

# TERMS AND CONDITIONS FOR THE PROVISION OF SOFTWARE SUPPORT AND MAINTENANCE SERVICES

## 1 DEFINITIONS

As used in an Agreement, the following terms shall have the meanings set forth below;

**"Affiliates"** means in relation to a Party, any existing or future person which directly or indirectly controls, is controlled by or is under common control with such Party;

**"Agreement"** means the contract for the provision of the Services pursuant to these Conditions including the Schedule and (unless the context otherwise requires) includes any additional terms and conditions agreed in writing between the Parties and attached to the Schedule;

**"Business Day"** means a day which is not a Saturday, Sunday or a public holiday in England and Wales or the country or countries in which the Services are performed;

**"Commencement Date"** means the date on which the Agreement shall become effective as set out in the Schedule, or where no such date is specified, the date of signing of the Schedule by the Customer;

**"Conditions"** means the terms and conditions set out in this document;

**"CPIH"** means the general index for measuring consumer prices inflation which is published monthly in the United Kingdom by the Office for National Statistics;

**"Customer"** means the (i) Customer as named in the Schedule; and (ii) its Affiliates (which may collectively be referred to as the **"Customer Group"**);

**"Data Protection Legislation"** means (i) EU Regulation 2016/679 (**"GDPR"**), and any national laws and secondary legislation including the UK Data Protection Act 2018, relating to the handling of Personal Data, as amended or updated from time to time and (ii) any successor legislation, as amended, consolidated, re-enacted or replaced from time to time;

**"End User"** means either (i) the separate entity set out on the Schedule and recognised by the Parties as a client of the Customer, and with which the Company has no direct contractual or other responsibilities under this Agreement; or (ii) where no separate entity is set out on the Schedule, the

Personnel of the Customer which may utilise the Services from time to time;

**"Good Industry Practice"** means, in relation to any activity or requirement relevant to this Agreement, the exercise of that degree of skill, care diligence, prudence and foresight and using the practices, processes, procedures and guidelines which would reasonably and ordinarily be expected from a skilled and experienced person engaged in the same type of such activity or requirement under the same or similar circumstances and conditions in the United Kingdom;

**"Hardware"** means the items of computer hardware on which the Software is installed;

**"IBM"** means IBM United Kingdom Limited whose registered number is 00741598 and registered address is PO Box 41, North Harbour, Portsmouth, Hampshire, PO6 3AU

**"Incident"** means any event which causes the Customer or End User to utilise the Services including an interruption to, or a reduction in, the operation and/or functionality of the Software;

**"Initial Term"** means the initial duration of the Agreement as set out in the Schedule;

**"Inventory"** means the Software and any related Hardware environments as set out in the Schedule and such additions and changes thereto as shall from time to time be agreed or authorised in accordance with the terms of the Agreement;

**"IPR"** means all copyright and other intellectual property rights, howsoever arising and in whatever media, whether or not registered, including (without limitation) patents, trademarks, service marks, trade names, registered design and any applications for protection or registration of these rights and all renewals and extensions thereof throughout the world;

**"Manufacturer"** means the manufacturer of an item of Hardware, or the authors of the Software;

**"Normal Working Hours"** means the hours between 08:00 and 18:00 on a Business Day;

**"Party"** means either the Company or the Customer and **"Parties"** shall mean both of them;

**“Personnel”** means officers, directors, employees, workers, and agents (including any persons hired as consultants or contract staff) engaged in the use and/or provision of the Services (or part thereof);

**“Response Time”** means the period of time measured from the point at which the Customer or End User (as applicable) logged an Incident with the Company until the Customer or End User is contacted by an appropriately skilled Company technical resource;

**“Schedule”** means the separate schedule to which these Conditions apply to include details such as the Commencement Date, Inventory, Initial Term, and Service Charges;

**“Service Charges”** means the charge(s) for the Services as set out in the Schedule and payable in advance at the intervals set out in the Schedule;

**“Services”** means the specific Software Support services and/or Software Maintenance to be performed from time to time by the Company as identified in the Schedule;

**“Software”** means the software products to be covered by the Services; and

**“Software Maintenance”** means the provision of services in accordance with Clause 1 of this Agreement;

a) For the purposes of the Agreement (i) reference to legislation is, except as otherwise specifically referenced, to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it; (ii) reference to a document or provision thereof is to that document or provision as amended, supplemented, replaced or novated; (iii) where the words “include”, “includes”, “including” or “in particular” (or similar derivatives) are used, they are deemed to be followed by the words “without limitation”; (iv) “will” and “shall” shall be interpreted as expressions of command, not merely expressions of future intent or expectation; (v) use of the singular imports the plural and vice versa; and (vi) headings are for purposes of reference only and will not in any way limit or affect the interpretation of any of the terms herein and references to any clause or paragraph in any document that forms part of the Agreement refer to the applicable clause or paragraph of that document, unless expressly stated otherwise, and ‘person’ includes any individual, firm, corporation wherever incorporated, trust, joint venture (whether or not having a separate legal existence), partnership, limited liability company, association (whether incorporated or not), or any other entity, or any governmental body or subdivision, agency, or authority. In the event of any inconsistency between the Conditions and the

Schedule then the Schedule shall prevail over the Conditions.

