

# Terms & Conditions v2.1

**THIS AGREEMENT** is

**BETWEEN:**

- (1) DataBunker Ltd, a company incorporated in England and Wales (registered number 07066255) and whose registered office is situated at Aspect Business Centre, Aspect Business Park, Bennerley Road, Nottingham, NG6 8WR (“the Service Provider”).
- (2) The Customer named on the Contract Schedule (“the Customer”)

**WHEREAS:**

- (A) The Service Provider is the supplier of the Services.
- (B) The Service Provider wishes to supply the Services to the Customer in accordance with this agreement.

**IT IS AGREED** as follows:

## 1. Definitions

1.1 In this Agreement, unless the context otherwise requires, the following terms shall have the following meanings:

|   |  |
|---|--|
| “ <b>Agreement</b> ”                      | this agreement including the Contract Schedule;  |
| “ <b>Claim</b> ”                          | the meaning given to it in clause 4.1;   |
| “ <b>Commencement Date</b> ”              | the date set out at the head of this Agreement;  |
| “ <b>Contract Schedule</b> ”              | the schedule attached to this Agreement and such further Contract Schedules that may be executed by the parties pursuant to clause 14.3;   |
| “ <b>Customer</b> ”                       | the person or entity identified at the head of this Agreement who shall receive the Services;  |
| “ <b>Customer PC(s)</b> ”                 | the computer(s) operated by the Customer which have the Software installed on them and that shall process and hold the Data;   |
| “ <b>Data</b> ”                           | means the information delivered to the Service Provider or the the Storage Site by the Customer as part of the Services;   |
| “ <b>the Service Provider Personnel</b> ” | the person(s) employed or engaged by the Service Provider in the delivery of the Services, Training and the Support;   |
| “ <b>Data Controller</b> ”                | is as defined in the Data Protection Act 1998;   |
| “ <b>Data Processor</b> ”                 | is as defined in the Data Protection Act 1998;   |
| “ <b>Documentation</b> ”                  | the current user guides as from time to time updated, if any, and any other policies or procedures that are provided by the Service Provider for use with the Services;  |
| “ <b>Fault</b> ”                          | performance of the Services which does not meet any reasonable description within the Documentation. For the avoidance of doubt, a Fault does not occur when the Services do not meet a particular need but does meet a reasonable interpretation of the behaviour defined in the Documentation;   |
| “ <b>Fees</b> ”                           | the prices for the Services and amounts payable by the Customer as specified in the Contract Schedule;   |
| “ <b>Hardware</b> ”                       | is the hardware supplied by the Service Provider to the Customer as part of the Services and identified in the Contract Schedule;  |
| “ <b>Intellectual Property Rights</b> ”   | all vested contingent and future intellectual property rights which are the property of the Service Provider. These include, but are not limited to goodwill, reputation, rights in confidential information, copyright, trade marks, logos, service marks, devices, plans, models, diagrams, specifications, source and object code materials, data and processes, design rights, patents, know-how, trade secrets, inventions, get-up, database rights (whether registered or unregistered) and any applications or registrations for the protection of these rights and all renewals and extensions thereof existing in any part of the world whether now known or in the future created; |

|                                 |  |
|---------------------------------|--|
| <b>“Problem”</b>                | the Customer's problems or queries in relation to the Services that are notified to the Service Provider by email or telephone;                  |
| <b>“Release(s) or Versions”</b> | a version of the Software made available by the Service Provider to the Customer;  |
| <b>“Restricted Information”</b> | the meaning given to it in clause 15.1;  |
| <b>“Services”</b>               | the Services set out in the Contract Schedule, including the Hardware and/or Software incidental to the supply of the Services;                  |
| <b>“Software”</b>               | is the software supplied by the Service Provider to the Customer as part of the Services and identified in the Contract Schedule;                |
| <b>“Storage Site”</b>           | the data centre as from time to time appointed;  |
| <b>“Support”</b>                | the provision of a response to Problems by telephone, e-mail, letter or fax as the circumstances require in the opinion of the Service Provider; |
| <b>“Term”</b>                   | the period identified as such in the Contract Schedule.  |
| <b>“Training”</b>               | the training in delivery or otherwise of the Services to Customer identified in the Contract Schedule.   |

