

# Master Services Agreement

This **Kerv Linked Master Services Agreement** is comprised of its schedules and the Master Services Order form, which shall collectively form (this “**Agreement**”). These documents and other Documentation can be found [\[HERE\]](#). Kerv reserve the right (as reasonably required) to update these terms and conditions from time to time (such amendments to fully supersede any previous provisions agreed). In the event of any substantive or material changes (as determined by Kerv) these shall be notified to the Customer via updates to the Kerv Communications Compliance Practice webpage (found [HERE](#)). The Customer hereby acknowledges and accepts it is responsible for reviewing and ensuring compliance with any changes made. For the avoidance of doubt all definitions and clauses herein shall apply to the Agreement.

## 1. DEFINITIONS

1.1. In this Agreement, the following definitions shall apply:

“Affiliate”	as applied to any given entity, means an entity that is controlled by, controlling, or under common control with such entity, including, without limitation, all parent companies and their respective subsidiaries and affiliates, partnerships. “Control” means control through ownership of more than a majority of shares of stock or other equity interest eligible to vote for members of the board of directors, or control by contract.
“Availability”	the ability of a service to perform its required function over a stated period. Availability is calculated as a percentage using the proportion of time that the service is available for use by the Customer, against the agreed availability period.
“Business Day”	a day other than a Saturday, Sunday or public holiday in the location where the Services are to be delivered
“Cease Notification”	means the email communication from the Customer to instruct Kerv to terminate elements of a Service.
“Cease Date”	means the date confirmed by Kerv in its Cease Notification acceptance email.
“Charges”	means the amounts due (including Subscription Charges) to Kerv and or PMNO for Services supplied by Kerv as set out in this Agreement and/or any Order.
“Change of Control”	shall be as defined in section 1124 of the Corporation Tax Act 2010, and the expression change of control shall be interpreted accordingly



<b>“Change Management Process”</b>	the process set out in clause 7 setting out how changes will be implemented in the customer configuration to ensure minimum disruption of services.
<b>“Confidential Information”</b>	means any and all information and know-how that one Party and/or its agents may from time to time disclose to the other Party in connection with this Agreement or which otherwise becomes known to the other Party during the term of this Agreement, whether orally, in writing, digitally, in the form of machine readable code or embodied in hardware or any other physical medium which relates to the business, including but not limited to the business plans, data, know-how, designs, illustrations, drawings, photographs, illustrations, notes, memoranda, terms of business, financial information, financial projections, financial records, customers and suppliers, sales and marketing information, spreadsheets, specifications, technical information and computer software together with all information derived from any such information and any other information clearly designated by one Party as being confidential to it (whether or not it is marked “confidential”), or which ought reasonably be considered to be confidential
<b>“Customer”</b>	means the entity identified in the Order.
<b>“Customer Data”</b>	the data inputted by the Customer, Users, or Kerv on the Customer's behalf for the purpose of using the Services or facilitating the Customer's use of the Services.
<b>“Delivery”</b>	means the delivery of goods to the Customer's premises or a Kerv Site as agreed and/or the date upon which the Services are available for use, irrespective whether such use has occurred.
<b>“Documentation”</b>	the documents, Orders and quotes made available to the Customer by Kerv from time to time which sets out a description of the Services (including those available via the link <a href="#">[HERE]</a> , the Charges payable for the Services and the user instructions for the Services.
<b>“Dual Running”</b>	means the simultaneous running of the existing Customer services alongside the Services to be delivered by Kerv under this Agreement
<b>“Early Termination Charge”</b>	means the amount of any Charges (as recompense) between the termination date and the latter of (a) the last date of the Initial Term or (b) the last date of the Renewal Term and/or (c) any shortfall in meeting a minimum threshold/term commitment.

Kerv reserves the right to discuss and progress such fee with the Customer.

<b>“Effective Date”</b>	means the date of the Customer’s signature of the Order. In the event the Customer has not signed an Order, the Effective Date shall be deemed the date upon which Services were commenced/ performed (including the preparation for the Services such as meetings held or other preparatory actions).
<b>“Emergency Maintenance”</b>	maintenance work which, in Kerv’s reasonable opinion, is urgently needed to maintain the integrity of a Service or to repair a Service and isn’t subject to pre-approval.
<b>“End of Life”</b>	collectively means both End of Sale and/ or End of Support where applicable.
<b>“End of Sale”</b>	means where a supplier no longer supplies the specified goods or Services.
<b>“End of Support”</b>	means where supplier support is no longer available for the goods or Services.
<b>“Excused Delays”</b>	means a delay occurring in respect of any Service due to: (a) a Force Majeure Event; (b) the Customers acts or omission or (c) delays caused by a third party not under the control of Kerv.
<b>“Force Majeure Event”</b>	means an act of God or any other event beyond a Party’s reasonable control, including lightning, flood, exceptionally severe weather, fire, explosion, war, civil disorder, industrial dispute (including an industrial dispute involving that Party’s own employees where that industrial dispute is beyond the reasonable control of that Party), terrorist act, act of Government or including but not limited to acts which change any telecommunications or financial services regulations, a refusal or delay by a third party in supplying services to Kerv in circumstances where there is no alternative service available at reasonable cost or restrictions of a legislative or regulatory nature (other than any anticipated on the date of signature of this Agreement), or epidemic or pandemic, the consequences of which such Party can neither prevent nor avoid. For the avoidance of doubt, any subcontractor delay or failure is not a Force Majeure Event unless such failure or delay is itself due to a Force Majeure Event.
<b>“Implementation Services”</b>	means the supply, installation, configuration and programming of equipment and/or Services at the Sites, training and project



