QPERCOM | Advanced Assessment Solutions

QPERCOM RECRUIT

TERMS AND CONDITIONS

QPERCOM | Advanced Assessment Solutions

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THIS AGREEMENT made on DATE MONTH YEAR (the "**Agreement**") **BETWEEN**

(1) **QPERCOM LIMITED** a company incorporated in Ireland (the "**Supplier**"); and

(2) **CLIENT NAME** incorporated and registered in the COUNTRY whose registered address is at ADDRESS (the "**Customer**").

BACKGROUND

(A) The Supplier has developed certain software applications and platforms which it makes available to subscribers via the internet on a paid subscription basis.

(B) The Customer wishes to use the Supplier's service in its business operations.

(C) The Supplier has agreed to provide and the Customer has agreed to take and pay for the Supplier's service subject to the terms and conditions of this Agreement.

NOW IT IS AGREED as follows:

1. **INTERPRETATION**

1.1 **Definitions**: In this Agreement:

"**Authorised Users**" means those employees, agents, independent contractors, students, members and trainees of the Customer who are authorised by the Customer to use the Services and the Documentation;

"**Commercially Reasonable Efforts**" means the same degree of priority and diligence with which the Supplier meets the support needs of its other similar customers.

"**Confidential Information**" means, in relation to a party's obligations under this Agreement, non-public information that is proprietary or confidential to the other party and is either clearly labelled as such or identified as Confidential Information in Clauses 11.5 (*supplier confidential information*) or 11.6 (*customer data*);

"**Customer Data**" means the data inputted by the Customer or Authorised Users in the course of the Customer's use of the Services;

"**Documentation**" means the document made available to the Customer by the Supplier online via CLIENTURL or such other web address notified by the Supplier to the Customer from time to time which sets out a description of the Services and the user instructions for the Services;

"**Data Protection Laws**" means all legislation and regulations relating to the protection of personal data including (without limitation) the Data Protection Acts 1988 to 2018, the General Data Protection Regulation (GDPR) and all other industry guidelines (whether statutory or non-statutory) or codes of practice or guidance issued by the Data Protection Commissioner relating to the processing of personal data or privacy or any amendments and re-enactments thereof;

"**Effective Date**" means DATE MONTH YEAR;

"**Electronic Transactions**" means the Electronic Transactions purchased by the Customer and equates to one completed and submitted assessment form pursuant to this Agreement which entitles Authorised Users to access and use the Services and the Documentation in accordance with this Agreement;

"**Initial Subscription Term**" means the initial term of this Agreement as set out in paragraph 2 of Schedule 1;

"**Loss**" includes any demand, claim, proceeding, suit, judgement, loss, liability, cost, expense, fee, penalty or fine;

"**Quarter**" means a calendar quarter, ending on any of 31 March, 30 June, 30 September and 31 December (but the first Quarter began on the Effective Date and shall end on the next following quarter end date, and the last Quarter shall end on expiry of the Subscription Term);

"**Renewal Period**" means the period described in Clause 14.1 (*Initial Subscription Term*);

"**Services**" means the software subscription services provided by the Supplier to the Customer under this Agreement in respect of the Software via CLIENTURL or any other website notified to the Customer by the Supplier from time to time, as more particularly described in the Documentation;

"**Software**" means the online software applications provided by the Supplier as part of the Services and listed in Schedule 1;

"**Subscription Fees**" means the subscription fees payable by the Customer to the Supplier for the Electronic Transactions, as set out in paragraph 3.1 of Schedule 1;

"**Subscription Term**" has the meaning given in Clause 14.1 (*Initial Subscription Term*) (being the Initial Subscription Term together with any subsequent Renewal Periods);

"**Support Services Policy**" means the Supplier's policy for providing support in relation to the Services as made available at CLIENTURL or such other website address as may be notified to the Customer from time to time;

"**Termination Date**" means:

(a) where the Agreement is terminated or otherwise expires pursuant to Clause 14.1 (*term*) and unless otherwise agreed in writing, the date of expiry of the Initial Subscription Term or Renewal Period (as the case may be); and

(b) where the Agreement is terminated pursuant to Clause 14.2 (*early termination*), the date of notice of termination;

"**Virus**" means any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by rearranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

