Software as a service

What is SaaS?

Software as a Service (SaaS) (sometimes known as software on demand or application service provision (ASP services)) is fast becoming the standard approach for the procurement of software for both private and public sector organisations and for consumers. A prime example of this is Microsoft's Office 365 application which overtook conventional licence sales of the Microsoft Office product at the end of 2017.

If you are a software business and you are looking to launch a SaaS offering, this note outlines some of the key issues which you should be aware of.

SaaS is a service not a product

One of the key mistakes which traditional software companies make when they are looking to launch a SaaS application is that they continue to think of the software as a product. The key difference between an on-premise software product and a SaaS application is that as a SaaS provider you will continue to have an ongoing obligation to the customer for the duration that they are using your software.

In traditional models, once the initial warranty period was over, customers were essentially on their own unless they had purchased separate support and maintenance. It was the customer's responsibility to keep the software up and running and to apply patches and bug fixes as required. Now with SaaS, many of these responsibilities have moved to the SaaS provider as part of the ongoing SaaS service. Because of this, the SaaS contracts often need be to more detailed to ensure that it is clear where the responsibilities lie.

There is no one size fits all approach

A SaaS contract will govern the customer's right to access and use the SaaS application in exchange for the payment of a fee. Generally the customer will pay a recurring fee (monthly or annually) but there may also be initial lump sum payments to cover things like set-up and configuration. Because each SaaS application is different and the purposes for which the application will be used will be different, there is no ''one size fits all approach'' that can be taken when drafting a SaaS contract. Despite this, there are some basic provisions which should be included in most SaaS contracts:

- Who are the parties to the SaaS contract?

- Trial period. Is there a free or reduced cost trial period? If yes, how long is it for?
- Initial fee. Is there an initial fee? How much is it and what does it cover?
- Subscription fee. How much is the subscription fee and how often is it payable?
- User count. Does the subscription fee cover a certain number of users? How will changes to the user count be handled?
- What does the SaaS application do and how will changes be managed?
- Are there restrictions on how and where the SaaS application can be accessed?
- Who owns the IP in the SaaS application and what rights does the customer have to use that IP?
- What is the term of the SaaS contract? Is it renewable?
- In what circumstances can the SaaS contract be terminated early?
- Effect of termination. What is the effect of termination?
- Data processing. What data processing will be performed by the SaaS application?
- Data ownership. Who owns the data?

Reliance on hosting providers

As noted above, a key difference between SaaS and on-premise offerings is that SaaS products are hosted by the software provider. However, in reality this is usually not the case. Rather than hosting the software themselves, SaaS providers typically outsource the hosting to a third party hosting provider. This makes the contracting arrangements more complex. The SaaS provider will have a contractual obligation to their customer to provide access to the application, but the SaaS provider will be dependent on the performance of the hosting provider to fulfil that obligation. If there is a failure of the hosting provider, the SaaS provider could face a claim from their customers and the SaaS provider will be left exposed if it is unable to bring a related claim against the hosting provider. For this reason, when drafting SaaS contracts it is important to consider, not only what warranties can be given in relation to the performance of the software, but also what warranties are being given by the hosting provider in relation to the availability of the service.

Service levels

Customers of SaaS applications, particularly business customers, will typically seek guarantees as to the availability and performance of the application. If availability will be dependent on a third party platform, such as the Microsoft Azure platform or Amazon's AWS platform, then the SaaS contract will need to incorporate the service levels, and more importantly the service exclusions, relating to those platforms.

Other issues which will need to be included in the contract are:

- System requirements. Is any specific hardware or software required to access and use the SaaS application?
- Are there any minimum bandwidth requirements in order to run the SaaS application?
- Are there uptime guarantees? How will downtime and scheduled maintenance of the SaaS application be managed?
- Support and maintenance. Is basic support and maintenance included in the subscription fee? Is enhanced support and maintenance available?

Our note on support, maintenance and SLAs contains more information about availability service levels and

support and maintenance contracts.

Data protection

Data protection is often a major concern for customers using SaaS applications and as a result of the General Data Protection Regulation (GDPR), SaaS providers will need to include certain provisions in their SaaS contracts if they will be storing or processing personal data on behalf of their customers. Customers will want to know where their data is being stored (or at least which geographic region it is being stored in), what security measures are in place to protect that data, and how they can access that data both during the term of the contract and upon termination.

Data management and security plays a more important role in SaaS contracts than in most traditional software licenses and careful consideration will need to be given to these issues if, as a SaaS provider, you are going to successfully commercialise your SaaS application.

Exit

SaaS customers are increasingly requiring detailed exit provisions in SaaS contracts and it is important for both the customers and the SaaS provider that exit is dealt with clearly in the contract so both parties understand their rights and obligations.

A key issue upon termination of a SaaS contract is whether the customer data will be returned or destroyed and whether there will be additional costs for the return of data. If customer data is to be returned, the format in which the data is to be returned should be detailed in the contract and it should be made clear whether the SaaS provider will deliver the data or whether the customer will be given access to the SaaS system to download the data itself.

It should be made clear in the contract that the customer's access to the SaaS application will end when the contract terminates. Whilst this should be obvious, less experienced customers, who are used to traditional perpetual software licences, may not appreciate that they have not purchased a 'product' which they get to keep and use indefinitely.

The SaaS contract may also cover the provision of additional termination assistance, which is typically available for an additional fee.

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