

In the digital economy, where data is digitalised which is stored, processed, manipulated and accessed through the always accessible and constantly evolving cloud, the procurement of technology no longer refers to the purchase of hardware and software but instead now focused on the procurement of digital infrastructure (in physical or virtual form), cloud services (including compute and storage) and ever-evolving data (and AI) products and services. The practitioner working on the documentation for procuring such products and services not only needs to have knowledge and familiarity with traditional areas of law such as contract law, sale and purchase of goods and services, but also must keep up with the rapidly and constantly evolving technologies (and the novel and complex products and services which such technologies enable) and determine how to apply existing principles of law and deal with the challenges and added legal complexity of the borderless nature of the cloud, including potential jurisdictional and choice of law issues.

Technology and its procurement is constantly evolving. It is important to know the nature of what is being procured. This knowledge guide is not intended to (nor is it possible) to cover all of the many areas of law (some of which are areas requiring specialised knowledge and experience) which may come into play, nor does this guide purport to cover the wide range of products and services. Instead, the aim of this guide is to identify various areas of law which may be relevant as well as to emphasise some specific aspects of contract law that come into play. Context is provided, where possible, by reference to procurement of digital infrastructure (such as data centres, colocation, telecommunications) and cloud services.

Proficiency Levels

Intermediate

Procurement Contracts and Corporate Structures

In addition to a typical contract structure where the only parties are the provider and customer and the contract is for the provision of a specific service, the use of master contract structures that provide for individual contracts to be formed through the use of order forms/statements of work. This includes:

- Entities that can contract using the master contract
- Entities that are parties to and assume obligations and liabilities under the master contract and each individual contract
- Whether an individual contract forms a separate and distinct contract or does there remain interconnections with the master agreement
- Related to the above, the terms that apply when an individual contract is formed, who are the obligors and who can enforce
- Triggers for, and consequences of, a default and/or termination

Advanced

Procurement Contracts and Corporate Structures

Complex contract structures:

- Pros and cons of using a central procurement entity and/or master agreements
- Common issues identified under “Intermediate”, including the different variations/positions and suitability given the client’s requirements, including Complex Group Structures, strategies for managing procurement across multinational corporations with different legal entities and tax considerations
- Market practice in the form of familiarity with the standard form contracts used by key industry vendors and their differing approaches to liability, data processing and jurisdiction

Industry and Technology Concepts

- Commonly used technical terminology and concepts relating to the subject matter of the procurement
- Form and manner in which the contract defines the subject matter and its specifications and/or functionality, e.g.
 - Cloud Services
 - Differences between concepts such as “IaaS”, “PaaS” and “SaaS” and its consequential implications.
 - Different types of services, e.g. cloud storage, compute, virtualisation or virtual servers, “X”-as-a-service or access/ use of AI tools and agents, how the

Proficiency Levels

Intermediate

Advanced

provision of AI tools and agents, how the provision of the service is quantified (e.g. storage capacity, processors/ processing power, number of users or usage tokens/ credits), particularly in the case of new leading-edge technologies/ services.

- Interplay between different parts of the contract, e.g. the effect on specifications/requirements of specified and limited remedies which apply to non-compliance, and vendor contractual deliverables.
- Data centres and colocation services:
 - Requirements for (i) colocation services for a limited space measured in the form of racks, cages or floors, or (ii) a lease or built-to suit lease and the differences between the two. For example, the key specification is not so much the measurement of the space but is instead the power requirement, with other specifications being in respect of cooling, backup power, uptime guarantees and PUE (and WUE).
 - Differences between a lease and a license and the different structures for ownership (e.g. where the owner is a trust) and operation of a data centre and the different effects/consequences.
- Telecommunications: Forms of telecommunications capacity, e.g. fibre pairs, circuits, spectrum, bandwidth, transmission capacity, and the different forms of legal rights (e.g. Indefeasible Right of Use, lease, a managed service).

