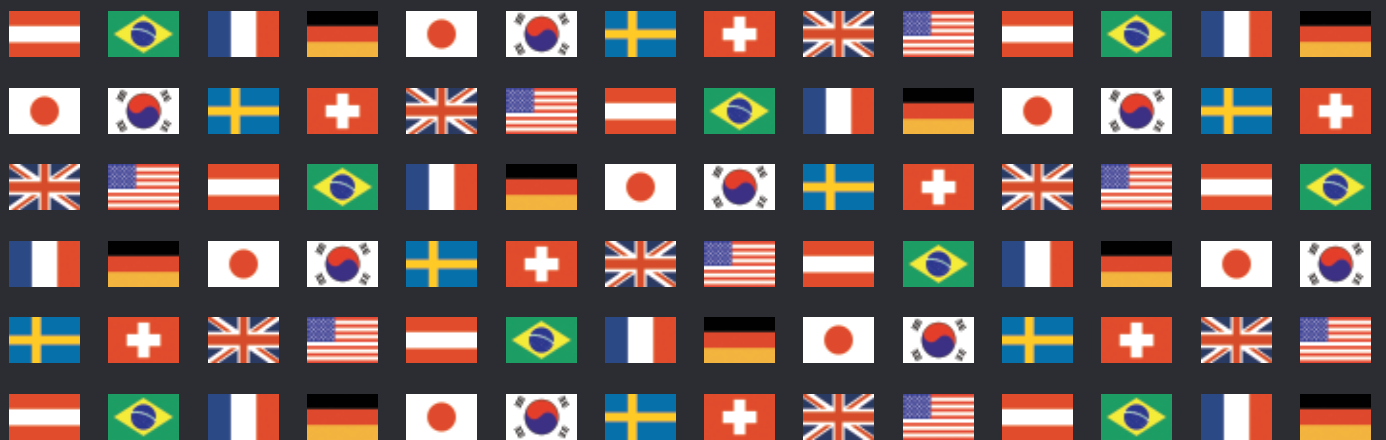


Cloud Computing 2021

Contributing editor
Marcus Pearl



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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First published 2017
Fourth edition
ISBN 978-1-83862-312-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Cloud Computing 2021

Contributing editor**Marcus Pearl**Bryan Cave Leighton Paisner LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Cloud Computing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Marcus Pearl of Bryan Cave Leighton Paisner LLP, for his assistance with this volume.



London
October 2020

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This article was first published in November 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Japan	40
Marcus Pearl Bryan Cave Leighton Paisner LLP		Akira Matsuda, Hiroki Saito and Landry Guesdon Iwata Godo	
Austria	5	Netherlands	45
Árpád Geréd Maybach Görg Lenneis Geréd		Joris Willems, Khaled Dadi and Cyril Christiaans DLA Piper	
Belgium	12	South Korea	53
Kristof De Vulder, Raf Schoefs and Alizée Stappers DLA Piper		Seungmin Jasmine Jung, Young-Hee Jo and Youngju Kim LAB Partners	
Brazil	19	Sweden	60
José Mauro Decoussau Machado, Ana Carolina Fernandes Carpinetti and Gustavo Gonçalves Ferrer Pinheiro Neto Advogados		Peter Nordbeck and Dahae Roland Advokatfirman Delphi	
France	27	Switzerland	67
Jean-Luc Juhan and Myria Saarinen Latham & Watkins		Oliver M Brupbacher, Ralph Gramigna and Nicolas Mosimann Kellerhals Carrard	
Germany	33	United Kingdom	74
Laura M Zentner and Viola Bensinger Greenberg Traurig LLP		Marcus Pearl Bryan Cave Leighton Paisner LLP	
		United States	92
		Manita Rawat and Matthew C Mousley Duane Morris LLP	

Global overview

Marcus Pearl

Bryan Cave Leighton Paisner LLP

2020 has been a year that has seen some seismic changes, with consequences for the cloud computing market. Despite the economic volatility, the global public cloud services market is forecast to grow 6.3 per cent to total US\$257.9 billion, up from US\$242.7 billion in 2019 (<https://www.gartner.com/en/newsroom/press-releases/2020-07-23-gartner-forecasts-worldwide-public-cloud-revenue-to-grow-6point3-percent-in-2020>). With the effects of the global economic downturn intensifying the urgency to move away from legacy infrastructure operating models, public cloud services are becoming increasingly important for businesses every-where. Recent reporting by AllCloud has emphasised this growing trend towards working on the cloud, with 85 per cent of organisations inter-viewed for the report expecting to have the majority of their workloads on the cloud by the end of 2020 (<https://allcloud.io/go/2020-cloud-infra-structure-report/#:~:text=More%20significant%20findings%20from%20the,approach%20are%20also%20running%20VMware>).