1.2 **Construction**: In this Agreement, unless the contrary intention is stated, a reference to:

(a) the singular shall include the plural and vice versa;

(b) a person shall be construed as a reference to any individual, firm or company, corporation, governmental entity or agency of a state or any association or partnership (whether or not having separate legal personality) or two or more of the foregoing;

(c) a person includes that person's legal personal representatives, successors and permitted assigns;

(d) time shall be construed by reference to whatever time may from time to time be in force in Ireland;

(e) any agreement document or instrument is to the same as amended, novated, modified, supplemented or replaced from time to time;

(f) 'this Agreement' mean the Clauses of, and the Schedules to, this Agreement, all of which shall be read as one document;

(g) a Clause or other provision is a reference to a Clause or provision of this Agreement, and any reference to a sub provision is, unless otherwise stated, a reference to a sub provision of the provision in which the reference appears;

(h) 'including' means comprising, but not by way of limitation to any class, list or category;

(i) a law includes any provision of any constitution, statute, statutory instrument, order, by-law, directive, regulation or decision of any governmental entity and any judicial or administrative interpretation of any of the foregoing, in each case, as amended, revised, modified or replaced from time to time;

(j) any Irish legal or accounting term for any action, remedy, method of judicial proceeding, insolvency proceeding, event of incapacity, legal or accounting document, legal or accounting status, court, governmental or administrative authority or agency, accounting body, official or any legal or accounting concept practice or principle or thing shall in respect of any jurisdiction other than Ireland be deemed to include what most approximates in that jurisdiction to the Irish legal or accounting term concerned;

(k) 'writing' shall include a reference to any electronic mode of representing or reproducing words in visible form; and

(l) 'business day' shall be construed as a reference to a day (other than a Saturday or Sunday) on which the banks are generally open for business in Ireland.

1.3 **Certain rules of construction disapplied**: If any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted

jointly by the parties and no presumption or burden of proof shall arise favouring or disfavouring any party by virtue of the authorship of any of the provisions of this Agreement.

1.4 **Exercise of powers of control**: Where any obligation in this Agreement is expressed to be undertaken or assumed by any party, that obligation is to be construed as requiring the party concerned to exercise all rights and powers of control over the affairs of any other person which it is able to exercise (whether directly or indirectly) in order to secure performance of that obligation by each such person as if that person were bound by that obligation.

1.5 **Headings**: Headings and captions are to be ignored in the construction of this Agreement.

2. AUTHORISED USERS & ELECTRONIC TRANSACTIONS

2.1 **Grant of Rights**: Subject to the restrictions set out in this Clause 2 and the other terms and conditions of this Agreement, the Supplier grants to the Customer a non-exclusive, non-transferable right to permit the Authorised Users to use the Services and the Documentation during the Subscription Term solely for the Customer's internal business operations.

2.2 **Usage restrictions**: In relation to the Authorised Users, the Customer undertakes that:

(a) the maximum number of Electronic Transactions that is recorded by Authorised Users use of the Services and the Documentation shall not exceed the number outlined in paragraph 3.1 of Schedule 1;

(b) it will not allow or suffer any User Subscription to be used by more than one individual Authorised User unless it has been reassigned in its entirety to another individual Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Services and/or Documentation; and

(c) each Authorised User shall keep a secure password for his use of the Services and Documentation, that such password shall be changed frequently in accordance with the Customer's own security policy and that each Authorised User shall keep his password confidential.

2.3 **Prohibited uses**: The Customer shall not access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that:

(a) is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;

(b) facilitates illegal activity;

(c) depicts sexually explicit images;

(d) promotes unlawful violence;

(e) is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or

(f) in a manner that is otherwise illegal or causes damage or injury to any person or property.

The Customer acknowledges that it is solely responsible for ensuring that its use of the Services does not infringe this Clause 2.3 and the Supplier shall not be obliged to concern itself with the Customer's use of the Service; however, the Supplier reserves the right, without liability or prejudice to its other rights to the Customer, to disable the Customer's access if the Supplier becomes aware of any use of any material that breaches the provisions of this Clause.