	management as set out in this Agreement, Documentation and/or in the PDD (as appropriate).
<b>“Infrastructure Monitoring”</b>	means the observation of the infrastructure of the Service to maintain performance and identify issues before they escalate
<b>“Initial Term”</b>	means the initial term of this Agreement as set out in the Order
<b>“Kerv”</b>	means Kerv Communications Compliance Practice Limited (registered number: 13489823) or DoubleEdge Professional Services Limited (registered number 05977863); both having their registered office at 1 Finsbury Avenue, London, EC2M 2PF
<b>“Managed Services”</b>	means Site Reliability Engineering, Infrastructure Monitoring, Server Patching
<b>“Minimum Commitment”</b>	means the agreed minimum spend of the Customer during the Initial Term and/or any Renewal Term, in respect of the Services as set out in the relevant Schedules and Order/s.
<b>“Normal Business Hours”</b>	means 9.00 am to 5.00 pm local UK time, each Business Day
<b>“Operational Services”</b>	means the Services including as set out in either the Service Framework Summary document <a href="#">[LINK]</a> and/or the Schedules to this Agreement.  Where such are procured, they will be set out in an Order for the support and management of the equipment and/or Services.
<b>“Order/s”</b>	means the order form presented for the Customers signature and/or any subsequent additional orders further described in clause 7.
<b>“Overage Charges”</b>	means the occurrence of additional Charges, payable by the Customer, where the minimum contracted limit/allowance for a Service has been exceeded.
<b>“Party” or “Parties”</b>	means the Customer and Kerv together.
<b>“Renewal Date”</b>	means the anniversary of the Service Commencement Date post the Initial Term.
<b>“Renewal Term”</b>	means a twelve (12) month duration from the Renewal Date post the Initial Term. For clarification the Renewal Term may consist of multiple twelve (12) month periods.



<b>“Site(s)”</b>	means either the Customer’s virtual infrastructure which the Customer shall make suitable for integration into the Services or a physical site, where the Services are to be delivered.
<b>“Server Monitoring”</b>	means monitoring of the Azure and application environment to improve reliability and stability.
<b>“Server Patching”</b>	means the application of updates to the software that the servers run on, including open source patching, antivirus management and patches provided by any third party service provider.
<b>“Services”</b>	means the Subscription, Managed Services, hardware and software applications and platforms made available to the Customer under this Agreement, via the internet on a pay-per-use basis for the purpose of communications and compliance recording of voice, video, instant messaging and screen content, as more particularly described in the Documentation
<b>“Service Commencement Date”</b>	means the date (subject to Excused Delays) upon which the Service is available for use, irrespective of whether i) the Services are decided not to be used by the Customer and/or ii) all of the Services are not fully delivered in accordance with any specification document.
<b>“Service Level Agreement”</b>	means the Service Level and/or Availability as set out and applied in each Service Schedule.
<b>“Site Reliability Engineering”</b>	means the ongoing monitoring to ensure the availability of the Services.
<b>“Software”</b>	means the online software applications provided by Kerv as part of the Services and/or third party software in object code form together with any operating systems, utilities, applications and other programs residing in memories or embedded into or incorporated within the Customer equipment.
<b>“Subscription Charges</b>	means the subscription fees payable by the Customer to Kerv for the User Subscriptions, as set out in an Order.
<b>“Support Services”</b>	means the maintenance, break fix support or software assurance Services as set out in this Agreement.
<b>“Term”</b>	has the meaning given in 18.1 clause 18.1 (being the Initial Term together with any subsequent Renewal Term(s)).
<b>“Third Party Influences”</b>	means third party manufacturer, supplier or carrier related incidents that may impact on the success of the Response Times

which are not subject to the Service Levels provided always that such delays are communicated to the Customer.

**“User(s)”**

means the individual(s) capable of utilising, engaged in the use of and/or receiving a Service under the Customer’s responsibility, who are authorised by the Customer to use the Services and the Documentation, as further described in clause 2 and other sections of this Agreement. For clarification an individual will be considered a ‘User’ irrespective of whether such individual(s) are employees, agents and/or independent contractors of the Customer or a customer of the Customer, where the Customer has provided access to other entities.

**“User Subscriptions”**

means the User subscriptions purchased by the Customer pursuant to clause 2.8 which entitle Users to access and use the Services in accordance with this Agreement.

**“Vulnerability/ies”**

anything or device (including any software, code, file, device or program) 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 re-arranging, 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. In this Agreement:**

- 1.2.1. any terms defined in this Agreement may, unless the context otherwise requires, be used in the singular or the plural;
- 1.2.2. the words “includes” or “including” shall be construed as being followed by the words “without limitation”;
- 1.2.3. references to clause and/or section numbers and/or Schedules shall be to those in this Agreement unless the context otherwise requires, and are for reference purposes only and shall not affect the interpretation of this Agreement;

**1.3. This Agreement, each Order and any Documentation, to the extent reasonably possible, shall be construed so as to be consistent with each other. If and to the extent, this Agreement and an Order cannot reasonably be construed as consistent with each other, then the various documents will have the following order of precedence with respect to their respective subject matters: (i) the Order; (ii) the Schedules; (iii) this Agreement except to the extent expressly overruled (by section and/or clause number and/or heading) by another of the documents; and (iiii) Documentation with regard to changes to the Order(s).**

- 1.4. Notwithstanding Kerv's acknowledgment of receipt or acceptance of a purchase order issued by Customer, any boiler plate, pre-printed term or condition of such purchase order that is in addition to or in conflict with this Agreement shall be void and of no effect and is hereby rejected by Kerv.

