

## **Negotiating Online Services Terms with Microsoft**

**By Robert J. Scott**

Microsoft's 365 and Azure offerings are very compelling to prospective business purchasers. Why not ask the publisher of the software to host your applications in a secure cloud environment? The answer for many of my clients is that Microsoft's standard Online Services Terms and Conditions are incredibly one sided and put too much of the risk on the customer. For regulated entities, the basic terms and conditions do not address the requirements of major federal regulations such as HIPAA and GLBA. Nevertheless, with the proper communication and negotiation strategy, Microsoft's online terms can often be amended to provide adequate protection for even the most regulated entities including enterprise financial services firms and healthcare providers. Here is how we help our clients get it done.

### **Get Clear on Your Requirements Up-Front**

At the earliest possible stage in the negotiations, business customers need to make it very clear to the Microsoft team they are working with what the requirements are. This includes identifying what 365 profiles the business will be using and any "deal breaker" points on the terms and conditions. If the customer is a bank, for example, and Microsoft will not add language requirement by GLBA in vendor contracts, that's a deal breaker. If the business is a healthcare company and Microsoft will not agree to an acceptable BAA, that's a deal breaker. If a business' standard contracting terms require vendors to take financial responsibility for a data breach that results from the negligence of the vendors employees and Microsoft will not modify the terms of the standard limitation of liability, that's a deal breaker. All clients have different priorities but they all have their deal breaker points. We outline all the requirements in a PowerPoint presentation early in the discussions. This helps the Microsoft account team deal with the business desk and the LCA group within Microsoft. Proceeding without them, leads to inefficiencies and could impact whether your Microsoft 365 deal gets done or not.

### **Make Sure Microsoft's Proposal is Tied to the Requirements**

The best way to negotiate with Microsoft on cloud deals is to have them quote a price in that includes all the requirements. Customers will want to avoid negotiating the commercial terms, i.e., discount levels and tiers before discussing key terms and conditions related to risk balancing with Microsoft. As with any vendor, Microsoft evaluates the overall deal when considering concessions on terms and conditions. Microsoft will not want to offer the most favorable risk balancing at the lowest possible price. Customers should be prepared to pay a fair price for the terms and conditions they need to make the deal work.

## **Indemnity**

As a general proposition, Microsoft does not indemnify its customers for third-party claims related to security and privacy incidents under any circumstances. While this position violates the standard contracting guidelines for many clients, there are ways to work around it. First, I encourage my clients to transfer the risk through first-party cyber liability insurance that will cover the customer in the event of a data breach. This insurance covers Microsoft's customer in the event of third-party claims by customers and may cover the cost of regulatory response in connection with privacy and security incidents related to cloud adoption. Of course, these premiums need to be taken into account as the total cost of the transaction. Second, there are other ways to negotiate with Microsoft to work around the lack of indemnity. For example, a client might ask Microsoft to expand its limitations of liability or seek special terms related to reimbursement of data breach costs.

## **Limitation of Liability**

Limitations of liability provisions set forth the amount that the vendor will be required to pay in event that certain claims arise related to the contract. When adopting cloud services of any kind, limitation of liability provisions can be a key contract term subject to intense negotiation. Like many vendors, Microsoft likes to limit its liability by tying in some way what the customer can recover to the customer's spend. My issue with revenue-based limitations of liability is that they do not necessarily correlate to the clients probable claims scenario, especially if there is a breach relatively early in contract term. For example, a massive data breach could cost many multiples of what a client has paid to Microsoft for online services. For these reasons, limitations of liability can be the final sticking point in many online services deals.

## **Security Requirements**

For regulated entities in particular, it is critical to undertake a thorough due diligence before selecting a cloud services vendor. This due diligence could be questioned in court or by regulators in the event of a data breach following implementation. In order to discharge your due diligence obligations, you have to carefully compare the security policies and procedures to those of your company and the requirements of applicable regulations. In the end, the due diligence process is designed to identify and not necessarily eliminate all security risks. The key is to understand the risk and then make decision based upon all the facts and circumstances that the level of risk is acceptable. We work diligently with our client's security teams to documents the security policies and undertakings that Microsoft will be governed by in connection with online services. When done properly, I believe Microsoft's cloud can be adopted by even the most heavily regulated companies in financial services and healthcare.

## **Conclusion**

Microsoft's 365 and Azure platforms are transforming the way IT services are consumed. The move away from on-premises perpetual licenses to cloud-based subscriptions is attractive for a number of reasons. Unfortunately, Microsoft's basic terms and conditions are onerous and problematic for large enterprises or those that are subject to privacy and security regulations. Nevertheless, with proper leverage and effective negotiation strategy, customers can achieve the benefits of Microsoft's cloud solutions without taking undo legal and regulatory risk. If you are negotiating with Microsoft, we can help achieve your goals.



**About the author Rob Scott:**

Robert represents mid-market and large enterprise companies in software license transactions and disputes with major software publishers such as Adobe, IBM, Microsoft, Oracle and SAP. He has defended over 225 software audit matters initiated by software piracy trade groups such as the BSA and SIIA. He is counsel to some of the world's largest corporations on information technology matters including intellectual property licensing, risk management, data privacy, and outsourcing. Robert ensures that Scott & Scott, LLP continues its focus on cost-effective strategies that deliver positive results.

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