1.2 Unless the context otherwise requires:-

- 1.2.1 words importing any gender include every gender;
- 1.2.2 words importing the singular number include the plural number and vice versa;
- 1.2.3 words importing persons include firms, companies and corporations and vice versa;
- 1.2.4 references to numbered clauses and the schedule are references to the relevant clause in or the schedule to this Agreement;
- 1.2.5 reference in any schedule to this Agreement to numbered paragraphs relate to the numbered paragraphs of that schedule;
- 1.2.6 the headings to the clauses, schedules and paragraphs of this Agreement will not affect the interpretation;
- 1.2.7 any reference to an enactment includes reference to that enactment as amended or replaced from time to time and to any subordinate legislation or byelaw made under that enactment;
- 1.2.8 any obligation on any party not to do or omit to do anything is to include an obligation not to allow that thing to be done or omitted to be done; and
- 1.2.9 any party who agrees to do something will be deemed to fulfil that obligation if that party procures that it is done.

1.3 In the case of conflict or ambiguity between any provision contained in the body of this Agreement and any provision contained in the Contract Schedule, the provisions in the body of this Agreement shall take precedence.

## **2. Appointment and Licence**

- 2.1 the Service Provider agrees to supply the Customer with the Services in consideration of the payment of the Fee by the Customer.
- 2.2 The Customer undertakes to use the Services only for its purposes and shall not resell the Services to any third party.

## **3. Intellectual Property Rights**

- 3.1 The Service Provider or its licensor is the owner or licensee of all Intellectual Property Rights forming part of the Services and Documentation.
- 3.2 Neither this Agreement nor any licence or sub-licence granted under this Agreement shall be construed to convey or transfer any ownership or proprietary interest in any Intellectual Property Rights in the Services or Documentation to the Customer or any third party.
- 3.3 Except to the extent that the Service Provider cannot prohibit such acts by law, the Customer agrees not to translate, adapt, vary, modify, disassemble, decompile or reverse engineer the Software, Hardware or Documentation or create derivative works of the same for any purpose (including error correction or any other type of maintenance) without having received prior written consent from the Service Provider.
- 3.4 The Customer agrees that:
  - 3.4.1 the Services and Documentation are the valuable property of the Service Provider and shall be treated as Restricted Information as described under clause 15; and
  - 3.4.2 it will not sell, license, lease, rent, loan, lend, transmit, network, or otherwise distribute or transfer the Services and/or Documentation in any manner to third parties save as is expressly permitted otherwise in this Agreement.
- 3.5 The Customer undertakes:
  - 3.5.1 not to cause or permit anything which may damage or endanger the Intellectual Property Rights or title to them or assist or allow others to do so;
  - 3.5.2 to notify the Service Provider of any actual, threatened or suspected infringement of the Intellectual Property Rights;
  - 3.5.3 to notify the Service Provider of any claim by any third party that the Services infringe any intellectual property rights of any third party;

- 3.5.4 to take such reasonable action as the Service Provider may direct at the expense of the Service Provider in relation to such infringement;
- 3.5.5 to affix such notices to the Services or their packaging or advertising as the Service Provider may be legally or statutorily required to do;
- 3.5.6 to compensate the Service Provider for any use by the Customer of the Intellectual Property Rights otherwise than in accordance with this Agreement;
- 3.5.7 to indemnify the Service Provider for any liability incurred to third parties for any use of the Intellectual Property Rights otherwise than in accordance with this Agreement;
- 3.5.8 on the expiry or termination of this Agreement forthwith not to use the Intellectual Property Rights save for any Services already purchased under the terms of this Agreement; and
- 3.5.9 not to tamper with any markings or name plates or other indication of the source of origin of the Services which may be placed by the Service Provider on the Services.