## 2 APPOINTMENT AND DURATION

The Agreement shall commence on the Commencement Date and shall (subject to early termination in accordance with the Agreement) continue for the Initial Term and (unless specified otherwise on the Schedule) thereafter from year to year until terminated by the Company giving the Customer or the Customer giving the Company not less than ninety (90) days prior written notice to expire on the last day of the Initial Term or any subsequent anniversary thereof.

## 3 SOFTWARE SUPPORT SERVICES

During the continuance of the Agreement the Company shall provide to the Customer and End User (as applicable) with support and assistance (**“Software Support”**) in relation to Software included in the Inventory which satisfies the conditions for eligibility set out in Clause 7.

a) Software Support shall comprise the following elements provided in the form of email or telephone contact, and where requested by the Company at its discretion, remote access to the Hardware;

- (1) The provision of technical expertise, advice and guidance on the use of the Software in the event of difficulty including where resulting in system outages, function disruption and/or performance issues;
- (2) The use of proven problem diagnostic techniques to identify the root cause of problems, suggest workarounds (where practical) and/or requisite patch identification (where relevant patch or patches are available from the Manufacturer);
- (3) Guidance on setting up industry standard performance measurement tools and basic advice on how to review the statistics collected by such tools to identify potential and actual performance issues;
- (4) Providing technical advice in utilising the Software to “Best Practice” including usage, installation and configuration, product compatibility, interoperability, planning information for software fixes, and interpretation of documentation;
- (5) Providing information on known security vulnerabilities within the Software and suggested workarounds (where practical) and/or requisite patch identification (where

relevant patch or patches are available from the Manufacturer);

- (6) Identifying and recommending such updates to the Software (where available from the Manufacturer) as are reasonable and necessary for the Software to operate under new releases of the relevant operating system;
- (7) Providing information on additional or new functionality available in versions and/or releases of the Software not yet installed by the Customer or End User which may be of benefit to the Customer's or End User's business operations.

#### **4 SOFTWARE MAINTENANCE SERVICES**

During the continuance of the Agreement, in addition to Software Support pursuant to Clause 1, and where specified on the Schedule, the Company will provide additional maintenance services ("**Software Maintenance**") to the Customer and End User (as applicable) as described in this Clause 1.

a) Software Maintenance shall comprise the following elements provided in the form of email or telephone contact, and where requested by the Company at its discretion, remote access to the Hardware;

- (1) Setup and execution of standard performance measurement tools and the completion of reviews of the statistics collected by such tools to make recommendations as to how to avoid or alleviate performance issue. Implementation of any recommendations will be chargeable in accordance with Clause 10;
- (2) Setup and execution of Hardware Management Console ("**HMC**") scanner tools to (where supported by the Software and Hardware combination) produce documentation covering hardware configuration including system information, logical partition information, assignment of network resources, and usage of processing resources;
- (3) Where specified on the Schedule, an annual health check performed by the Company as described in sub-clause b) shall be performed across the Inventory during Normal Working Hours on a date agreed in writing between the Parties;
- (4) Subject to Clause 6 a), the Company shall provide (not install) any Software patches, releases, or version updates requested by the Customer or End User or identified as

appropriate via provision of Software Support ("**Download Support**");

b) Prior to the provision of Software Maintenance, the Customer shall allow, and/or ensure the End user allows the Company access to the Inventory to perform an initial health check to ensure the Company has accurate and complete baseline information for providing the Service. The health check shall include reviewing:

- (1) Software release, version and fix levels;
- (2) Potential information security risks;
- (3) Performance and capacity concerns;
- (4) Data replication issues (where applicable);
- (5) Standard and regularly scheduled tasks; and
- (6) Basic file system and system configuration.

Following the health check the Company shall provide the Customer with a report including any appropriate recommendations for the updating of Software patch levels and/or other changes to the Inventory.