## 2. SERVICES

- 2.1. Kerv shall, during the Term, provide the Services to the Customer on and subject to the terms of this Agreement. The Order form shall dictate the Service schedule(s) to apply to the Order. In any event of error selecting the applicable Service schedule within an Order, the relevant schedule for the Services procured shall apply, unless the Order confirms otherwise.
- 2.2. Subject to clauses 4, 5 and 6, Kerv shall use commercially reasonable endeavours to make the Services available twenty-four hours a day, seven days a week, except for:
- 2.2.1. planned maintenance carried out in accordance with the Change Management Process; and
  - 2.2.2. unscheduled maintenance performed outside Normal Business Hours, provided that Kerv has used reasonable endeavours to give the Customer at least six (6) Normal Business Hours' notice in advance.
- 2.3. Kerv will, as part of the Services, use commercially reasonable endeavours to provide the Customer with Kerv's standard customer support services during Normal Business Hours in accordance with Kerv's Service Level Agreement. The Customer may purchase enhanced support services separately at Kerv's then current rates.

### Reselling of Kerv Services

- 2.4. Kerv acknowledges and agrees that the Customer may provide Kerv Services to clients of the Customer. In such event, both the Customer and the end user of the Services shall be deemed a User.
- 2.5. The Customer will ensure where it provides the Services to a User (as anticipated in clause 2.4), the User fully understands and agrees contract terms with the Customer (the "**End User Contract**").
- 2.6. The Customer's flow of the terms and conditions set out in this Agreement into any End User Contract, shall ensure the User is agreeing to provisions of equal strength, application and intention as those set out herein.
- 2.7. The Customer will facilitate and ensure any third party use of Service terms (including software licence terms) are fully incorporated into the End User Contract.
- 2.8. The Customer indemnifies Kerv (to the extent permissible at law) against any and all losses arising from the Customer not fulfilling the obligation to flow the contract provisions as set out in this Agreement into any End User Contract.

### Dual Running

- 2.9. The Customer shall bear all costs arising from or in connection with Dual Running including failure to comply with clauses 2.9 to 2.11 (inclusive).
- 2.10. The Customer hereby undertakes to notify and instruct Kerv to cease the existing services not provided by Kerv as soon as reasonably practicable. All such notifications and instructions shall be in writing using the 'cease notification process' (as set out within the Termination provision below).



2.11. For the avoidance of doubt Kerv excludes all liabilities, costs, expenses, damages and losses suffered or incurred by the Customer arising from or in connection with any delay of the cease of the existing services if:

2.11.1. Any delay is caused directly or indirectly by the Customer or any sub-contractor or agent thereof; or

2.11.2. Any delay that is outside the direct control of Kerv, including but not limited to:

2.11.2.1. Delays caused by carriers & their third-party suppliers;

2.11.2.2. Delays caused by council, landlords and civil construction permissions and activities;

2.11.2.3. Delays caused by environmental and physical anomalies discovered as part of delivery;

2.11.2.4. Delays caused by changes requests or additions to the project scope;

2.11.2.5. Delays caused by execution of contingency actions and solution re-design, upon discovery of validation and design issues.

## **User Subscriptions**

2.12. Subject to the Customer purchasing the User Subscriptions in accordance with clause 2.13 and 2.14 and the restrictions set out in this Agreement, Kerv hereby grants to the Customer a non-exclusive right and licence, without the right to grant sublicences, to permit the Users to use the Services during the Term solely for the Customer's internal business operations.

2.13. In relation to the Users, the Customer undertakes that:

2.13.1. the maximum number of Users that it authorises to access and use the Services shall not exceed the number of User Subscriptions it has purchased from time to time. For the avoidance of doubt, the Customer may purchase additional User Subscriptions at additional cost from Kerv from time to time;

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

2.13.3. each User shall keep a secure password for their use of the Services and that each User shall keep their password confidential;

2.13.4. it shall maintain a written, up to date list of current Users and provide such list to Kerv within five (5) Business Days of Kerv's written request at any time or times;

2.13.5. it shall permit Kerv or Kerv's designated auditor to audit the Services in order to establish the name and password of each User and the Customer's data processing facilities to audit compliance with this Agreement. Each such audit may be conducted no more than once per quarter, at Kerv's expense, and this right shall be exercised with reasonable prior notice, in such a manner as not to substantially interfere with the Customer's normal conduct of business;

2.13.6. if any of the audits referred to in clause 2.13.5 reveal that any password has been provided to any individual who is not a User, then without prejudice to Kerv's other rights, the Customer





shall promptly disable such password and account and Kerv shall not issue any new passwords to any such individual; and

2.13.7. if any of the audits referred to in clause 2.13.5 reveal that the Customer has underpaid Subscription Charges to Kerv, then without prejudice to Kerv's other rights, the Customer shall pay to Kerv an amount equal to such underpayment as calculated in accordance with the prices set out in the Documentation within ten (10) Business Days of the date of the relevant audit.