#### **4. Third Party Claims**

- 4.1 The Service Provider shall defend, at its expense, any claim, brought against the Customer alleging that any Services and/or Documentation as acquired under this Agreement infringes an intellectual property right of a third party (the 'Claim'). the Service Provider shall pay all costs and damages awarded or agreed to in settlement of a Claim PROVIDED THAT the Customer furnishes the Service Provider with prompt written notice of the Claim and provides the Service Provider with reasonable assistance and sole authority to defend or settle the Claim.
- 4.2 If in the reasonable opinion of the Service Provider the Services become the subject of a Claim, then the Service Provider shall either obtain for the Customer the right to continue using the Services and/or Documentation, replace them, or, with the prior written consent of the Reseller, modify them so they becomes non-infringing. If such remedies are not reasonably available (in the Service Provider's sole opinion), then the Services shall cease from a point in time notified by the Service Provider to the Customer and the Customer shall cease to use the Services and/or return the Documentation which are the subject of the Claim. the Service Provider's sole liability in respect of the unexpired period for which the Services were agreed to be supplied under this Agreement shall be to refund the Fees paid by the Customer pro rata to such unexpired period.
- 4.3 The Service Provider shall have no liability for any Claim resulting from the combination of the Services with other services which were neither supplied nor combined with the Services by the Service Provider.

#### **5. Obligations and Rights of the Service Provider**

- 5.1 the Service Provider agrees with the Customer through the Term:
  - 5.1.1 to supply the Customer with the Services;
  - 5.1.2 to install the Software on the Customer's PC;
  - 5.1.3 to install the Hardware at the Customer's premises;
  - 5.1.4 to supply the Customer with support and maintenance as per clause 8 of this Agreement; and
  - 5.1.5 to provide Training to the Customer on the use of the Services. Subsequent and/or additional training requirements will be subject to an additional fee to be confirmed by the Service Provider.
- 5.2 The Service Provider may add to the Services such other services or products as in its sole discretion it deems appropriate PROVIDED THAT the Customer at the Service Provider's request executes a new agreement in respect of the additional services or products.
- 5.3 The Service Provider shall be entitled for any reason to reject any order or request for the Services submitted by the Customer.
- 5.4 The Service Provider does not undertake to provide the Services without any interruption whatsoever but shall use reasonable commercial endeavours to make the Services available.
- 5.5 The service levels required of the Service Provider for the supply of Services to be provided to the Customer are confirmed in the Contract Schedule.
- 5.6 The Service Provider will not be liable for failure to provide the Services subject always to its obligation to provide the Services with reasonable skill and care.
- 5.7 The Service Provider has no access to the content of Data transmitted under the Agreement as all Data is encrypted prior to transmission to the Service Provider which cannot be unencrypted without a password.
- 5.8 The Service Provider will not hold or maintain a record of any password necessary to access Data that is stored in accordance with the Agreement.
- 5.9 In no circumstances will the Service Provider attempt to process any Data supplied under the Agreement except for the storage and retrieval of encrypted data.
- 5.10 The Service Provider will not attempt to assist the recovery of any Data where loss is caused by the loss of or corruption to any encryption key.

#### **6. Customer's Obligations**

- 6.1 The Customer shall be responsible for providing the internet access facilities required for the delivery of the Services.
- 6.2 The Customer shall throughout the Term:
  - 6.2.1 obey the Service Provider's reasonable instructions in relation to the intended use of the Services;

- 6.2.2 supply to the Service Provider such information and support as may enable the Service Provider to carry out its obligations under this Agreement; and
  - 6.2.3 not use the Services to store or transmit any data which is illegal, defamatory or obscene or which breaches the rights of any third party and to fully and effectively indemnify the Service Provider against any and all claims or expense arising from any breach or suspected breach of this undertaking.
- 6.3 The Customer acknowledges and confirms that the Customer owns or is licensed and is permitted to transmit to the Service Provider or the Storage Site all Data without breach of any law, agreement, arrangement or duty or the rights of any third party.
- 6.4 The Customer acknowledges that the loss of any encryption key will result in irretrievable loss of all Data and no practical means exists of recovering such Data.
- 6.5 The Customer shall indemnify and keep indemnified the Service Provider from and against any and all loss fees and costs incurred by the Service Provider resulting from any breach of this Agreement by the Customer including:
  - 6.5.1 any act or neglect or default of the Customer's agents employees licensees;
  - 6.5.2 breaches resulting in any successful claim by any third party alleging libel or slander in respect of any claim in any Documentation or any other matters arising from the resale of the Services PROVIDED THAT such liability has not been incurred by the Service Provider through any default on its part in carrying out the terms of this Agreement.
- 6.6 The Customer shall pay all expenses of and incidental to performing its obligations under this Agreement.