#### **5 SERVICE LEVELS**

The Company shall perform the Services during the hours of cover and with the Response Time and Update Frequencies ("**SLA**") for Incidents broken down as follows:

- (1) for Priority 1 Incidents, hours of cover of 24 x 7 x 365 days a year and a Response Time of sixty (60) minutes, followed by an Update Frequency of two (2) hours;
- (2) for Priority 2 Incidents, cover during Normal Working Hours with a Response Time of two (2) hours and an Update Frequency of two (2) Business Days; and
- (3) for Priority 3 Incidents, cover during Normal Working Hours with a Response Time of eight (8) hours and an Update Frequency of five (5) Business Days.

and based on the Incident priority definitions set out below. The priority for an Incident is determined by the Customer when logging the Incident with the Company:

- (1) A Priority 1 Incident is defined as where there is a total or significant failure of a system with no work around, ie., failure of an entire system or software service with no work around such that the server cannot be used by the Customer and/or End User business;
- (2) A Priority 2 Incident is defined as where there is failure of a significant proportion of a system with a work around, ie., failure of one or more

software services that does not cause the server to fail but the Customer and/or End User is working under a non-standard configuration which is causing ongoing risk and/or disruption to use of the server by the business and/or a significant number of users; and

- (3) A Priority 2 Incidents defined as where there is a minor failure of a software service or a system with or without a work around, ie., failure of a single software function that does not impact critical business functions and/or relates to the inability of a single user to complete normal business activity.

## **6 DOWNLOAD SUPPORT**

a) Download Support (as defined in Clause 1) is only available for open source software and software from IBM and then in respect of the latter, only for (i) the releases and versions of the Software covered by the Customer's or End Users (as applicable) IBM SWMA for the Inventory; or (ii) subject to this Clause 6, the releases and versions of the Software available to which the Customer or End User (as applicable) was entitled under any expired IBM SWMA.

b) In the event that any IBM SWMA held by the Customer or End User for the Inventory expires prior to or after the Commencement Date and the Customer does renew such agreement, the Customer is responsible for downloading all information relating to proof of entitlement and license keys (where applicable) for both currently installed and later releases and versions of the Software. If required by the Customer, and subject to a signed letter of authorisation, the Company shall obtain such entitlement and licensing information on the Customer's behalf.

c) Subject to sub-clause d) the Company is under no obligation to provide Download Support for any Software that is not covered by existing IBM SWMA or cannot be demonstrated by the Customer or End User (as applicable) to the Company as having been covered by an expired IBM SWMA.

d) Download Support includes the provision of patches or other fixes to resolve security vulnerabilities in the Software irrespective of whether and the Customer or End User (as applicable) has a current IBM SWMA for the Inventory. For the avoidance of doubt the provision of resolution for security vulnerabilities does not entitle the Customer or End User to any release or version upgrades they were not already entitled to under a current or expired IBM SWMA unless a release upgrade is the only method available from IBM for providing a resolution to a security vulnerability or a mandatory pre-requisite.

## **7 ELIGIBILITY OF SOFTWARE**

a) The Company reserves the right to examine Software which was not previously on cover immediately preceding the Commencement Date or the Customer requests in writing be added after the Commencement Date to determine whether it is in an acceptable condition for the performance of the Services under this Agreement.

b) Any examination arising from sub-clause a) shall be carried out by the Company within thirty (30) days of the Commencement Date or for Software to be added after the Commencement Date, within thirty (30) days of this Agreement being amended and agreed by all Parties for the additional Software,

c) Whether examined by the Company or not, if in the reasonable opinion of the Company any item of Software which was not on cover immediately prior to the Commencement Date, is not in an acceptable condition, it shall be excluded from cover until its condition becomes acceptable to the Company.

d) Where a Software version becomes unsupported by the authors of the Software, the Company will use reasonable endeavours to provide the Services, however, where the only solution (in the absolute discretion of the Company) is to upgrade to a later version of the Software, this will be chargeable in accordance with Clause 10 if such upgrade is performed by the Company.

## **8 EXCEPTIONS**

The Services exclude the following for any cause other than the Company's neglect or fault:

- (1) damage or faults with the Software which in the Company's reasonable opinion results from neglect or misuse by the Customer or End User, Hardware faults, or other software faults;
- (2) use of the Software other than for the purposes for which it was designed or breaches by the Customer and/or End User of their obligations under this Agreement;
- (3) act of God, fire, flood, war, act of violence, or any other similar occurrence leading to partial or complete damage to the Inventory;
- (4) faults (including faults within the relevant operating system) to software other than that in the Inventory and/or infection by viruses;
- (5) on site assistance at a Customer, End User location or other location, whether relating to the management of an Incident or not;
- (6) patching or upgrades of the Software, loading or uninstalling Software, applications or data, or

any other software support services other than those set out herein;

- (7) recovery or reconstruction of any data or programs lost or spoiled as a result of any breakdown of or fault in the Inventory;
- (8) administration, management, and/or strategy relating to the Software including other software in the Hardware; or
- (9) notification or installation of patch updates, maintenance levels, BIOS, firmware, or latest microcode availability.