2.14. The Customer shall not access, store, distribute or transmit any Vulnerabilities, or any material during the course of its use of the Services that:

2.14.1. is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;

2.14.2. facilitates illegal activity;

2.14.3. depicts sexually explicit images;

2.14.4. promotes unlawful violence;

2.14.5. is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or

2.14.6. is otherwise illegal or causes damage or injury to any person or property;

and Kerv reserves the right, without liability or prejudice to its other rights to the Customer, to disable the Customer's access to any Service and/or material that breaches the provisions of this clause.

2.15. The Customer and any User shall not:

2.15.1. except as may be allowed by any applicable law which is incapable of exclusion by agreement between the Parties and except to the extent expressly permitted under this Agreement:

2.15.1.1. attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software) in any form or media or by any means; or

2.15.1.2. attempt to de-compile, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or

2.15.1.3. access all or any part of the Services in order to build a product or service which competes with the Services; or

2.15.1.4. use the Services to provide services to third parties (save where otherwise agreed in writing between the Parties); or

2.15.1.5. subject to clause 2.15.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services available to any third party except the Users; or

2.15.1.6. attempt to obtain, or assist third parties in obtaining, access to the Services, other than as provided under this Agreement; or

- 2.15.1.7. introduce or permit the introduction of any Vulnerability into Kerv's network and information systems.

### **Cease Notification Process**

- 2.16. Customer hereby undertakes to notify and instruct Kerv to cease the existing Services, pursuant to the following Cease Notification process and in accordance with the associated Service Schedule (where appropriate).
- 2.17. Subject to clause 2.16, the following Cease Notification process shall apply where the Customer seeks to terminate an element of a Service and not an entire individual Service:
- 2.17.1. The Customer shall provide one hundred and twenty (120) days' notice prior to the Initial Term or Renewal Term (as appropriate), of the requirement to cease a Service;
- 2.17.2. Such notice shall be sent via the email address:kccpcease@kerv.com;
- 2.17.3. Kerv shall send an acknowledgement of receipt of the Customer request, such shall not be an acceptance of same;
- 2.17.4. Kerv will review the Customer requirement and provide (where reasonable and practical) confirmation of the request to cease including the agreed Cease Date.

## **3. DEMONSTRATION SERVICES**

- 3.1. Any proof of concept or demonstration Services provided hereunder shall be provided "as-is" for all purposes.
- 3.2. Kerv makes no (and excludes all other) warranties, representations, conditions and other terms, written or oral, or express, implied, statutory, collateral or otherwise, including implied terms or quality, title, interoperability, data accuracy or fitness for a particular purpose with respect to any Services or any component thereof. Without limiting the foregoing, Kerv does not warrant that all errors can be corrected, or that operation of any Service shall be uninterrupted or error-free.

## **4. KERV'S OBLIGATIONS**

- 4.1. Kerv undertakes that the Services will be performed substantially in accordance with the Order and with reasonable skill and care.
- 4.2. The undertaking at clause 4.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Kerv's instructions, or modification or alteration of the Services by any party other than Kerv or Kerv's duly authorised contractors or agents.
- 4.3. If the Services do not conform with the undertaking provided within clause 4.1 (above), Kerv will, at its expense, use reasonable 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 4.1.
- 4.4. This Agreement shall not prevent Kerv 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.
- 4.5. Kerv warrants that it has and will maintain, all necessary licences, consents, and permissions necessary for the performance of its obligations under this Agreement.



- 4.6. Kerv shall follow its archiving procedures for Customer Data. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy against Kerv shall be for Kerv to use reasonable commercial endeavours, to restore the lost or damaged Customer Data from the latest back-up of such Customer Data; as maintained by Kerv in accordance with its archiving procedure.
- 4.7. Kerv shall not be responsible for any loss, destruction, alteration, or disclosure of Customer Data caused by any third party; save for third parties directly sub-contracted by Kerv to perform services, relating to Customer Data maintenance and back-up, for which it shall remain fully liable.

### **Anti-Fraud**

- 4.8. Kerv will during the term of this Agreement:
  - 4.8.1. not engage in any activity, practice or conduct which would constitute fraud, including but not limited to a fraud offence under section 199(6) of the Economic Crime and Corporate Transparency Act 2023;
  - 4.8.2. notify the Customer (in writing) if it becomes aware of any suspected or actual breach of clause 4.8.1, or has reason to believe that it has received a request or demand to commit a fraud offence within the meaning of section 199(6) of the Economic Crime and Corporate Transparency Act 2023, in connection with the performance of this Agreement;
  - 4.8.3. establish, maintain and enforce its own policies and procedures including but not limited to reasonable procedures to prevent the commission of fraud and to ensure compliance with clause 4.8.1; and
  - 4.8.4. if requested, co-operate with and provide reasonable assistance to the Customer, at the Customer's cost, to enable the Customer to investigate, or respond to any requests from a relevant government department or agency to investigate, an alleged offence under 199 of the Economic Crime and Corporate Transparency Act 2023.
- 4.9. Breach of sub clauses 4.8.1 to 4.8.4 shall be deemed a material breach under clause 18.6.2.