## **7. Customer's Support and Maintenance Obligations**

- 7.1 The Customer shall notify the Service Provider if any Problem or Fault is not covered by this Clause 7 and any time spent thereafter by the Service Provider investigating such Problems under the terms of Clause 8 will be chargeable at the Service Provider's then current rate (identified in the Contract Schedule) unless the Customer gives notice to the Service Provider not to pursue such investigations. the Service Provider shall invoice such charges at its discretion and such charges shall be paid in accordance with clause 14.
- 7.2 The Customer shall be responsible for correctly selecting all Data to be backed up under this Agreement. the Service Provider shall not be responsible for any loss of data or for any claim against the Customer that may occur because data has not been correctly selected or identified at the time of initial setup or subsequent revision. The Customer should ensure that the Data selected for backup is the Data that is to be restored in the event of a system failure or as a result of file corruption.
- 7.3 The Customer shall provide all reasonable co-operation and assistance to the Service Provider in its efforts to provide the necessary support and maintenance. Such co-operation and assistance shall include but not be limited to:
  - 7.3.1 a reasonable level of responsiveness to the Service Provider's requirements and communications;
  - 7.3.2 the timely transmittal and release of appropriate and accurate documentation and information; and
  - 7.3.3 the making of facilities and personnel available to assist the Service Provider when and to the extent as is reasonably requested.

## **8. The Service Provider's Support and Maintenance Obligations**

- 8.1 The Service Provider shall provide support and maintenance to the Customer in respect of the Services and Documentation as specified in the Contract Schedule.
- 8.2 The Service Provider shall not be obliged to provide support and maintenance if payment of any sum due to the Service Provider by the Customer is overdue.
- 8.3 Pursuant to clause 8.1 above, the Service Provider is obliged to respond only to Problems and notify and make available to the Customer all new Releases or Versions. All other services shall be charged at the Service Provider's standard rates confirmed in the Contact Schedule.
- 8.4 The Service Provider shall act upon the Problem (s) in accordance with the Documentation. If a Problem is due to a Fault, the Service Provider shall thereupon use its reasonable endeavours to correct the Fault within a reasonable period of time to be determined solely by the Service Provider.
- 8.5 Upon request, the Customer shall provide the Service Provider with a statement by e-mail of any Problem requiring Support and/or maintenance services of the Service Provider.
- 8.6 Upon reasonable request, the Customer shall ensure that the Service Provider's Personnel are provided with the appropriate approvals, access information and remote electronic access, via internet remote access if necessary, for the purpose of investigating or rectifying Problems. The Customer will indemnify the Service Provider against any loss or damages resulting from any breach of this clause.
- 8.7 The Service Provider shall not be obliged to continue to provide support and maintenance services in respect of the relevant Problem if the Customer cannot provide or obtain such approvals, information and access set out in clause 8.6 above.
- 8.8 During this Agreement, additional functionality in respect of the Services may also be released by the Service Provider and the Service Provider may make such available to the Customer at an additional charge to be mutually agreed by the parties. The additional functionality shall not form part of the Services unless the relevant Fee is paid. The Service Provider shall at its sole discretion decide what constitutes additional functionality and whether to make such available to the Customer.

- 8.9 The Service Provider shall keep the Customer informed in advance of any Releases or Version of the Software which it intends to replace or discontinue and the likely time scale for introduction, replacement or discontinuation of the same.

## **9. Exclusions from Support and Maintenance**

- 9.1 The Service Provider shall be under no obligation to provide the Support in respect of:
- 9.1.1 problems resulting from any modifications or customisation of the Services not made by or authorised in writing by the Service Provider;
  - 9.1.2 any software other than the Software;
  - 9.1.3 incorrect or unauthorised use of Services or operator error where these are defined as use or operation not in accordance with the Documentation;
  - 9.1.4 any fault in any computer hardware (including Customer's PCs) other than the Hardware the Service Provider;
  - 9.1.5 any programs used in conjunction with the Services;
  - 9.1.6 use of the elements of the Services in any combination other than those specified in the Documentation;
  - 9.1.7 use of the Services with any other software or services that the Service Provider has not expressly authorised in writing to be used with the Services;
  - 9.1.8 use of the Services with computer hardware, operating systems or other supporting software other than the Software and Hardware; and
  - 9.1.9 any operating system installations.