## 9 **SERVICE CHARGES**

a) In consideration of the Services the Customer shall pay the undisputed Service Charges periodically in advance and in accordance with the payment terms as set out in the Schedule and stated on each correctly rendered invoice (the “**Due Date**”).

b) All undisputed Service Charges shall be paid without deduction, set off or prior demand and no payment shall be considered made until it is received by the Company. For the avoidance of doubt the Customer shall not be entitled to a refund in the event that it does not make use of the Services at its disposal.

c) Where the Customer disputes an invoice and withholds payment (or part thereof), the nature and detail of the dispute shall be detailed in writing, and the Parties will act promptly and in good faith to resolve the matter. Payment for undisputed items on a disputed invoice shall be made in accordance with the normal payment terms for the invoice.

d) Subject to this sub-clause and only to be effective after expiration of the Initial Term, the Company shall be entitled from time to time to increase the Service Charges by giving to the Customer not less than ninety (90) days prior written notice. Such increase shall not exceed the percentage rate of CPIH at the date of notice being issued by the Company and no more than one (1) increase in the Service Charges pursuant to this sub-clause is permitted in any twelve (12) month period.

e) Without prejudice to any other remedy available to it the Company may at any time by one (1) month notice in writing to the Customer vary all or any of its charges to cover any increases in cost to the Company in performing its obligations under the Agreement: (i) resulting from non-compliance by the Customer and/or End User with the terms of this Agreement; or (ii) where the Agreement is for an unlimited number of Incidents and the Company can demonstrate in good faith that the cost of providing the Services is no longer economically viable.

f) Within fourteen (14) days of notice provided pursuant to sub-clause e) (the “**Increase Notice Period**”) the Customer may give written notice to the Company to terminate the Agreement unless the amendment or variation in Service Charges is imposed by legal requirements when the Customer shall have no right to terminate. If the Customer does not terminate in the Increase Notice Period, the Customer is deemed to have accepted the increased/new Service Charges.

g) The Company shall be entitled to recover the Service Charges, notwithstanding that performance of the Services may not have taken place. The time of payment of the Service Charges shall be of the essence of the Agreement. Receipts for payment will be issued only upon request.

h) Subject to sub-clause i), any item of Software may be removed from the Agreement by the Customer at any time during the term of the Agreement by giving the Company ninety (90) days written notice. A full pro-rata credit against any Service Charges paid in advance, without penalty, will be issued.

i) If at any time during the term of the Agreement the net effect of any amendments to this Agreement would be to cause the annual value of the Service Charges to fall below eighty (80) percent of the annual value of the Service Charges as at the Commencement Date (the “**Minimum Contract Value**”), the Service Charges will be charged on the basis of the Minimum Contract Value.

j) If the Customer fails to make any undisputed payment within thirty (30) days after the Due Date for payment then, without prejudice to any other right or remedy available to the Company, the Company shall be entitled to suspend any further performance of the Services and charge the Customer interest accrued daily (both before and after any judgement) on the amount unpaid, at the rate of three (3) per cent above the base rate of Barclays Bank plc from time to time, until payment in full is made (a part of a month being treated as a full month for the purpose of calculating interest).

k) If the Customer fails to make any undisputed payment within sixty (60) days of the Due Date for payment then, without prejudice to any other right or remedy available to the Company the Customer shall be deemed in material breach of the Agreement and the Company shall have termination rights in accordance with Clause 21 a) (1), provided that this sub-clause shall apply only to the failure to pay a material undisputed amount owed.

l) The Service Charges and any additional charges are exclusive of any applicable value added tax, which

the Customer shall be additionally liable to pay to the Company.

#### **10 ADDITIONAL CHARGES**

The Company shall make an additional charge, to be agreed in writing and in advance with the Customer, and in accordance with the Company's standard scale of charges from time to time in force for assistance provided:

- (1) by reason of any request or issue relation to the Software due to causes not covered by the Services including those set out in Clause 8;
- (2) which the Company repeatedly and reasonably finds (having given prior written notice to the Customer or End User) are not Incidents and/or hence avoidable, frivolous or not necessary;
- (3) for software not covered by this Agreement which the Company agrees to perform and where the Customer does not want such software added to the Services,
- (4) for remote or on-site assistance to update (including preventative maintenance), upgrade the Software, and/or perform hardware migrations and/or refreshes;
- (5) for remote or on-site assistance in system configuration changes and/or to set-up or new system environments, including logical partitions,
- (6) for on-site assistance at a Customer or End User location to resolve an Incident,

provided always that the Company shall not be obliged to carry out such works.

#### **11 MANUFACTURER SWMA**

The Customer agrees that any Manufacturer SWMA services provided for any items in the Inventory are governed by the Manufacturer's terms and conditions and service levels and that the Company shall not have any liability in respect of such Manufacturer SWMA services. Where such Manufacturer SWMA has been purchased via the Company, the Company will provide logging and incident management for Manufacturer SWMA support calls in addition to the Services.