## **5. CUSTOMER'S OBLIGATIONS**

- 5.1. The Customer shall provide Kerv with:
  - 5.1.1. all necessary co-operation in relation to this Agreement;
  - 5.1.2. all consents, permissions, configurations and sign-offs set out in the Documentation and as required by Kerv from time to time, and
  - 5.1.3. all necessary access to such information as may be required by Kerv;
  - 5.1.4. security access information and configuration services; in order to provide the Services, including but not limited to Customer Data;
  - 5.1.5. assurance they will (without affecting its other obligations under this Agreement), comply with all applicable laws and regulations with respect to its activities under this Agreement;
  - 5.1.6. assurance they will 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, Kerv may adjust any agreed timetable or delivery schedule as reasonably necessary;



- 5.1.7. assurance that in conjunction with the Customer obligations set out in clause 2, the Customer will ensure Users use the Services in accordance with the terms and conditions of this Agreement and shall be ultimately held responsible for any User's breach of this Agreement and associated losses for same;
  - 5.1.8. assurance they will obtain and shall maintain, all necessary licences, consents, and permissions necessary for Kerv, its contractors and agents to perform their obligations under this Agreement, including without limitation the Services;
  - 5.1.9. assurance that the Customer network and systems comply with the relevant specifications provided by Kerv from time to time; and
  - 5.1.10. assurance the Customer, to the extent permitted by law and except as otherwise expressly provided in this Agreement, are solely responsible for procuring, maintaining and securing its network connections and telecommunications links from its systems to Kerv's data centres, and all problems, conditions, delays, delivery failures, denial of service and all other loss or damage arising from or relating to the Customer's and/or a User's network connections or telecommunications links or caused by the internet.
- 5.2. The Customer shall use all reasonable and commercial endeavours to prevent any unauthorised access to, or use of, the Services and, in the event of any such unauthorised access or use, promptly notify Kerv.
- 5.3. The Customer shall own all right, title and interest in and to all of the Customer Data that is not personal data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all such Customer Data.

## 6. CHARGES AND PAYMENT

- 6.1. The Customer shall pay the Charges to Kerv for the Services in accordance with this clause **Error! Reference source not found.**6; irrespective of whether the Customer has received payment pursuant to any End User Contract.
- 6.2. Kerv shall be entitled to issue an invoice to the Customer for the Services at any time after the Effective Date and annually thereafter unless otherwise agreed in writing. The Customer shall pay each undisputed invoice within thirty (30) days after the date of such invoice.
- 6.3. Where the Customer wishes to withhold payment in relation to a genuine dispute regarding an invoice, the Customer shall notify Kerv within ten (10) days of the date of the invoice and the Customer may only withhold payment of the specific items agreed with Kerv as being under dispute.
- 6.4. Pursuant to clause 6.3, the Customer may not exercise any right of set off, abatement, counterclaim, retention, deduction or any other withholding against amounts invoiced to it (including where invoices have been issued late or have been subsequently amended to correct errors) by Kerv.
- 6.5. If the Customer fails to pay any properly due and payable amount under this Agreement within thirty (30) days of the due date; without prejudice to any other rights and remedies of Kerv:
- 6.5.1. Kerv may, without liability to the Customer, disable the Customer's and/or any User's password, account and access to all or part of the Services. Kerv shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and



- 6.5.2. Kerv may apply interest on such overdue amount, which shall accrue on a daily basis at a rate of 4% (four percent) above the base lending rate of the Bank of England. The application of this late interest fee shall commence on the due date, continuing until the overdue amount is paid in full and cleared funds, whether such payment occurs before or after judgment.
- 6.6. All Charges stated or referred to in this Agreement:
- 6.6.1. shall be payable in pounds sterling;
  - 6.6.2. are, subject to clause 18, non-cancellable and non-refundable;
  - 6.6.3. are exclusive of value added tax, which shall be added to Kerv's invoice(s) at the appropriate rate.
- 6.7. If, at any time whilst using the Services, the Customer and/or a User exceeds the amount of storage space specified in the Order, the Customer may incur Overage Charges at Kerv's then current excess data storage fees.
- 6.8. Kerv reserves the right to adjust/vary the Charges annually, in accordance with the following, where the Customer has in excess of ten (10) employees and such price increase is acceptable pursuant to regulatory bodies:
- 6.8.1. where such changes are enforced on Kerv by regulatory authorities; after providing the Customer with reasonable written notice of the changes imposed on Kerv by such regulatory authorities; and
  - 6.8.2. for Services up to a rate not exceeding the variance indicated by the Consumer Price Index ("CPI") plus 3.9%; and
  - 6.8.3. to reflect any rises in the foreign exchange rate after providing the Customer with reasonable written notice; or
  - 6.8.4. with effect to reflect any rises in supplier and/or manufacturer rates or costs, whether reasonably anticipated or not; or
  - 6.8.5. where such changes are enforced on Kerv by its suppliers, after providing the Customer with reasonable notice.
- 6.9. The invoice shall be issued in an electronic format via email. Should paper copies be requested an additional administration Charge shall be applied to the invoice.
- 6.10. Kerv shall calculate the Charges by reference to data recorded or logged by its systems which shall be binding on the Customer, except in the case of errors or omissions.
- 6.11. In the event the Customer requests or is the cause of any delay (save for an Excused Delay); the Customer shall remain liable for all Charges (including but not limited to, both set up and recurring Charges), as set out in the Order.
- 6.12. Unless stated otherwise in an Order, the following payment profiles shall be invoiced, payable and applied to the respective Services:
- 6.12.1. Professional Services shall be invoiced up front before used;
  - 6.12.2. Hardware and/or Software shall be invoiced immediately upon the earliest of i) signature of an Order form or ii) the receipt of a purchase order;



- 6.12.3. Any software assurance and support services Charges (and subsequent invoices for such) shall in no event occur later than the date the Services are ready to be used, irrespective of whether such are used by the Customer.
- 6.13. In the event the Customer has used the Services prior to the invoice commencement; the Customer hereby acknowledges and agrees it may be invoiced in arrears for the actual usage consumed, at the pro-rated annual recurring Charge rates (set forth in the Order); unless otherwise agreed in writing between the Parties.
- 6.14. All payments payable to Kerv under this Agreement shall become due immediately on termination of this Agreement, despite any other provision. This condition is without prejudice to any right to claim for interest under the law, or any such right under this Agreement.