## **10. Warranty**

- 10.1 The Service Provider warrants that it will perform the Services substantially in accordance with, the Documentation and the Contract Schedule.
- 10.2 The Service Provider does not warrant that the Services will meet any particular requirements or that their operation will be entirely error-free or that all defects are capable of correction or improvement. All other warranties including any implied warranties of merchantability, satisfactory quality or fitness for purpose or ability to achieve a particular result are hereby excluded as far as law permits. In the absence of fraud, no oral or written information or advice given by the Service Provider or its agents or licensees shall create a warranty or give rise to any other liability other than is given in this Agreement.
- 10.3 The Service Provider does not warrant third party Services. Where the Service Provider supplies third party hardware as part of the Services, The Service Provider will pass on to the Customer the benefit of any third party warranty which will usually be supplied by a third party manufacturer as specified in the documentation provided with the third party hardware.

## **11. Warranty Remedies**

- 11.1 In respect of the Services, the Customer agrees that its sole remedy in respect of any non-conformance with any warranty in this Agreement is that the Service Provider will remedy such non-conformance and if in the Service Provider's reasonable opinion it is unable to remedy such non-conformance, the Service Provider will cease provision of the Services and return the Data and refund any relevant cost that has been paid by the Customer.
- 11.2 The Customer must promptly notify the Service Provider of any non-conformance to the above warranties in order to benefit from the remedies stated above and in any event within a calendar year after delivery of any Services.

## **12. Limitation of Liability**

- 12.1 This clause 12 sets out the entire financial liability of the Service Provider (including any liability for the acts or omissions of their respective employees, agents and subcontractors) to the Customer in respect of:
- 12.1.1 any breach of this Agreement;
  - 12.1.2 any use made or resale of the Services by the Customer, or any other service incorporating any of the Services; and
  - 12.1.3 any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Agreement.
- 12.2 Nothing in this Agreement shall limit or exclude the liability of the Service Provider for:
- 12.2.1 death or personal injury resulting from negligence; or
  - 12.2.2 fraud or fraudulent misrepresentation; or
  - 12.2.3 breach of the terms implied by section 12 of the Sale of Goods Act 1979; or
  - 12.2.4 breach of section 2 of the Consumer Protection Act 1987; or
  - 12.2.5 any deliberate personal repudiatory breach of this Agreement or any breach of this Agreement by the Service Provider or its employees, agents or subcontractors or any breach of this Agreement that results from the wilful act or wilful omission of the Service Provider or its employees, agents or subcontractors.

- 12.3 Without prejudice to clause 12.2, the Service Provider shall be liable to the Customer for direct damage to tangible property including loss of data or use of data caused by the negligence of its employees in connection with the performance of their duties pursuant to this Agreement. The Service Provider's total liability under this clause 12.3 shall be limited to a maximum of £1,000,000 in any calendar year for all claims in total arising under this clause 12.3.
- 12.4 Without prejudice to clause 12.2, in no event will the Service Provider be liable for any damages resulting from lost profits, loss of anticipated savings, nor for any damages that are an indirect or secondary consequence of any act or omission of the Service Provider whether such damages were reasonably foreseeable or actually foreseen.
- 12.5 Without prejudice to clause 12.2, in no event shall the Service Provider be liable to the Customer for any losses whatsoever (whether lost future revenues, lost future profits, expenditure incurred to no benefit, or otherwise) suffered or incurred by the Customer solely or substantially because this Agreement has been terminated by either party.
- 12.6 Without prejudice to clause 12.2, all liability that is not expressly assumed in this Agreement is hereby excluded. These limitations will apply regardless of the form of action, whether under statute, in contract, tort, including negligence, or any other form of action.
- 12.7 Both parties acknowledge and agree that the limitations and exclusions of liability set out in this clause are reasonable and have been agreed taking into account the commercial value of this Agreement to each party and the commercial standing of each party.