#### **12 INTELLECTUAL PROPERTY RIGHTS**

a) Neither Party shall cause or permit anything that may infringe or exploit any of the IPR of the other Party or a third party without the written permission of the other Party. Nothing in this Agreement shall constitute or create any licence, right to use, right to exploit or other rights in respect of any of the Parties' IPR.

b) The Customer acknowledges that any products, software, or paperwork delivered in the course of performing the Services may contain knowledge and code in the form of methods, techniques, modules, fragments, principles and algorithms developed over time by the Company and its subcontractors not specifically for the Services. The Customer agrees that the Company and its agents may reuse all such knowledge and code at entirely the Company's own discretion.

c) The Company shall fully indemnify the Customer against all claims, demands, actions, reasonable costs, reasonable expenses (including but not limited to reasonable legal costs and disbursements on a solicitor and client basis), losses and damages arising from or incurred by reason of any claim (including but not limited to the defence of such claim) that the Company's IPR used in the provision of the Services infringes or allegedly infringes the IPR of a third party.

d) For the avoidance of doubt, the Company acknowledges that documents, records or other materials provided or made available to the Company by or on behalf of the Customer and/or End User and any amendments additions or changes to them, shall be owned by and remain within the ownership of the Customer or End User (as applicable) and nothing in this Agreement or otherwise shall confer on the Company any right, title or interest in respect of such documents, records or materials.

e) The Customer will procure that in so far as any End User has access to or use of the Services such End User will comply with all the terms and obligations of this Clause 12 as if such End User was a party to this Agreement.

#### **13 CUSTOMER OBLIGATIONS**

a) **Incident Logging:** The Customer shall ensure the Company is informed by notification to the Company's nominated service control (as notified to the Customer in writing from time to time) in a reasonable period of time, of any Software failure or potential failure, and shall where requested by the Company, permit or arrange with the End User for the Company to have the necessary access to the Software and use of necessary tools, machines and devices in the Customer's or End User's possession. The Customer shall maintain or take reasonable efforts to ensure the End User maintains accurate and current logs and records concerning changes, preventative maintenance and upgrades of the Software.

b) **Use and Care of the Software:** During the continuance of the Agreement the Customer shall, or as applicable take reasonable measures to ensure any End User shall:

- (1) ensure proper environmental conditions are maintained for the Hardware and shall maintain in good condition the accommodation of the Hardware, the cables and fittings associated therewith and the electricity supply thereto;
  - (2) not make or authorise any modification to, tamper with, wrongfully operate, or repair the Software (with the exception of installing or removing Manufacturer supplied updates) without the Company's prior written consent;
  - (3) keep and operate the Software in a proper and prudent manner in accordance with the Manufacturer's written operating instructions and ensure that only competent trained Personnel (or persons under their supervision) are allowed to operate the Software;
  - (4) notify the Company in writing if any of the Software is to be moved and or has been moved from the Hardware or if any of the Software has been removed from service;
  - (5) not use the Software other than for the purpose for which it was designed and take reasonable precautions to avoid damage to the Software.
- d) **Access to the Software:** During the continuance of the Agreement the Customer shall, or as applicable take reasonable measures to ensure any End User shall:
- (1) provide full and safe remote access to the Software for the purposes of the Agreement when requested by the Company including necessary access rights, connectivity and other required facilities to enable the Company to remotely investigate and assist in the resolution of Incidents on items of Software. The Customer acknowledges that failure to provide remote access may delay the Incident resolution time.;
  - (2) where on-site support is required (i) make available to the Company Personnel adequate working space and facilities and full and free access and use of the Hardware to enable the Company to provide the Services; and (ii) take all reasonable precautions to ensure the health and safety of the Company's Personnel while at Customer or End User premises including complying with any common law or statutory requirements relating to health and safety at work.
- e) **Notification and Information:** During the continuance of the Agreement the Customer shall, or as applicable take reasonable measures to ensure any End User shall:
- (1) promptly notify the Company if the Software is not operating correctly. Failure by the Customer or End User (as applicable) so to notify the Company within seventy two (72) hours of the Customer or End User first becoming aware of such failure or incorrect working may result in additional charges being levied by the Company in the event such failure of notification can be reasonably be demonstrated by the Company to have increased the effort required to resolve the related Incident;
  - (2) make available to the Company such programs (including manufacturer supplied recovery media), operating manuals and information as may be reasonably necessary to enable the Company to perform its obligations hereunder and shall if requested by the Company provide Personnel familiar with the Customer's or End User's (as applicable) software and operations, and such Personnel shall cooperate fully with the Company's Personnel in the diagnosis of any malfunction of the Software;
  - (3) provide such telecommunication facilities as are reasonably required by the Company for testing and diagnostic purposes, at the Customer's expense;
  - (4) keep full security copies of the Customer's or End User's (as applicable) software, programs and computer records and carry out appropriate system management functions in accordance with best computing practice. The master copies of software or programs are not to be released by the Customer or End User and the Company is to be given only copies thereof if it requests such software or programs.
- c) The Customer and/or End User are responsible for all activities related to normal day to day monitoring, operation, configuration, patching, upgrades, and management of the Software. For the avoidance of doubt the Company is only responsible for the provision of the Services in accordance with this Agreement.
- d) In the event it is necessary to attempt to recover data and or other information stored in the Software, it is the Customer's responsibility to ensure that recovery is achievable and completed. The success of such a recovery will be dependent on the back up procedure previously carried out.
- e) The Customer and/or End User shall maintain valid licences and to allow fault resolution for previously unidentified Software faults, maintain maintenance sufficient agreements (where available)