2.4 **Usage Restrictions**: The Customer shall not:

(a) except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties:

(i) and except to the extent expressly permitted under this Agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or

(ii) attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or

(b) access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or

(c) use the Services and/or Documentation to provide services to third parties; or

(d) license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Authorised Users, or

(e) attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this Clause 2.

2.5 **Unauthorised use**: The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify the Supplier.

2.6 **Rights limited to Customer**: The rights provided under this Clause 2 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

2.7 **Additional Electronic Transactions**:

(a) The Customer may, from time to time during any Subscription Term by notice in writing to the Supplier, request additional Electronic Transactions in excess of the number set out in paragraph 3.1 of Schedule 1.

(b) If the Supplier approves that request (such approval not to be unreasonably withheld or delayed):

(i) the Supplier shall grant access to the Services and the Documentation to such additional Authorised Users in accordance with the provisions of this Agreement; and

(ii) the Customer shall, within 30 days of the date of the Supplier's invoice, pay to the Supplier the relevant fees for such additional

Electronic Transactions as set out in paragraph 3.2 of Schedule 1 and, if such additional Electronic Transactions are purchased by the Customer part way through the Initial Subscription Term or any Renewal Period (as applicable), such fees shall be pro-rated for the remainder of the Initial Subscription Term or then current Renewal Period (as applicable).

2.8 **Effective Date**: The use of the Services and the Documentation under this Agreement shall be deemed to have been governed by this Agreement since the Effective Date as if the Agreement had been executed, and had come into force, on that date.

3. SERVICES

The Supplier shall, during the Subscription Term, provide the Services and make available the Documentation to the Customer on and subject to the terms of this Agreement.

4. CHARGES AND PAYMENT

4.1 **Fees**: The Customer shall pay the Subscription Fees to the Supplier for the Electronic Transactions in accordance with this Clause 4 and paragraph 3 of Schedule 1.

4.2 **Payments**: The Customer shall on COMMENCEMENT DATE provide to the Supplier valid, up-to-date and complete credit card details or approved purchase order information acceptable to the Supplier and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides:

(a) its credit card details to the Supplier, the Customer hereby authorises the Supplier to bill such credit card:

(i) on 01 August for the Subscription Fees payable in respect of the Initial Subscription Term; and

(ii) subject to Clause 14.1 (*term*), on each anniversary of the Effective Date for the Subscription Fees payable in respect of the next Renewal Period;

(b) its approved purchase order information to the Supplier, the Supplier shall invoice the Customer:

(i) on DATE MONTH YEAR for the Subscription Fees payable in respect of the Initial Subscription Term; and

(ii) subject to Clause 14.1 (*term*), at least 30 days prior to each anniversary of the Effective Date for the Subscription Fees payable in respect of the next Renewal Period, and the Customer shall pay each invoice within 30 days after the date of such invoice.

4.3 **Default**: If the Supplier has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of the Supplier:

(a) the Supplier may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and the Supplier shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and

(b) interest shall accrue on a daily basis on such due amounts at an rate equal to EURIBOR (as at 1 January and 1 July in each year) plus 8 percentage points, commencing on the due date and continuing until fully paid, whether before or after judgment.

4.4 **Payment provisions**: All amounts and fees stated or referred to in this Agreement:

(a) shall be payable in the currency specified in Schedule 1;

(b) are, subject to Clause 13.5, non-cancellable and non-refundable;

(c) are exclusive of value added tax, which (if applicable) shall be added to the Supplier's invoice(s) at the appropriate rate.

4.5 **Fee increases**: The Supplier shall be entitled to increase the Subscription Fees, the fees payable in respect of the additional Electronic Transactions purchased pursuant to Clause 2.7 (*additional electronic transactions*) and/or the excess storage fees payable pursuant to Clause 2.7 at the start of each Renewal Period upon 90 days' prior notice to the Customer and paragraph 3 of Schedule 1 shall be deemed to have been amended accordingly.

5. CUSTOMER DATA

5.1 **Ownership**: The Customer shall own all right, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.

5.2 **Back-up**: The Supplier shall follow its archiving and back-up procedures for Customer Data. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for the Supplier to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by the Supplier in accordance with its archiving and back-up procedure. The Supplier shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party (except those third parties sub-contracted by the Supplier to perform services related to Customer Data maintenance and back-up).

