The B2B Case of Bandwidth-on-Demand (BoD): Applicable Contract Types

Martin Waldburger
CSG Doctoral Seminar
Zurich, Switzerland
April 22, 2008
Key Issues

- Jurisdiction
- Applicable contract types
- Mandatory, recommended contract elements

- B2C: Content, information
- B2B: Dynamic bandwidth request

Identified set of value-added service types

Automated contract formation

Mapping ES (end system) to geographic location
- Guaranteed paths between ESes / Encryption

Fixed or mobile TCP/IP access network

Infrastructure

“80/20 rule”
- Simple mechanism: good results
- Higher reliability: expensive
- Mobility challenging

Highly challenging:
- requires ISP cooperation
Focus:

What contract types are applicable to BoD?

Motivation
Contractual freedom
Contract characterization

BoD
Characteristic functionality
BoD contract
Example

Contract Assessment
Nominate contracts in Swiss Code of Obligations
Type-by-type assessment

Conclusions & Open Issues
Motivation

- Contractual freedom
  - Fundamental principle
  - Contract parties' will
  - Legal frame set by contract law

- Legal uncertainty: contract characterization

Trade-off between freedom and uncertainty
• Bandwidth as commodity
  – Layer 3 functionality vs. layer 1 / 2 technology
  – Setup time critical success factor
  – Automated provisioning → automated contract formation

• Business-to-Business case
  – Bilateral contracts
  – International context
  – Mixed contract

 optical networks
 GMPLS, RSVP

Key Issues | Outline | Motivation | BoD | Contract Assessment | Conclusions & Open Issues
"Dynamic Bandwidth and Automated Monitoring - change your bandwidth on demand, based on your company's needs, and customize reports that let you view bandwidth usage"
Nominate contracts in the Swiss Code of Obligations

**Characterization:**
- Legal nature
- Application scope
- Obligations
- Termination

**Key Issues**
- Outline
- Motivation
- BoD
- **Contract Assessment**
- Conclusions & Open Issues

**Not all are considered complete contracts**

**Characterization:**

- **Good transfer**
  - Property transfer
    - Sale, change
    - Gift
  - For use
    - Rent, leasehold
    - Borrowing, loan
    - Deposit

- **Work (result)**
  - Work and labor
  - Publishing

- **Mandate (take action)**
  - Order
    - Agency of necessity
    - Commission
    - Employment
    - Shipping, affreightment
    - Power of attorney
    - Allocation/assignment

- **Various**
  - Surety/bail
  - Play and bet
  - Non-trading partnership
  - Annuity/prebend
## Contract Assessment (2)

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Order</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal nature</td>
<td>Mandate: Procurement of delegated business or services in exchange for compensation if compensation agreed or common.</td>
<td>✔</td>
</tr>
<tr>
<td>Application scope</td>
<td>Obligationes faciendi: Labor performance, activities of all kinds</td>
<td>✘</td>
</tr>
<tr>
<td>Obligations</td>
<td>Mandatory</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Take action</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Performance in <strong>person</strong></td>
<td>✘</td>
</tr>
<tr>
<td></td>
<td>Take care</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Allegiance (act in the interest of mandant)</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Act according to instructions</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Accountability (deliver report of activities)</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Handing over results</td>
<td>✔</td>
</tr>
</tbody>
</table>

### Mandant
- Compensation (if agreed) | ✔
- Cover expenses | ✔

**Termination**
- At **any time**, unilaterally possible | ✘
## Contract Assessment (3)

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Work and labor</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal nature</td>
<td><strong>Work (result):</strong> Production of a work in exchange for compensation.</td>
<td>?</td>
</tr>
<tr>
<td>Application scope</td>
<td>Material or immaterial performance resulting in a material or immaterial work</td>
<td>?</td>
</tr>
<tr>
<td>Obligations</td>
<td><strong>Entrepreneur</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Production and handing over of work</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>Performance in <strong>person</strong></td>
<td>✘</td>
</tr>
<tr>
<td></td>
<td>Take care</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Timeliness</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>Execution by substitution (accept sourcing of substitutes)</td>
<td>✘</td>
</tr>
<tr>
<td></td>
<td>Warranty (imperfection)</td>
<td>?</td>
</tr>
<tr>
<td>Orderer</td>
<td>Compensation</td>
<td>✓</td>
</tr>
<tr>
<td>Termination</td>
<td>Orderer: Any time before work completion (compensation)</td>
<td>✘</td>
</tr>
</tbody>
</table>
### Contract Assessment (4)

**Key Issues**

- **Motivation**
- **BoD**
- **Contract Assessment**
- **Conclusions & Open Issues**

#### Contract type

<table>
<thead>
<tr>
<th>Legal nature</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leasehold</td>
<td></td>
</tr>
</tbody>
</table>

#### Application scope

<table>
<thead>
<tr>
<th>Movable and immovable goods or right to use (exploitation)</th>
<th>✔</th>
</tr>
</thead>
</table>

#### Obligations

<table>
<thead>
<tr>
<th>Lessor</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Handing over exploitable good or right in time</td>
<td>✔</td>
</tr>
<tr>
<td>Large-scale maintenance</td>
<td>✔</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Lessee</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation</td>
<td>✔</td>
</tr>
<tr>
<td>Small-scale maintenance</td>
<td>✘</td>
</tr>
</tbody>
</table>

#### Termination

| Similar to rent, limited | ✔ |

---

**Rent might be an alternative**

**Table:**

<table>
<thead>
<tr>
<th>Contract type</th>
<th>Leasehold</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal nature</td>
<td>Good transfer for use: Good or rights transfer for commercially exploitable use.</td>
<td>✔</td>
</tr>
<tr>
<td>Application scope</td>
<td>Movable and immovable goods or right to use (exploitation)</td>
<td>✔</td>
</tr>
<tr>
<td>Obligations</td>
<td>Lessor</td>
<td></td>
</tr>
<tr>
<td>Handing over exploitable good or right in time</td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Large-scale maintenance</td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Lessee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensation</td>
<td>✔</td>
<td></td>
</tr>
<tr>
<td>Small-scale maintenance</td>
<td>✘</td>
<td></td>
</tr>
<tr>
<td>Termination</td>
<td>Similar to rent, limited</td>
<td>✔</td>
</tr>
</tbody>
</table>
Conclusions & Open Issues

No unlimited application of any nominate contract type

→ BoD is an innominate contract

Leasehold is as close as it gets

→ BoD may be deemed to have nature of leasehold, but maintenance to be determined separately

Open Issues

• What about imperfection of works?
• Sui generis or mixed innominate contract?
• What about secondary obligations, e.g., support?
Thank you for your attention

Questions? Feedback?
“The Terms, and your relationship with Google under the Terms, shall be governed by English law. You and Google agree to submit to the exclusive jurisdiction of the courts of England to resolve any legal matter arising from the Terms. Notwithstanding this, you agree that Google shall still be allowed to apply for injunctive remedies (or an equivalent type of urgent legal relief) in any jurisdiction.“

„If any court of law, having the jurisdiction to decide on this matter, rules that any provision of these Terms is invalid, then that provision will be removed from the Terms without affecting the rest of the Terms. The remaining provisions of the Terms will continue to be valid and enforceable.“

http://google.co.uk/accounts/TOS