### **Minimum Commitment**

- 6.15. Where a minimum threshold or Minimum Commitment applies, it shall be stipulated in the Order and apply for the duration of the identified Services. No Order shall act to reduce the Minimum Commitment for any Service set out in any other Order. For the avoidance of doubt, the Customer must meet and satisfy any Minimum Commitment set out in this Agreement.
- 6.16. If the Customer has failed to meet any Minimum Commitment for a Service during the Term; upon termination of that Service; or the Agreement itself (whichever is applicable) the Customer shall pay to Kerv any shortfall in such Minimum Commitment as an Early Termination Charge.
- 6.17. If this Agreement is terminated by the Customer, under clause 18.1 and/or 18.2, during the Initial Term for any Service, the Minimum Commitment shall be reduced pro-rata to the point of termination.
- 6.18. For the avoidance of doubt, where the Initial Term has been extended to include a Renewal Term the Minimum Commitment applicable during the Initial Term, shall apply to the extended term without exception.
- 6.19. Where the Customer exceeds any value of a purchase order, for Services which have been delivered (irrespective of whether such is above the Minimum Commitment), the Customer shall pay in full for the Services not included on the purchase order.
- 6.20. For the avoidance of doubt, where the Customer has in excess of ten (10) employees an increase in Charges shall not apply pursuant to the OFCOM regulation. CPI will be applied annually to the Minimum Commitment upon the renewal of Service. In the event of an Initial Term of thirty six (36) months or more, the CPI increase will not be applied. Thereafter, any Renewal Term will incur a CPI plus increase.

## **7. ORDERING AND CHANGE CONTROL**

- 7.1. An Order constitutes an offer by the Customer under the terms of this Agreement and no Order shall be binding on Kerv until an authorised officer of Kerv has accepted the Order in writing or, Kerv has despatched the Customer equipment or commenced the Services requested in the Order.
- 7.2. Kerv may make changes to an Order that are necessary due to changes in the vendor's/manufacture's specification to comply with safety or other requirements of any Customer equipment, and/or the Services, provided that the revised Order shall provide Customer equipment and/or the Services materially equivalent to those originally set out in the Order.





- 7.3. Certain telecommunication systems and services are subject to regulation by regulatory authorities. Any regulatory authority may from time to time change the regulatory framework within which the Services are provided, and the Customer accepts that Kerv may need to change the Services to comply with such regulatory framework.
- 7.4. In the event an Order is accepted by Kerv the Customer may request, and/or Kerv may recommend, changes to the Order. Kerv shall advise the Customer, where possible within ten (10) days of the likely impact of any such change, including the effect on the Charges and the Services Commencement Date, if relevant.
- 7.5. The Parties shall discuss any recommendation or request made under clause 7.4 as soon as practicable, but neither Party will be obliged to agree to any change.
- 7.6. Until such time as any change is agreed in writing by both Parties, Kerv shall, unless otherwise agreed in writing continue to provide the Services as if such change had not been requested.
- 7.7. Any change agreed by the Parties, pursuant to clause 7.4, shall constitute a variation of the Order and shall be made in writing and signed by both Parties.
- 7.8. The Customer shall provide a purchase order for every Order placed; where such is a requirement for the Customer's own procurement/ordering processes. The Customer hereby agrees that where no purchase order is provided, any goods and/or Services provided under this Agreement may be delayed or withheld. The Customer hereby agrees and acknowledges, where it has not met the condition to issue a purchase order (as it requires); such shall not impact, delay or result in the withholding of any payment to Kerv for the Services; where a valid undisputed invoice has been raised.
- 7.9. Pursuant to clause 7.8 where the Customer has not met its obligations within this clause, such will not provide grounds to dispute an invoice.

## 8. STATUS

- 8.1. The following definitions shall apply to this clause 8:
- “**End Client**” means, in the context of the off-payroll rules (IR35), the Kerv entity identified within this Agreement, who shall be responsible for overseeing the delivery of the Services by any Consultant it instructs to assist in such delivery.
- “**Consultant**” means a third party provider of services to Kerv, who operates as a separate legal entity/person to Kerv and who is not an employee, agent or partner of Kerv.
- 8.2. For clarification purposes this clause 8 shall only apply where Kerv procures services from Consultant(s) to deliver the deliverables or perform the Services procured by the Customer.
- 8.3. In the context of the off-payroll rules, Kerv as End Client will be responsible for making all status determinations regarding the off payroll status of any Consultant engaged by Kerv in the delivery of the procured Customer deliverables or services.
- 8.4. The Customer hereby acknowledges and agrees that since Kerv is providing an outsourced service to the Customer, Kerv may engage Consultants to deliver deliverables or perform services pursuant to this Agreement.
- 8.5. Kerv acknowledges it has the following responsibilities pursuant to this clause 8:
- 8.5.1. to comply with relevant laws including off payroll (IR 35) regulations; and





8.5.2. to complete the necessary assessment to determine the employment status of the Consultant.

8.6. The Customer acknowledges and agrees Kerv is not, nor will become during the term of this Agreement, a managed service company, within the meaning of section 61B of the Income Tax (Earnings and Pensions) Act 2003.