### **13. Orders and Deliveries**

- 13.1 While the Service Provider shall use reasonable commercial efforts to meet delivery and supply times, the Customer's only remedy for unreasonable delay in the supply of the Services will be the right to terminate this Agreement after service of notice of breach to the Service Provider whereupon the Service Provider shall repay to the Customer any sums already paid by the Customer.

### **14. Fees**

- 14.1 The Service Provider will invoice the Customer for the Fees monthly in advance. The Fees will be payable within 14 days of the date of the invoice unless otherwise specified in the Contract Schedule.
- 14.2 The Service Provider may authorise a collection agency to manage the periodic collection of Fees. Where relevant, details of the collection agency will be supplied at the commencement of the Agreement.
- 14.3 The Services and Fees at the Commencement Date shall be determined in accordance with the provisions of the Contract Schedule attached to this Agreement and the parties may sign further Contract Schedules to govern future Services and the Fees and other terms relating thereto. Such further Contract Schedules shall be expressed to be subject to the terms of this Agreement.
- 14.4 The Service Provider reserves the right to charge interest on any Fees or other sum outstanding to the Service Provider from the Customer at the rate of 4% above Barclays Bank Plc sterling base rate on a monthly basis from the due date of payment until payment has actually been made. The Customer shall notify the Service Provider in writing within 10 days of receipt of an invoice where that invoice is in dispute. In the event of being notified of a dispute, the Service Provider shall resolve such dispute within 28 days of being notified of the dispute. Interest will continue to accrue during any period of dispute.

### **15. Confidentiality**

- 15.1 'Restricted Information' means any private, secret or confidential information which is disclosed by either party pursuant to or in connection with this Agreement (whether orally or in writing and whether or not such information is expressly stated to be confidential or marked as such).
- 15.2 Both parties shall at all times during the continuance of this Agreement and after its termination:
- 15.2.1 use their best endeavours to keep all Restricted Information confidential and accordingly not disclose any Restricted Information to any other person;
  - 15.2.2 not use any Restricted Information for any purpose other than the performance of its obligations under this Agreement; and
  - 15.2.3 be responsible for the activities of any properly appointed employees, sub-contractors or subsidiaries and undertake that they will be bound to the same extent of confidentiality as this clause.
- 15.3 The provisions of clause 15.2 shall not apply to:
- 15.3.1 any information in the public domain otherwise than by breach of this Agreement;
  - 15.3.2 information in the possession of the receiving party before disclosure thereof by the disclosing party;
  - 15.3.3 information obtained without restriction from a third party; and
  - 15.3.4 information required to be disclosed by a court of competent jurisdiction, governmental body or applicable regulatory authority.

### **16. Suspension of Services**

- 16.1 Without prejudice to any other remedy it may have the Service Provider is permitted to suspend the Services;
- 16.1.1 if the Customer is in breach of any term of this Agreement;

- 16.1.2 if the Customer owes Fees or other sums to the Service Provider and such sums are due and payable in accordance with this Agreement;
  - 16.1.3 where the Service Provider reasonably suspects that the Customer is in breach of any term of this Agreement or reasonably anticipates that the Customer will be; and
  - 16.1.4 where the Service Provider reasonably believes that the security of its systems is, or is about to be, compromised.
- 16.2 The Service Provider does not warrant the retention or integrity of the Data stored pursuant to this Agreement while the Services are suspended and shall have no liability to the Customer during this time.
- 16.3 Fees continue to accrue and be payable at any time while the Services are suspended pursuant to clause 16.1 above.

## 17. Duration and Termination

- 17.1 This Agreement is effective for the Term.
- 17.2 The Service Provider shall be entitled to terminate this Agreement by giving not less than 30 days' written notice to the Customer if majority control of the Customer is acquired by any person or group of connected persons not having control of the Customer as at the date of this Agreement.
- 17.3 Either party shall be entitled forthwith to terminate this Agreement by written notice to the other if:
- 17.3.1 the other party commits any material breach of any of the provisions of this Agreement and, in the case of a breach capable of remedy, fails to remedy the same within 30 days after receipt of a written notice giving full particulars of the breach and requiring it to be remedied;
  - 17.3.2 an encumbrancer takes possession or the Customer becomes insolvent within the meaning of the Insolvency Act 1986;
  - 17.3.3 anything analogous to any of the foregoing under the law of any jurisdiction occurs in relation to that other party; or
  - 17.3.4 that other party ceases, or threatens to cease, to carry on business.