5.3 Both parties will comply with all applicable requirements of the Data Protection Laws. This clause 5 is in addition to, and does not relieve, remove or replace, a party's obligations or rights under the Data Protection Laws.[1]

5.4 The parties acknowledge that:

(a) if the Supplier processes any personal data on the Customer's behalf when performing its obligations under this Agreement, the Customer is the controller and the Supplier is the processor for the purposes of the Data Protection Legislation.

(b) the personal data may be transferred or stored outside the EEA or the country where the Customer and the Authorised Users are located in order to carry out the Services and the Supplier's other obligations under this Agreement.

5.5 Without prejudice to the generality of clause 5.4, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the personal data to the Supplier for the duration and purposes of this agreement so that the Supplier may lawfully use, process and transfer the personal data in accordance with this agreement on the Customer's behalf.

5.6 Without prejudice to the generality of clause 5.4, the Supplier shall, in relation to any personal data processed in connection with the performance by the Supplier of its obligations under this agreement:

(a) process that personal data only on the documented written instructions of the Customer unless the Supplier is required by Data Protection

Laws to process personal data. Where the Supplier is relying on the Data Protection Laws as the basis for processing personal data, the Supplier shall notify the Customer of this before performing the processing required by the Data Protection Laws unless it prohibits the Supplier from so notifying the Customer;

(b) not transfer any personal data outside of the European Economic Area and the United Kingdom unless the following conditions are fulfilled:

(i) the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;

(ii) the data subject has enforceable rights and effective legal remedies;

(iii) the Supplier complies with its obligations under the Data Protection Laws by providing an adequate level of protection to any personal data that is transferred; and

(iv) the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the personal data;

(c) assist the Customer, at the Customer's cost, in responding to any request from a data subject and in ensuring compliance with its obligations under the Data Protection Laws with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

(d) notify the Customer without undue delay on becoming aware of a personal data breach;

(e) at the written direction of the Customer, delete or return personal data and copies thereof to the Customer on termination of the agreement unless required by Data Protection Laws to store the personal data (and for these purposes the term "delete" shall mean to put such data beyond use); and

(f) maintain complete and accurate records and information to demonstrate its compliance with this clause 5 and immediately inform the Customer if, in the opinion of the Supplier, an instruction infringes the Data Protection Laws.

5.7 Each party shall ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the other party, to protect against unauthorised or unlawful processing of personal data and against

accidental loss or destruction of, or damage to, personal data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting personal data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to personal data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it).

5.8 Either party may, at any time on not less than 30 days' notice, revise this clause 5 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to this Agreement).

6. THIRD PARTY PROVIDERS

The Customer acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. The Supplier makes no representation or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by the Customer, with any such third party. Any contract entered into and any transaction completed via any third-party website is between the Customer and the relevant third party, and not the Supplier. The Supplier recommends that the Customer refers to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. The Supplier does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

7. SUPPLIER'S OBLIGATIONS

7.1 **Standards**: The Supplier undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.

7.2 **Non-conformance**: The undertaking at Clause 7.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to the Supplier's instructions, or modification or alteration of the Services by any party other than the Supplier or the Supplier's duly authorised contractors or

agents. If the Services do not conform to the foregoing undertaking, Supplier will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in Clause 7.1. Notwithstanding the foregoing, the Supplier:

(a) does not warrant that the Customer's use of the Services will be uninterrupted or error-free; or that the Services, Documentation and/or the information obtained by the Customer through the Services will meet the Customer's requirements; and

(b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

7.3 **No exclusivity**: This Agreement shall not prevent the Supplier from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this Agreement.

8. CUSTOMER'S OBLIGATIONS

8.1 **Undertakings**: The Customer shall:

(a) provide the Supplier with:

(i) all necessary co-operation in relation to this Agreement; and

(ii) all necessary access to such information as may be required by the Supplier;

in order to provide the Services, including but not limited to Customer Data, security access information and configuration services;

(b) comply with all applicable laws and regulations with respect to its activities under this Agreement;

(c) carry out all other Customer responsibilities set out in this Agreement in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, the Supplier may adjust any agreed timetable or delivery schedule as reasonably necessary;

(d) ensure that the Authorised Users use the Services and the Documentation in accordance with the terms and conditions of this Agreement and shall be responsible for any Authorised User's breach of this Agreement;

(e) obtain and shall maintain all necessary licences, consents, and permissions necessary for the Supplier, its contractors and agents to perform their obligations under this Agreement, including without limitation the Services;

(f) ensure that its network and systems comply with the relevant specifications provided by the Supplier from time to time; and

(g) be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to the Supplier's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.