## 9. CONFIDENTIALITY

- 9.1. Each Party shall keep confidential any Confidential Information disclosed to it by the other Party during the Term and shall only use Confidential Information for the purpose for which it was disclosed.
- 9.2. Each Party will keep strictly confidential all Confidential Information of the other received or obtained during the negotiation or performance of this Agreement and, except with the prior written consent of the other or to the extent that disclosure is required by law, will not disclose such Confidential Information to any third party or copy or use it for any purpose other than for the proper performance of its obligations or the proper exercise of its rights under this Agreement.
- 9.3. Neither Party will acquire any right in nor title to Confidential Information of the other nor any licence in respect of it except as expressly stated in this Agreement. Each Party will protect Confidential Information of the other as if it were its own Confidential Information and will not copy, summarise, modify or disclose it except to the minimum extent necessary to perform its obligations or exercise its rights under this Agreement. Each Party will ensure that all persons to whom it discloses Confidential Information of the other are bound by obligations of confidentiality and non-disclosure at least equivalent to those in this Agreement.
- 9.4. The obligations of confidentiality in this Agreement do not apply to any information:
  - 9.4.1. that is generally available to the public, unless this availability results from a breach of this Agreement;
  - 9.4.2. the Party receiving the information already possesses or which it obtains or originates independently in circumstances in which that Party is free to disclose it to others; or
  - 9.4.3. is required to be disclosed by any court or tribunal that is authorised to order its disclosure, provided that such Party required to disclose the information will, unless prohibited by law, notify the other Party in writing in order to give the other party an opportunity to seek an injunction or other suitable protection (as available).
- 9.5. Each Party agrees and acknowledges that damages alone may not be an adequate remedy for breach of this clause and that each Party may be entitled to seek injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this clause.
- 9.6. On termination or expiry of this Agreement, each Party shall (save for the extent necessary for the enforcement of any rights under this Agreement):
  - 9.6.1. return to the other Party all documents and materials (and any copies thereof) containing, reflecting, incorporating or based on the other Party's Confidential Information;
  - 9.6.2. erase all of the other Party's Confidential Information from its computer systems (to the extent possible); and



9.6.3. certify in writing to the other Party that it has complied with the requirements of this clause, provided that a recipient Party may retain documents and materials containing, reflecting, incorporating or based on the other Party's Confidential Information to the extent required by law or any applicable governmental or regulatory authority.

9.7. Upon termination or expiry of this Agreement, the Customer shall have six (6) months to retrieve its data and recordings from the Software, after which Kerv shall delete the Customer's data and recordings and have no liability to the Customer whatsoever for loss of such data and recordings.

### **Publicity**

9.8. Notwithstanding this clause 9, Kerv may, make reasonable references to the Customer (including the use of the Customer's logo and direct quotes) as a consumer of the Services in its advertising and/or promotional literature and other materials including a press release on contract signature and video and written case studies. The Customer hereby acknowledges and agrees that any Charges for any Order are conditional upon the Customers reasonable compliance with this clause. In the event the Customer does not agree to this clause; such exclusion, may impact the Charges offered in any Order.

## **10. INTELLECTUAL PROPERTY RIGHTS**

10.1. The Customer acknowledges and agrees that Kerv 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, under or in, any 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.

10.2. Kerv confirms that it has all the rights in relation to the Services and the Documentation that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this Agreement.

10.3. The Customer unconditionally agrees to adhere to and be bound by, the terms and conditions of all Software licences, as provided by Kerv to the Customer prior the Effective Date, relating to the Customer equipment/ Services supplied by Kerv under this Agreement and the Customer shall have no right to assign, sublicensing or transfer such Software licences.

10.4. Both Parties agree to defend the other from and against any claim or action by any third party in relation to a breach of any third party intellectual property rights ("IPR Claim") and shall indemnify each other, subject to clause 13 of this Agreement, against all costs awarded under any final judgment, court order or settlement arising directly out of or in connection with that IPR Claim.

10.5. The indemnity at clause 10.4 above is subject to the following conditions:

10.5.1. both Parties hereby agree to give prompt notice to the other in writing as soon as the notifying party becomes reasonable aware of any IPR Claim or alleged IPR Claim; and

10.5.2. both Parties hereby agree to make no admissions (written or oral) in respect of any IPR Claim without the other Party's prior written consent; and

10.5.3. the indemnified Party must grant the indemnifying Party sole control of the defence including conducting any negotiations or litigation including defence of proceedings and/or settlement of any IPR Claim and the costs incurred or recovered in such negotiations or settled claim shall be for the indemnifying Party's account; and