## 18. Termination Consequences

- 18.1 On the termination of this Agreement for any reason:
- 18.1.1 the Customer shall within 30 days send to the Service Provider or otherwise dispose of in accordance with the directions of the Service Provider copies of the Hardware, Software and the Documentation and all advertising, promotional, sales material and Restricted Information relating to the Services or the Service Provider then in the possession of the Customer;
  - 18.1.2 all licences the Customer may have under this Agreement in respect of the Intellectual Property Rights shall immediately terminate;
  - 18.1.3 the Reseller shall have no claim against the Service Provider for compensation for loss of goodwill or any similar loss;
  - 18.1.4 the Service Provider will have no obligation to retain any of the Data;
  - 18.1.5 clauses that are necessary for the enforcement or interpretation of this Agreement shall survive, which shall include clause 3, clause 15 and clause 19; and
  - 18.1.6 subject as otherwise provided in this Agreement and to any rights or obligations which have accrued prior to termination, neither party shall have any further obligation to the other under this Agreement.

## 19. Hardware

- 19.1 All Hardware shall at all times be held by the Customer in safe custody at the Customer's risk and maintained and kept in good condition by the Customer until returned to the Service Provider and shall not be disposed of or used other than in accordance with the Documentation or the Service Provider's other written instructions or authorisation.
- 19.2 The Customer shall procure that the Service Provider (and any person it shall so instruct to do so on its behalf) shall at all times have the right to enter the Customer's premises to remove the Hardware if any of the terms of this Agreement (in particular clause 19.1) in relation to the Hardware have been breached.

## 20. Data Protection

- 20.1 The Service Provider and the Customer will each fully comply their responsibilities arising under the Data Protection Act 1998.
- 20.2 The Customer shall be the Data Controller in relation to the Data in its entirety and in all circumstances Data Bunker shall be the Data Processor.
- 20.3 The Data will only be processed by the Service Provider to take delivery of or release Data pursuant to this Agreement.
- 20.4 The Service Provider will not process or attempt to process any Data other than in accordance with this clause 20 without the Customer's prior written instructions
- 20.5 The Customer shall keep the the Service Provider fully indemnified for all costs and expenses arising as a result of any breach by the Customer in relation to this clause 20.

## **21. Agency, Partnership**

This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the parties other than the contractual relationship expressly provided for in this Agreement.

## **22. Amendments**

This Agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the parties.

## **23. Announcements**

No party shall issue or make any public announcement or disclose any information regarding this Agreement unless prior written consent has been obtained from the other party.

## **24. The Service Provider Entire Agreement**

24.1 This Agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the subject matter of this Agreement. However the obligations of the parties under any pre-existing non-disclosure agreement shall remain in full force and effect in so far as there is no conflict between the same. The parties confirm that they have not entered into this Agreement on the basis of any representation that is not expressly incorporated into this Agreement.

## **25. Force Majeure**

25.1 Neither party shall have any liability under or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from circumstances beyond the reasonable control of that party. This will include, but is not limited to, fire, lightning, explosion, war, flood, malicious damage, default of suppliers or sub-contractors, or any act of local or national government or authority and any cause or circumstance whatsoever outside the reasonable control of the parties. If such circumstances continue for a continuous period of more than three months either party may terminate this Agreement with immediate effect by giving notice to the other party.

## **26. Notices**

26.1 All notices under this Agreement shall be in writing.

26.2 Notices shall be deemed to have been duly given:

26.2.1 when delivered, if delivered by courier or other messenger (including registered mail) during normal business hours of the recipient; or

26.2.2 when sent, if transmitted by fax or e-mail and a successful transmission report or return receipt is generated; or

26.2.3 on the fifth business day following mailing, if mailed by national ordinary mail, postage prepaid; or

26.2.4 on the tenth business day following mailing, if mailed by airmail, postage prepaid,

in each case addressed to the address, e-mail address, or facsimile number identified in the Contract Schedule or as subsequently notified by either party.