9. RECORDS & AUDIT:

9.1 **Records**: An up to date record of current Electronic Transactions is available on the Administrator Dashboard on the homepage of CLIENTURL at all times and this record is filterable by date range.

9.2 **Right of Audit**: The Supplier shall be entitled, and the Customer shall permit the Supplier, to audit the Services in order to establish the name and password of each Authorised User not more than once per Quarter. Any such audits shall be conducted on prior reasonable notice, in such a manner as not to substantially interfere with the Customer's normal conduct of business.

9.3 **Consequence of Audit Findings**:

(a) If any audit reveals that any password has been provided to any individual who is not an Authorised User, then without prejudice to the Supplier's other rights, the Supplier shall promptly disable such passwords and the Customer shall not issue any new passwords to any such individual.

(b) If any audit reveals that the Customer has underpaid Subscription Fees to the Supplier, then without prejudice to the Supplier's other rights, the Customer shall pay to the Supplier an amount equal to such underpayment as calculated in accordance with the prices set out in paragraph 3.1 of Schedule 1 within 10 business days of the date of the relevant audit.

9.4 **Costs of Audit**: The Supplier shall pay its own cost and expenses for any audit pursuant to this Clause 9.4 save where such audit identifies that the Customer has underpaid Subscription Fees by five per cent or the amount of Subscription Fees invoiced for the period under audit, in which case the Customer shall reimburse the Supplier, for its out of pocket expenses in conducting such audit. This Clause 9.4 is intended as a fair allocation of audit expenses and not as damages or a penalty.

10. PROPRIETARY RIGHTS

The Customer acknowledges and agrees that the Supplier and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, this Agreement does not grant the Customer any rights to, or in, patents, copyright, database right, trade secrets, trade names, trademarks (whether registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.

11. CONFIDENTIALITY

11.1 **Confidential Information**: Each party may be given access to Confidential Information from the other party in order to perform its obligations under this Agreement. A party's Confidential Information shall not be deemed to include information that:

(a) is or becomes publicly known other than through any act or omission of the receiving party;

(b) was in the other party's lawful possession before the disclosure;

(c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;

(d) is independently developed by the receiving party, which independent development can be shown by written evidence; or

(e) is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.

11.2 **Use**: Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.

11.3 **Compliance by employees**: Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.

11.4 **No Liability for Third Party Actions**: Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.

11.5 **Supplier Confidential Information**: The Customer acknowledges that details of the Services, and the results of any performance tests of the Services, constitute the Supplier's Confidential Information.

11.6 **Customer Data**: The Supplier acknowledges that the Customer Data is the Confidential Information of the Customer.

12. INDEMNITY

12.1 **Customer Indemnity**: The Customer shall indemnify and keep indemnified the Supplier on demand against any Loss arising out of or in connection with the Customer's use of the Services and/or Documentation, provided that:

(a) the Customer is given prompt notice of any such claim; and

(b) the Supplier provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense.

12.2 **Right to replace or modify the services**: In the defence or settlement of any claim that the Services or Documentation infringes any patent effective as of the Effective Date, copyright, trade mark, database right or right of confidentiality, the Supplier may procure the right for the Customer to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this Agreement on not less than five business days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.

12.3 **Exclusive remedy**: The foregoing and Clause 13 (*limitation of liability*) state the Customer's sole and exclusive rights and remedies, and the Supplier's (including the Supplier's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trademark, database right or right of confidentiality.

13. LIMITATION OF LIABILITY

13.1 **Scope**: This Clause 13 sets out the entire financial liability of the Supplier (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer:

(a) arising under or in connection with this Agreement;

(b) in respect of any use made by the Customer of the Services and Documentation or any part of them; and

(c) in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.