Delivery, testing and remedies In the context of the subject matter (see above) to determine whether the product or service supplied complies (whether at point of delivery or during the contract term) with the contractual requirements and the consequences of any non-compliance:

- Testing and acceptance procedures and/or the use of pilots/trials
- Service levels, issue severity classification, response time and escalation requirements
- Triggers/requirements for root cause analysis or investigations and reporting
- The use of service credits, deductions, service level agreements, mandatory remedial measures
- The use of audit rights, market benchmarking

Fees and payments In the context of the subject matter (see above), typical pricing and payment arrangements, the review of and advisory on the application of the prescribed pricing methodology and payment arrangements, in particular the relationship (if any) to the level of contractual performance and remedies (see above).

Proficiency Levels

Intermediate

Risk management Individual issues (and potential interaction) to better advise on the potential impact/consequences for the client and its business, as well as possible risk mitigation:

- Risk of choice of law and jurisdiction issues
- Available dispute resolution methods (and their pros and cons), particularly in cross-border transactions
- Definition/scope of *force majeure*, including (global and localised) pandemics, (global and localised) war and other supply chain disruptions
- Possibility of risk mitigation through insurance (and limitations of insurance)
- Resiliency and business continuity requirements
- Compliance with corporate policies (e.g. ESG)
- Avoiding vendor “lock-in”

Advanced

Risk management Individual issues (and potential interaction) to better advise on the potential impact/consequences for the client and its business, as well as possible risk mitigation.

Technology/product/current market trends, and other relevant real time information, relevant product and market to calibrate the likelihood of risks:

- Risk of trade control and sanctions issues (and how to deal with them)
- Risk of changes in law, change in control (and how to deal with them)
- Distinguishing between different types of events which would typically constitute force majeure (and the causes thereof) and providing for specific and appropriate relief (instead of a broad suspension of obligations) and/or revisions to the relevant obligation (e.g. adjustment to service levels or change in method of performance), with the objectives of enabling (and incentivising) continued performance of the contract and avoiding a frustration situation
- Risk of non-insurable risks
- Data and AI sovereignty issues
- End of life and end of support issues
- Practicality of common contractual provisions, in particular remedies for breach. For example, where the client’s (only) remedy is the right to terminate the contract (and a general claim for damages) but the exercise of such right may result in greater disruption to the client’s business than that resulting from the breach.
- Alternative, practical or legal, methods to address the client’s concerns (and associated pros and cons)

Other contractual terms and issues Contract law, in particular, aspects such as the formation of contracts, contract interpretation, illegality and enforceability, remedies, to be able to advise on issues such as:

- When a binding contract is formed
- Determination of the terms of the contract, in particular, online/ click-wrap contracts, use of standard terms and incorporation of terms by reference and battle of forms, order of prevalence in the event of conflicts or inconsistencies, warranties, and conditional terms.
- Breach of contracts and enforceability of contractual terms such as liquidated damages/ penalty provisions, guarantees and indemnities, limitation of liability, unilateral amendment of terms,
- Dispute resolution, particularly in the case of long-term contracts where it may be in the interests of both parties to ensure continued performance of the contract even though a dispute has arisen
- Termination rights and the consequences of termination (including an awareness of the practicality, or not, of the same)
- Related to the above, post-termination support issues such as data portability, preparation and provision of handover information and documentation and other assistance with the handover

Proficiency Levels

Intermediate

Advanced

Other specialised areas of law which may be addressed or need to be addressed in the contract, such as:

- Intellectual property
- Data protection and cybersecurity, including restrictions on use and cross-border transfers, and notification obligations
- Resilience and business continuity plans
- Sanctions and trade controls
- Particularly in the case of telecommunications, licensing and regulatory requirements
- Powers of government, law enforcement and the courts to require lawful intercept, access to facilities and systems, disclosure of information and documents

Energy and Cooling, ESG The construction and operations of data centres (including colocation services) and consideration of the environmental and sustainability aspects, particularly in the respect of the energy and cooling requirements:

- Different types of energy sources and cooling solutions to be able to understand, advise on and review basic (or to include template) provisions to implement the customer’s corporate policies on environmental and sustainability standards for suppliers.

Energy and Cooling, ESG Energy, environmental and sustainability issues in the context of the broader supply chain beyond the subject matter of a specific transaction. For example, a client looking to lease a data centre may also require the provision of chilled water services, the purchase of RECs and/or carbon credits or a virtual power purchase agreement. While the documentation may be handled by other specialist practitioners, the procurement practitioner can advise the client on risk identification and mitigation for the project as a whole.