as maybe necessary for the Software being supported with the relevant Manufacturers(s).

f) The Customer shall ensure that the Company Personnel are made aware of all rules, procedures, and other relevant matters in relation to health and safety in advance at any visits to Customer and/or End User premises or premises under the control of the Customer.

#### **14 CUSTOMER WARRANTIES**

a) The Customer warrants and undertakes to the Company that it or the End User is the owner or licensee of the Software and that it has full power and authority to enter into the Agreement and permit the Company to perform its services on the Inventory.

b) The Customer undertakes to indemnify and hold harmless the Company against any losses, damages and/or reasonable costs and expenses that the Company may suffer as a result of a breach by the Customer of sub-clause 14 a) above.

c) The Customer warrants to the Company that it has prior to the making of the Agreement made reasonable efforts to collate and disclose to the Company all known faults or defects in the Software which existed at or immediately prior to the Commencement Date.

d) The Customer shall indemnify the Company and keep the Company fully and effectively indemnified on demand against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Customer, End User, their Personnel or subcontractors, or any breach of its warranty at sub-clause 14 c).

#### **15 COMPANY WARRANTIES**

a) Subject to sub-clause 15 b) the Company warrants that it will use reasonable skill and diligence in accordance with Good Industry Practice and appropriately qualified and experienced Personnel in performing the Agreement. The Company does not warrant that the Services or any additional services will cause the Software to operate without interruption or error.

b) For the avoidance of doubt the warranty in sub-clause 15 a) is given by the Company subject to the following conditions:

- (1) the Company shall be under no liability in respect of any defect in the Services arising from any information or instruction supplied by the Customer or End User;
- (2) the Company shall be under no liability in respect of and to the extent of any defect in the

Services arises from wilful damage, negligence and/or negligence by the Customer and/or End User, abnormal working conditions, failure to follow the Company's reasonable written instructions, misuse or alteration or repair of the Software by the Customer or End User without the Company's approval;

- (3) the Company shall be under no liability if the undisputed Service Charges have not been paid by the Due Date for payment and the Services have been suspended pursuant to Clause 9 a).

c) The Company shall indemnify the Customer and keep the Customer fully and effectively indemnified on demand against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Company, its Personnel or subcontractors.

d) Subject as expressly provided in these Conditions all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

#### **16 LIABILITY**

a) Any claim by the Customer which is based on any defect in the Services shall be notified to the Company within two (2) Business Days from the date of performance or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure.

b) Where any valid claim in respect of the Services is notified to the Company in accordance with these Conditions, the Company shall be entitled to re-perform the Services, in which event the Company shall have no further liability to the Customer in respect of such claim.

c) The Parties accept that nothing in this Agreement limits or excludes any liability for: (i) fraud or fraudulent misrepresentation (ii) death or personal injury resulting from their negligent acts or omissions in connection with this Agreement; (iii) the Company's IPR indemnity pursuant to Clause 12; or (iv) any liability which cannot by applicable law be limited or excluded.

d) Subject to sub-clause c) the liability of the Company under the Agreement in respect of each event or series of connected events shall not exceed the aggregate Service Charges during the Initial Term. If a number of events give rise to substantially the same loss then they shall be regarded as giving rise to only one claim under this Agreement.

e) The Company shall not be liable for any loss or damage sustained or incurred by the Customer or any third party (including without limitation any loss of use

of the Software or loss of or spoiling of the Customer's or End User's (as applicable) software, programs or data) resulting from any breakdown of or, fault in the Software except to the extent such breakdown or fault is caused by any omission or negligence on behalf of the Company.

f) The Company shall not be liable to the Customer for any loss arising out of any failure by the Customer or End User to keep full and up-to-date security copies of the software, programs, or data it uses, in accordance with best computing practice.

g) Notwithstanding anything else contained in these Conditions, neither Party shall be liable to the other for loss of profits or contracts or other indirect or consequential loss whether arising from negligence, breach of contract or howsoever (including loss or damage suffered by the other Party as a result of an action brought by a third party) even if such loss was reasonably foreseeable or a Party had been advised of the possibility of the other Party incurring the same.

h) For the avoidance of doubt the Customer is responsible to the End Users for all obligations and liability in respect of, the performance, and/or availability of the Services, or their non-performance and non-availability. Unless explicitly stated in this Agreement the Company is only obligated to the Customer for the provision and performance of the Services, and then only under the terms and conditions of this Agreement.