## **27. Schedule**

The provisions of the Contract Schedule shall form part of this Agreement as if set out here.

## **28. Severance**

If any provision of this Agreement is prohibited by law or judged by a court to be unlawful, void or unenforceable, the provision shall, to the extent required, be severed from this Agreement and rendered ineffective as far as possible without modifying the remaining provisions of this Agreement, and shall not in any way affect any other circumstances of or the validity or enforcement of this Agreement.

## **29. Successors and Assignees**

29.1 This agreement shall be binding upon, and inure to the benefit of, the parties and their respective successors and permitted assignees, and references to a party in this Agreement shall include its successors and permitted assignees.

29.2 The Service Provider may assign, novate, charge, subcontract or in any way deal in any of its rights, obligations and licences under this Agreement without the Customer's prior written consent. The Customer must obtain the Service Provider's prior written consent before it can assign, novate, charge, subcontract or in any way deal in any rights, obligations or licences it has have under this Agreement.

29.3 In this Agreement references to a party include references to a person:

29.3.1 who for the time being is entitled (by assignment, novation or otherwise) to that party's rights under this Agreement (or any interest in those rights); or

29.3.2 who, as administrator, liquidator or otherwise, is entitled to exercise those rights,

and in particular those references include a person to whom those rights (or any interest in those rights)



are transferred or pass as a result of a merger, division, reconstruction or other reorganisation involving that party. For this purpose, references to a party's rights under this Agreement include any similar rights to which another person becomes entitled as a result of a novation of this Agreement.

### **30. Waiver**

- 30.1 No delay, neglect or forbearance on the part of either party in enforcing against the other party any term or condition of this Agreement shall either be or be deemed to be a waiver or in any way prejudice any right of that party under this Agreement. No right, power or remedy in this Agreement conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party.

### **31. Counterparts**

- 31.1 This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original, and such counterparts or duplicates shall together constitute one and the same agreement.

### **32. Time of the Essence**

- 32.1 In respect of the Customer's obligations only, time shall be of the essence in this Agreement as regards any time, date or period mentioned in this agreement or subsequently substituted as a time, date or period by agreement in writing between the parties.

### **33. Subcontracting**

- 33.1 With the prior written consent of the Service Provider (such consent not to be unreasonably withheld or delayed) the Customer may perform any or all of its obligations under this Agreement through agents or sub-contractors, provided that the Customer shall remain liable for such performance and shall indemnify the Service Provider against any loss or damage suffered by the Service Provider arising from any act or omission of such agents or sub-contractors.

### **34. Language**

- 34.1 This Agreement is made only in the English language. If there is any conflict in the meaning between the English language version of this Agreement and any version or translation of it in any other language, the English language version shall prevail.

### **35. Costs and Expenses**

- 35.1 Each party shall bear its own legal costs and other costs and expenses arising in connection with the drafting, negotiation, execution and registration (if applicable) of this Agreement.

### **36. Variation**

- 36.1 This Agreement may be modified or amended from time to time by the mutual agreement of both parties provided that any such modification is specified in writing and signed by both parties.

### **37. Set-off**

- 37.1 Where either party has incurred any liability to the other party, whether under this Agreement or otherwise, and whether such liability is liquidated or unliquidated, each party may set off the amount of such liability against any sum that would otherwise be due to the other party under this Agreement.

### **38. Third Parties**

- 38.1 The parties confirm their intent not to confer any rights on any third parties by virtue of this Agreement and accordingly the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement.

### **39. Reservation of Rights**

- 39.1 All rights not specifically and expressly granted to the Customer by this Agreement are reserved to the Service Provider.

### **40. Proper Law and Jurisdiction**

- 40.1 This Agreement and all matters arising from it and any dispute resolutions referred to below shall be governed by and construed in accordance with English law and the English Courts shall have exclusive jurisdiction in respect of any disputes notwithstanding the conflict of law provisions and other mandatory legal provisions.