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Corporate Insights: Key Legal Tips to Maximize Your Understanding and Use of Software-as-a-Service Agreements

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"Software-as-a-Service," commonly known as "SaaS," is a subscription-based software distribution model in which the vendor allows users to connect to and use cloud-based applications over the Internet for the subscribed term. Common examples of SaaS services include Microsoft Outlook, Microsoft Office 365, and Zoom.

Businesses often use a SaaS CRM (Customer Relationship Management) tool to manage customer interactions, thereby eliminating the need to maintain the underlying software and hardware infrastructure. In this way, SaaS reduces IT costs and simplifies updates and maintenance, both of which are managed by the SaaS provider. Moreover, the SaaS model provides better IP protection to the vendor as the vendor does not have to provide the customer with access to the software's source code. Published data suggests that over 80% of businesses use at least one SaaS application in their operations, while close to 90% use cloud services in one form or another.

SaaS services are provided pursuant to an agreement typically referred to as the "SaaS Agreement." SaaS Agreements include many key provisions that can be favorable either to the vendor or the end-user customer, and such provisions should be considered and negotiated prior to signing on to the deal. We have highlighted some of the key legal issues and terms that the vendor and customer should consider when negotiating a SaaS Agreement:

SaaS Provision	Considerations for Vendor	Considerations for Customer
Scope of License / Intellectual Property Rights	• Keep scope narrow to specific named licensees • If possible, software to be used only internally by customer for business purposes • Ensure that SaaS Agreement includes protective IP provision that software will remain the IP of the vendor and that customer cannot copy, sublicense, reverse engineer, decompile, or reproduce the software/ source code	• Broader scope of license where license extends to affiliates, if needed • Right to sublicense the software, if needed
Warranties	• Provide limited warranties relating to defects and/or infringement. Vendor should retain control of the choice of remedy that will be provided in case of breach of warranty.	• Customer may demand additional warranties, like strict compliance of software function with the documentation provided • Customer would prefer to retain control of the choice of remedy that may be provided in case of breach of warranty
Service Level Agreements (SLAs)	• Should include commercially reasonable targets • Should provide exceptions for things beyond vendor's control (like outages, third-party software update issues)	• More robust SLA setting out the specific targets and specifications • Right to request refund and/or right to terminate in event of non-compliance
Use of Data/ Data Rights	• Right to use anonymized / de-identified data to improve performance of software or create reports for potential customers	• Retain right to all customer data or grant limited rights to data

SaaS Provision	Considerations for Vendor	Considerations for Customer
Indemnity	• Narrow scope – provide indemnity for infringement of IP and data rights violation • Get indemnity from customer relating to infringement of customer IP or misuse of vendor software • Build exception where IP indemnity will not be provided if customer misused software	• Broader scope of indemnity, including indemnity for infringement of IP, data rights violation, breach of reps and warranties, and for willful misconduct and negligence
Limitation of Liability Cap	• Liability cap should be limited in terms of amount and the covered term. Vendor should consider the fees paid under the SaaS Agreement and vendor's insurance coverage amount before determining the liability cap amount. • Keep all indemnity obligations subject to the cap amount	• Not all indemnity provisions should be subject to a liability cap. For example, claims relating to infringement of IP, confidentiality and breach of data privacy can be carved out of any liability cap. • To the extent possible, no indemnity should be provided by customer
Auto-Renewal	• Prefer auto-renewal provisions	• Avoid auto-renewal provision which allow opt-out only for a limited period prior to expiration • Prefer termination at convenience provision

While we have highlighted some of the key provisions and issues above, this list is not intended to be all-inclusive. Depending on the type of SaaS tool and unique business circumstances at issue, different key provisions (including provisions not identified here) may be more or less significant to the vendor or customer. Should you have any questions or need assistance regarding drafting or negotiating SaaS Agreements, please reach out to the authors or your primary Bowditch contact.

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