## **17 CONFIDENTIALITY**

Each Party shall treat as confidential all information obtained from the other pursuant to the Agreement and shall not divulge such information to any person (except to such Party's own Personnel and then only to those Personnel who need to know the same) without the other Party's prior written consent provided that this Clause 17 shall not extend to information which was rightfully in the possession of such Party prior to the Commencement Date or the commencement of the negotiations leading to the Agreement, which is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this Clause 17 or which is trivial or obvious. Each Party shall ensure that its Personnel are aware of and comply with the provisions of this Clause 17.

## **18 DATA PROTECTION**

a) Both Parties shall comply with the Data Protection Legislation in so far as it is relevant in respect of the provision and use of the Services. For the purposes of this Agreement, the terms Data Controller, Data Processor, Personal Data, and Processing shall be as defined in the Data Protection Legislation.

b) The Parties acknowledge that the Customer is a Data Controller and that the Company is not considered a Data Processor in providing the Services. The Company further acknowledges that it has not been given any authority by the Customer to make any attempt to access any data on the Inventory and confirms that it shall not do so.

c) The Customer acknowledges that Company does not require access to, use of, or other rights to the data on the Inventory in order to deliver the Services and its obligations in accordance with the terms of this Agreement.

d) The Parties further acknowledge that it may be necessary to exchange Personal Data relating to their respective Personnel and/or End User(s) in order to receive the benefit of or deliver the Services (as applicable). Where a Party receives any such Personal Data from the other Party, it does so as Data Controller and shall ensure that it fully complies with the Data Protection Legislation.

## **19 SUBCONTRACTING**

a) With the exception of Manufacturer SWMA the Company may not subcontract the Services provided under this Agreement after the Commencement Date either in whole or part without the prior written consent of the Customer (which shall not be unreasonably withheld or delayed).

b) Subject to Clause 11, in the event any Services are subcontracted under this Agreement the Company shall procure and ensure that its permitted subcontractors (i) are authorised, licensed, qualified, approved and permitted to deliver the subcontracted services in accordance with Good Industry Practice; and (ii) the Company shall be and shall remain responsible and liable for all its obligations pursuant to this Agreement and for all acts and omissions of its subcontractors.

## **20 NON-SOLICITATION**

During the term of this Agreement and for twelve (12) months thereafter, neither Party may solicit, directly or indirectly, any employee of the other Party who was involved in the provision or receipt of the Services. This Clause 20 shall not restrict a Party from hiring employees of the other Party who apply unsolicited in response to a general advertising or recruitment campaign.

## **21 TERMINATION**

a) Notwithstanding anything else contained herein, the Agreement may be terminated by either Party forthwith on giving notice in writing to the other Party if the other Party:

(1) commits any material breach of any term of the Agreement and (in the case of a material breach capable of being remedied) shall have failed, within thirty (30) days after the receipt of a request in writing from the other Party so to do, to remedy the material breach (such request to contain a warning of such Party's intention to terminate). For the avoidance of doubt, and subject to Clause 9 k) the failure by the Customer to pay any material amount of any undisputed sums due under this Agreement shall be considered a breach of a material obligation; or

(2) shall have a receiver or administrative receiver appointed over it or over any part of its undertaking or assets or shall pass a resolution for winding-up (otherwise than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction) or a Court of competent jurisdiction shall make an order to that effect, or if the other Party shall become subject to an administration order or shall enter into any voluntary arrangement with its creditors or shall cease or threaten to cease to carry on business.

c) For the avoidance of doubt a breach of Party's obligations under Clauses 23 and 24 shall be deemed a material breach not capable of remedy and the non-breaching Party may terminate the Agreement in writing with immediate effect.

d) Any termination of the Agreement howsoever occasioned shall not affect any accrued rights or liabilities of either Party nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

## **22 FORCE MAJEURE**

a) Neither Party hereto shall be liable for any breach of its obligations hereunder resulting from causes beyond its reasonable control including acts of God, riots, war or armed conflict, acts of terrorism, acts of government authorities, fire, flood, hurricane, tornado, or earthquake, pandemics, or disaster, force majeure declaration of suppliers, strikes, lockout or other form of industrial action (other than of its own Personnel), wrecks or delays in transportation, embargoes, container shortages, inability to obtain supplies and raw materials requirements or regulations of any civil or military authority.