Owing partly to the covid-19 pandemic and the concomitant requirement for seamless remote working across the globe, Desktop as a service (DaaS) is predicted to achieve significant levels of growth this year, estimated at US\$1.2 billion in 2020 (an increase of 95.4 per cent). Despite this growth, software as a service (SaaS) is still the largest market segment, forecast to reach US\$104.7 billion in 2020. The further shift towards subscription-based SaaS models, and the need for new software collaboration tools during covid-19, have driven the growth in this area. Infrastructure as a service (IaaS) remains the second-largest market segment and is forecast to grow by 13.4 per cent to US\$50.4 billion. The past year has also seen the expansion of the cloud computing market in Africa. As a continent with around 17 per cent of the world's population, the fact that Africa's data centre capacity has doubled in the past three years yet still currently accounts for less than 1 per cent of global data centre capacity offers potentially lucrative opportunities for international investors and cloud computing providers alike. Further improvement in the continent's infrastructure is likely to facilitate greater uptake of cloud technologies.

Despite the continued sector growth, following outages suffered by Gmail, Google Drive and Adobe Lightroom issues in 2020 (and the earlier AWS outage in 2017), the increase in reliance on cloud computing throughout 2020 has led to concerns about the risk of overdependence on the services of a small number of cloud technology providers (<https://techhq.com/2020/09/whats-the-risk-of-becoming-too-cloud-dependent/>). The potential implications of the insolvency of a cloud provider (given the current economic climate) could also be dramatic. For SaaS arrangements in particular, the customised nature of software-specific data fields and data storage used by the applications can make it harder to find an alternative provider that can provide the necessary software functionality and/or interfaces. There may be difficulties too in extracting and migrating data to a new provider.

Problems faced by cloud technology providers may impact not only the services relied on, but the security of the data hosted by those providers too. For example, a major US credit card issuer was fined US\$80 million by US regulators and ordered to improve internal controls

after regulators identified a string of failings that allowed hackers to obtain the personal data of more than 106m customers and credit card applicants in 2019.

From a European perspective, the impact and consequences of the *Schrems II* decision (Case C-311/18) is still playing out. At the time of going to press, we were awaiting further guidance from the European Data Protection Board as to the methods that can be used to transfer data between the EU and the US, following the invalidation of the EU-US Privacy Shield. It is clear from the EU country surveys this year that GDPR compliance is an overriding concern (both from the perspective of international data transfers and that of regulatory oversight of data security breaches). EU regulators have handed down some significant fines this year for data breach, indicating a clear direction of travel. It is perhaps too soon to say whether there is a distinct move towards data localisation, but several EU countries are investing in the GAIA-X initiative (to develop an interconnected EU data infrastructure and reduce dependence on non-EU based cloud providers, by creating EU digital sovereignty). In tandem with this development, UK-based cloud providers and users of cloud services are awaiting the decision of the EU as to whether the UK will receive an adequacy decision, allowing transfers of personal data to be made between the EU and the UK following the end of the Brexit transition period on 31 December 2020.

As in 2019, each country chapter looks first at the cloud services market in each of the countries covered and examines what kind of cloud computing transactions take place and which of the global and local cloud providers are active in that country, as well as the cloud services the latter provide.

The survey then considers how active the central or regional government is in the development of the cloud. Are there specific, cloud-friendly policies? How are these policies implemented – by fiscal or customs incentives or development grants, or other means? And do any other government initiatives apply?

We next turn to the core of this work: law, regulation, contract and market practice. We address the following questions for each country.

- Is cloud computing specifically recognised and provided for in the local legal system and, if so, how?
- Is there any legislation or regulation that directly and specifically prohibits, restricts or otherwise governs cloud computing?
- What legislation or regulation indirectly prohibits, restricts or otherwise regulates cloud computing?
- What are the consequences of breach of those laws and regulations?
- Recognising the importance of B2C cloud adoption, what local consumer protection measures apply to cloud computing?
- Knowing that cloud – especially public cloud – may pose real challenges in certain sectors, for example, financial services and health, what (if any) sector-specific legislation or regulation applies?
- Public and private sector organisations around the world worry about – and some have already had to cope with – what happens when a cloud service provider (CSP) becomes insolvent. What insolvency laws will apply in those situations?

Almost all surveys of chief information officers, chief information security officers, CROs and other business leaders around the world highlight their continuing concern about cyber and data security in the cloud, as well as whether and how they continue to comply with data protection and privacy regulation in migrating to the cloud – especially since the coming into operation of the EU General Data Protection Regulation in May 2018. So, we identify the principal data protection or privacy legislation applicable to cloud computing.

We next analyse as far as we can from publicly available sources the typical key terms of B2B public cloud computing contracts in local markets.

It is clear that cloud computing is having a significant impact in the workplace, so we also identify labour and employment law considerations that apply.

Because much of the developed world and many emerging economies are becoming increasingly concerned about how to tax online and

digital products and services, especially where supplies cross borders and will be made from IT product and services providers without a permanent establishment in their target markets, we outline the direct and indirect taxation rules that apply to the establishment and operation of CSPs and their customer transactions.

Finally, we identify recent notable cases as well as commercial, administrative or regulatory decisions or actions that have directly involved cloud computing as a business model. And we conclude with a review of general updates and trends as far as they can be discerned, as well as considering how covid-19 has affected the cloud computing market (and the impact of any emergency covid-19 legislation on providers and users of cloud technology).

With a new and fast-developing area such as cloud computing, we must keep our questions under review. And it follows that our answers to those questions may change over time. Of course, law and regulation will change, as will contract and market practice.

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