13.2 **Service provided as is**: Except as expressly and specifically provided in this Agreement:

(a) the Customer assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Customer, and for conclusions drawn from such use. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the Supplier by the Customer in

connection with the Services, or any actions taken by the Supplier at the Customer's direction;

(b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this Agreement; and

(c) the Services and the Documentation are provided to the Customer on an "as is" basis.

13.3 **Losses not excluded**: Nothing in this Agreement excludes the liability of the Supplier:

(a) for death or personal injury caused by the Supplier's negligence; or

(b) for fraud or fraudulent misrepresentation.

13.4 **Certain losses excluded**: Subject to Clause 13.2 and Clause 13.3, the Supplier shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement.

13.5 **Financial Limit**: Subject to Clause 13.2 and Clause 13.3, the Supplier's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to the total Subscription Fees paid for the Electronic Transactions during the 12 months immediately preceding the date on which the claim arose.

14. TERM AND TERMINATION

14.1 **Term**: This Agreement shall, unless otherwise terminated as provided in this Clause 14, commence on the Effective Date and shall continue for the Initial Subscription Term and, thereafter, this Agreement shall be automatically renewed for successive periods of 12 months (each a "**Renewal Period**"), unless:

(a) either party notifies the other party of termination, in writing, at least 60 days before the end of the Initial Subscription Term or any Renewal Period, in which case this Agreement shall terminate upon the expiry of the applicable Initial Subscription Term or Renewal Period; or

(b) otherwise terminated in accordance with the provisions of this Agreement,

and the Initial Subscription Term together with any subsequent Renewal Periods shall constitute the "**Subscription Term**".

14.2 **Early Termination**: Either party (each a "**terminating party**") may terminate this Agreement forthwith upon written notice to the other party (a "**defaulting party**") to that effect if:

(a) the defaulting party commits a breach of its obligations under this Agreement which breach is (in the opinion of the terminating party) material and, where such breach is (in the opinion of the terminating party) capable of remedy, fails to remedy that breach within 30 days of having been given notice by the terminating party to remedy that breach; or

(b) the defaulting party is, or is deemed for the purposes of any relevant law to be, unable to pay its debts as they fall due or to be insolvent, or admits inability to pay its debts as they fall due; or the defaulting party suspends making payments on all or any class of its debts or announces an intention to do so, or a moratorium is declared in respect of any of its indebtedness; or

(c) any step (including the making of any proposal, the convening of any meeting, the passing of any resolution, the presenting of any petition or the making of any order) is taken with a view to a composition, assignment or arrangement with any creditors of, or the winding up, liquidation or dissolution of, the defaulting party; or any liquidator, provisional liquidator, receiver or examiner is appointed to or in respect of the defaulting party or any of its assets.

14.3 **Consequences of Termination**: On termination of this Agreement for any reason:

(a) all licences granted under this Agreement shall terminate with effect from the Termination Date;

(b) each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;

(c) the Customer shall remove and backup all Customer Data within 10 days of the Termination Date;

(d) the Supplier shall be entitled destroy or otherwise dispose of any of the Customer Data in its possession after the tenth day following the Termination Date.

14.4 **Survival of Obligations**: The provisions of this Clause 14 and Clauses 1 (*interpretation*), 11 (*confidentiality*) 13 (*limitation of liability*) 16 (*governing law and jurisdiction*) 17 (*communications*) and, to the extent applicable 18 (*general*) shall survive the termination this Agreement however it arises, and shall continue to bind the parties or the relevant party (as applicable) without limit in time.

14.5 **Accrued Rights**: Termination of this Agreement shall not affect any rights of the parties accrued up to the Termination Date.

15. FORCE MAJEURE

The Supplier shall have no liability to the Customer under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport or telecommunications network, act of God, war, epidemic, pandemic, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Customer is notified of such an event. In such circumstances, the time for performance shall be extended by a period equivalent to the period during which performance of the obligation has been delayed or failed to be performed.

16. GOVERNING LAW AND JURISDICTION

16.1 **Governing Law**: This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with Irish law.

16.2 **Jurisdiction**: The Irish courts shall have exclusive jurisdiction to hear, determine and settle any dispute arising out of or in connection with this Agreement and the parties submit to the jurisdiction of the Irish courts for that purpose.

