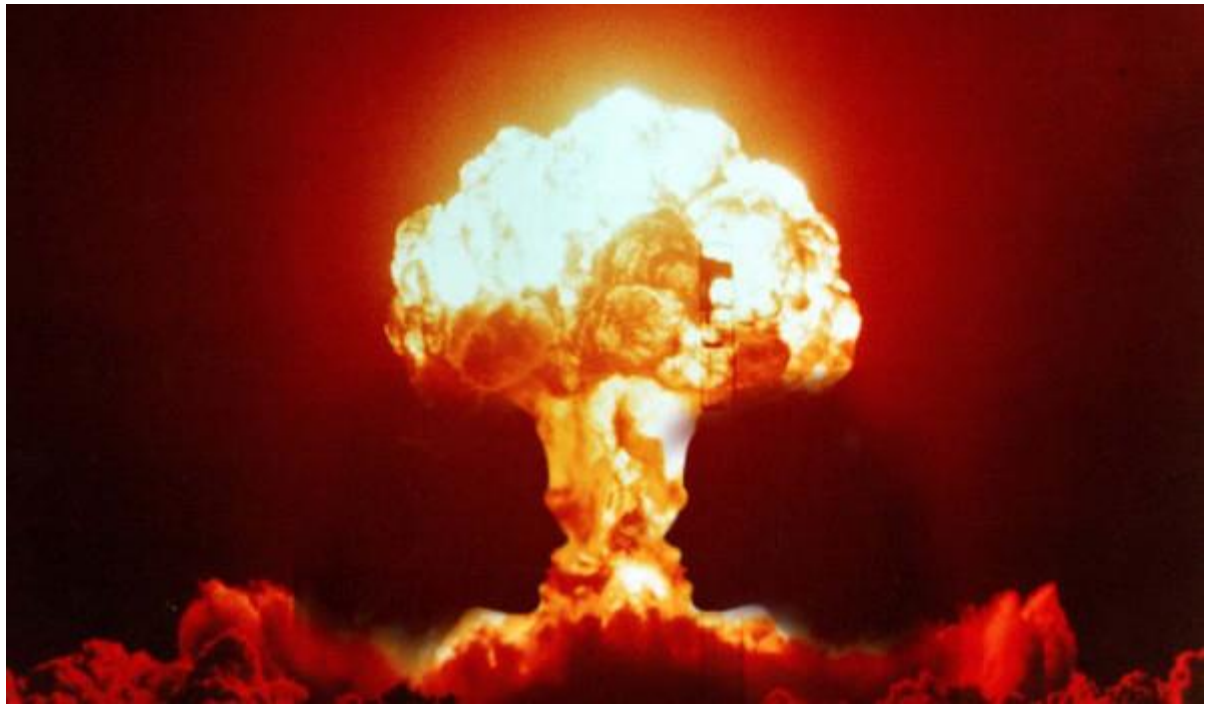
- Continuity of Service is **key** for any customer
- Rights to suspend may be perceived to be easier for a supplier to exercise than a termination right
- Kinds of triggers:
  - Any breach of the AUP
  - If Customer use of the service poses a security risk
  - If Customer use may adversely impact upon the Services or supplier's services to other customers
  - If Customer use "may subject the Supplier to liability"
  - Breach of any IP provisions

Suspension Rights

- Key negotiation points:
  - Is notice required (and is this subject to any subjective determination by the supplier)?
  - Must breach of any of the contract provisions be “material”?
  - Is there any reasonableness requirement applicable to the decision to suspend?
  - Is the suspension limited:
    - In terms of the aspects of the services which are made subject to the suspension?
    - In duration?

  And what happens if the supplier got it wrong….?

Termination Rights



Termination Rights

- Typical formulation in a cloud services agreement:
  - Supplier can terminate:
    - For any material breach not cured within 30 days
    - For any breach which would have given rise to a right to suspend, upon 30 days advance notice {NB – seemingly then without a cure period…?}
    - In order to comply with applicable law or governmental requests
    - For convenience…?
  - Only obligation upon supplier thereafter is to allow a short period (e.g 90 days for retrieval of data)

Termination Rights

But does this work in practice??

Termination Rights

- The things to press for:
  - No right of termination for convenience for the supplier
  - Termination for breach linked to materiality AND a reasonable cure period in all circumstances
  - Continuation of provision of services post-termination for such period as is necessary to enable transition to a replacement platform
  - **ie just as you would expect to see in a “normal” outsourcing agreement!**

Remedies and Sanctions

Remedies and Liabilities

Typical drafting in cloud agreements:

- Service Credits as a “sole and exclusive remedy”
- Warranty breaches limited to correct of defect
- Liability claims limited to fees paid for defective element of services only
- Few unlimited losses (e.g just as required by law, IP breaches)
- Widely drafted exclusions (including loss/corruption of data, service interruption or outages, loss of business or profit, unavailability or non performance of any of the Services)
- Separation of cloud services from any other elements (eg professional/migration services)

Remedies and Liabilities

What have we achieved in actual negotiations?

- Service Credits as a “sole and exclusive remedy” unless a set threshold of “Material Outage” is hit, at which point damages can be claimed
- Warranty breaches limited to correct of defect reserved right to claim damages
- Liability claims limited to fees paid for defective element of services only reserved right to claim damages
- Few unlimited losses (e.g just as required by law, IP breaches) extend to gross negligence/deliberate defaults
- Widely drafted exclusions (including loss/corruption of data, service interruption or outages, loss of business or profit, unavailability or non performance of any of the Services) links to rights to claim damages for unavailability or outages, based on “Material Outage” concept

Conflicts of Laws

- Many cloud providers are truly “global” in scope
- Raises questions as to laws impacting upon service provider or their location of service provision

GDPR – obligation not to disclose data unless mandated by an EU court or regulatory body

US Cloud Act – ability to mandate disclosure of information held by a US domiciled company, regardless of where the data is processed