b) Each of the Parties hereto agrees to give notice forthwith in writing to the other upon becoming aware of an event of force majeure and such notice shall contain details of the circumstances giving rise to the

event of force majeure. The Party affected by the force majeure event shall use reasonable endeavours to mitigate any effects of the force majeure event.

c) A Party cannot claim relief if the event of force majeure is attributable to that Party's wilful act, neglect or failure to take reasonable precautions against the relevant event and provided it is not an event that the relevant Party would reasonably be expected to manage via its business continuity or disaster recovery planning in accordance with Good Industry Practice.

## **23 ANTI-BRIBERY**

a) Both parties agree to comply with all applicable laws, regulations, legally binding codes and sanctions relating to anti-bribery and anti-corruption ("**Anti-Bribery Law**").

b) In the event that a Party is found not to comply with Anti-Bribery Law or has reasonable grounds for suspecting the other Party of not being in compliance, it shall as soon as reasonably practicable, notify the other Party in writing of the particulars of such non-compliance and/or suspicions.

## **24 MODERN SLAVERY**

a) Both Parties shall comply with all applicable laws, statutes, regulations legally binding codes and sanctions relating to modern slavery and human trafficking (the "**Slavery Rules**") and the Company shall comply with any reasonable written request received from the Customer for the purposes of any annual reporting requirements under the Slavery Rules.

b) In the event that a Party is found not to comply with the Slavery Rules or has reasonable grounds for suspecting the other Party of not being in compliance, it shall as soon as reasonably practicable, notify the other Party in writing of the particulars of such non-compliance and/or suspicions.

## **25 NOTICES**

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in the Schedule or such other address as the recipient may designate by notice given in accordance with the provisions of this Clause. Any such notice shall be deemed to have been served if by hand when delivered, if by first class post forty eight (48) hours after posting.

## **26 GENERAL**

a) This Agreement sets out the entire agreement and understanding between the Parties in respect of the subject matter of this Agreement and supersedes all prior arrangements or understandings, whether oral

or written, between the Parties relating to the subject matter hereof.

b) The Parties acknowledge that they have entered into this Agreement in reliance only upon the representations, warranties and promises specifically contained or incorporated in this Agreement and, save as expressly set out in this Agreement, neither Party shall have any liability in respect of any other representation, warranty or promise made prior to the date of this Agreement unless it was made fraudulently.

c) To the extent that any provision of this Agreement is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, that provision shall be deemed severed and not to be a part of this Agreement, it shall not affect the enforceability of the remainder of this Agreement nor shall it affect the validity, lawfulness or enforceability of that provision in any other jurisdiction.

d) The Company's Personnel are not authorised to make any representations concerning the Services unless confirmed in writing.

e) Neither Party shall assign the Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld or delayed.

f) No failure or delay by either Party in exercising any of its rights under the Agreement shall be deemed to be a waiver of that right, and no waiver by the Company of any breach of the Agreement by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provision.

g) The Company is a member of the group of companies and accordingly the Company may perform any of its obligations or exercise any of its rights hereunder by itself or through any other member of its group, provided that any act or omission of any such other member shall be deemed to be the act or omission of the Company.

h) The Company shall provide, and the Customer shall accept the Services subject to the terms of the Agreement, which shall govern the Services to the exclusion of any other terms and conditions.

b) For the avoidance of doubt where the Customer requires the Company to issue invoices against a written Customer requisition ("**Purchase Order**") and there is any ambiguity and/or conflict between the terms of a Purchase Order and this Agreement, the terms of this Agreement shall prevail. The Customer shall within fifteen (15) Business Days from a request by the Company provide the applicable Purchase Order

number relevant to the Services to be included on any invoice submitted by the Company.

i) No variation to the Conditions or the Agreement shall be binding unless agreed in writing between the authorised representatives of the Customer and the Company.

j) The Parties acknowledge that no rights or benefits are expressly conferred upon or implied as conferred upon any other person or third party under the Agreement, however, the Company acknowledges that this Agreement and the Services are for the benefit of the members of the Customer Group and agrees that each member of the Customer Group shall be entitled to enforce the terms of this Agreement in its own right. For the avoidance of doubt only a member of the Customer Group that directly suffers under this Agreement shall be entitled to make a claim against the Company.

c) Notwithstanding that the whole or any part of any provision of the Agreement may prove to be illegal or unenforceable the other provisions of the Conditions and the remainder of the provision in question shall remain in full force and effect.

d) The Agreement shall be governed by the laws of England and Wales, and the Parties agree to submit to the exclusive jurisdiction of the courts of England and Wales.