16.3 **Convenient Forum**: The parties waive any objection to the Irish courts on grounds that they are an inconvenient or inappropriate forum to settle any such dispute.

17. COMMUNICATIONS

17.1 **Service**: Notices and other communications under or in connection with this Agreement shall be given in writing by hand, by airmail, registered courier or by e-mail, save that service of any notice of any claim, dispute, termination, breach or legal proceedings in connection with this Agreement shall not be made by e-mail. Any such notice, if so given, shall be deemed to have been served:

(a) if sent by hand, when delivered;

(b) if sent by airmail or registered courier, three business days after despatch; and

(c) if sent by e-mail, six hours after sending provided the sender has not received notice of failed or delayed delivery.

17.2 **Contact Details**: The address, telephone number and facsimile number of each party for the purpose of the giving of notices under this Agreement shall be that set forth in Schedule 1 in relation to each party (or such other address or number or address (if any) as has, for the time being, most recently been stipulated by the addressee concerned in a notice to the other party given in accordance with this Clause):

18. GENERAL

18.1 **Severability**: If the whole or any part of a provision of this Agreement is or becomes illegal, invalid or unenforceable under the law of any jurisdiction, that shall not affect the legality, validity or enforceability under the law of that jurisdiction of the remainder of the provision in question or any other provision of this Agreement and the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Agreement.

18.2 **Assignment**: The Customer shall not, without the written consent of the Supplier:

(a) assign, transfer (whether voluntarily or involuntarily, by operation of law or otherwise) or create or permit to exist any right, title or interest (including, without limitation, any security interest and any beneficial interest under any trust) in, to or under, any of its rights under this Agreement; or

(b) purport to transfer, sub-contract or delegate any of its obligations under this Agreement.

18.3 **Further Assurance**: Each party shall (at its own cost) do and execute, or arrange for the doing and executing of, each necessary act, document and thing as may be reasonably requested of it by any other party to implement this Agreement.

18.4 **Standard Form Documents**: The parties recognize that printed form purchase orders, invoices and other commonly used form documents relating to the performance of any obligations hereunder may contain terms which conflict with one or more terms of this Agreement. In case of any such conflict, the relevant terms of this Agreement shall prevail.

18.5 **No Partnership or Agency**: Nothing in this Agreement shall create, or be deemed to create, a partnership, joint venture, or the relationship of principal and agent, between the parties, and neither party shall have any right or authority to act on behalf of the other or to bind the other in any way.

18.6 **Language**: This Agreement is made only in the English language. If there is any conflict in meaning between the English language version of this Agreement and any version or translation of this Agreement in any other language, the English language version shall prevail. Each document and

communication referred to in this Agreement or to be delivered under it shall be in the English language or, if not, accompanied by an English translation of it, certified as accurate by an officer of the party issuing that document or communication; and in the case of conflict between English language version and any other version, English language version shall prevail.

18.7 **Counterparts**: This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Immediate evidence that a counterpart has been executed may be provided by transmission of such counterpart by fax machine or a scanned version thereof by email with the original executed counterpart engrossment to be put in the post as soon as practicable thereafter.

18.8 **Sole and Entire Agreement**: The express terms of this Agreement constitute the sole and entire agreement between the parties in relation to the provision of the Services and supersedes all prior written and oral arrangements, understandings, representations, warranties and agreements between them in that regard (if any). Each party acknowledges that it is not relying, and will not seek to rely, on any arrangement, understanding, representation, warranty, agreement, term or condition which is not expressly set out in this Agreement.

18.9 **Waivers, Rights Cumulative**: Each of the rights of each party under this Agreement may be exercised as often as is necessary, is cumulative and not exclusive of any other rights which that party may have under this Agreement, law or otherwise; and may be waived only in writing and specifically. Delay by a party in exercising, or the non-exercise by a party of, any such right shall not constitute a waiver of that right.

18.10 **Amendments**: Any amendment to this Agreement must be in writing and duly signed for and on behalf of each of the parties to this Agreement by their authorised representatives.

IN WITNESS OF WHICH, this Agreement has been duly executed by the undersigned signatories on behalf of the parties on the date first above written, and each signatory represents and warrants to the party (other than that which he or she represents) that he or she has the authority to sign on behalf of the party which he or she purports to bind.