- 10.5.4. the indemnified Party shall give the indemnifying Party all reasonable assistance requested at the indemnified Party's expense save where the infringement was directly caused by the acts or omissions of the indemnifying Party where the indemnifying Party shall pay the indemnified Party's reasonable expenses actually incurred; and
- 10.5.5. the Customer shall allow Kerv to modify the Customer equipment supplied by Kerv and/or the Services, or any part thereof, so as to avoid any IPR Claim, provided that the modification does not materially affect the functionality or Charges payable for the Customer equipment supplied by Kerv and/or the Services.
- 10.6. If the Customer equipment supplied by Kerv and/or Services become, or in Kerv's opinion are likely to become, the subject of an IPR Claim covered by the indemnity at clause 10.410.4 Kerv may at its sole option either:
  - 10.6.1. repair, replace or modify the affected Customer equipment supplied by Kerv and/or Services so that they are no longer infringing; or
  - 10.6.2. procure the right for the Customer to continue to use the Customer equipment supplied by Kerv and/or the Services or the relevant part thereof; or
  - 10.6.3. if neither 10.6.1 or 10.6.2 above are commercially reasonable, then Kerv may terminate the applicable elements of the Customer equipment supplied by Kerv and/or Services; and
  - 10.6.4. refund to the Customer the portion of the Charges paid for that terminated element less the depreciation (calculated on a straight line basis over three (3) years from the Effective Date) provided that where such termination materially impacts on the provision of the Services by Kerv to the Customer, Kerv shall compensate the Customer in respect of any losses it incurs as a result of such termination subject at all times to the limitation of liability set out in clause 13.2.
- 10.7. Where Kerv is the indemnifying Party and the Customer is the indemnified Party, the indemnity in clause 10.4 will not apply to any infringement arising from:
  - 10.7.1. any modification, alteration, repair, adjustment or configuration made by anyone other than Kerv or under Kerv's direction or instruction; or
  - 10.7.2. the Customer's use of the Customer equipment supplied by Kerv and/or the Services in conjunction with software, hardware or data, where use of such software, hardware or data in combination with the Customer equipment supplied by Kerv and/or Services gave rise to the infringement; or
  - 10.7.3. use of any software other than the most current, unaltered update, if such claim would have been avoided by the use of such update; or
  - 10.7.4. compliance by Kerv with designs, plans or specifications furnished by the Customer, or on the Customer's behalf.
- 10.8. Clause 10 states both Parties entire liability for infringement of any third party Intellectual Property Rights.
- 10.9. The Customer hereby warrants that it has the right to grant, and hereby grants to Kerv a revocable, non-transferable, non-exclusive unpaid right and license to use the Software for interoperability purposes, and access to all relevant computer systems in each case to the extent strictly necessary

for the performance by Kerv of the Services. Furthermore, the Customer hereby licences all necessary and relevant rights to Kerv free of charge and on a non-exclusive, non-transferable, worldwide basis to such extent as to enable Kerv to perform its obligations under this Agreement. Such licence shall terminate when this Agreement expires or terminates.

## 11. DATA PROTECTION

11.1. The following definitions shall apply to this clause 11:

11.1.1. **“Applicable Laws”** means (a) EU Data Protection Laws and European Union or Member State laws with respect to any Customer Personal Data in respect of which any Customer is subject; and (b) any other codes of conduct or guidelines promulgated under such laws; (c) the UK GDPR and (d) any other applicable law with respect to any Customer Personal Data in respect of which any Customer group member is subject.

11.1.2. **“Controller”, “Processor”, “Data Subject”, “Personal Data”, “Personal Data Breach”, “processing” and “appropriate technical and organisational measures”** shall have the same meaning as defined in the Data Protection Legislation.

11.1.3. **“Data Protection Legislation”** means to the extent applicable, the data protection or privacy laws of any other country.

11.1.4. **“UK GDPR”** means the UK General Data Protection Regulation and any amendments thereto and replacements thereof; as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

11.2. Both Parties will comply with all applicable requirements of the Data Protection Legislation and Applicable Laws. This clause 11 is in addition to, and does not relieve, remove or replace, a Party's obligations or rights under either the Applicable Laws and/or the Data Protection Legislation.

11.3. The Parties acknowledge that for the purposes of the Applicable Laws, the Customer is the Controller and Kerv is the Processor.

11.4. Without prejudice to the generality of clause 11.2, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data to Kerv for the duration and purposes of this Agreement.

11.5. Without prejudice to the generality of clause 11.2, Kerv shall, in relation to any Personal Data processed in connection with the performance by Kerv of its obligations under this Agreement:

11.5.1. process that Personal Data only on the documented written instructions of the Customer, unless Kerv is required by law to otherwise process that Personal Data.

11.5.2. ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Customer, 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);

11.5.3. ensure that all personnel who have access to and/or process Personal Data, are obliged to keep the Personal Data confidential; and

11.5.4. advise the Customer (where appropriate) that Personal Data may be transferred to a country or organisation outside of the EEA; and

11.5.5. ensure appropriate security safeguards are in place. To the extent Kerv intends to transfer Personal Data to a country outside of the EEA, it will ensure adequacy conditions in compliance with the Applicable Laws; and

11.5.6. assist the Customer, at the Customer's sole cost, in responding to any request from a Data Subject and facilitate the Customer's compliance with its obligations under the Applicable Laws with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

11.5.7. notify the Customer without undue delay on becoming aware of a Personal Data breach;

11.5.8. at the written direction of the Customer, delete or return Personal Data and copies thereof to the Customer on termination of this Agreement, unless required by Data protection Legislation to store the Personal Data; and

11.5.9. maintain complete and accurate records and information to demonstrate its compliance with this clause.

11.6. The Customer warrants and represents that the Customer has the right to transfer to Kerv any data transferred and/or to be transferred to Kerv, in connection with this Agreement (including User data) whatever its nature or its form. The Customer shall obtain any necessary local authorisation and consent for that data to be processed by Kerv as contemplated by this Agreement and including in any jurisdiction in which Kerv may process the data.

## 12. INDEMNITY

12.1. This clause 12 is excluded from any Customer limitation of liability or limitation of damages provision set out in the Agreement.

### User Content Indemnity

12.2. The Customer acknowledges and agrees that Kerv does not own or have any control over the content, security or any other aspect of any data, information or material that the Customer enters, uploads or otherwise supplies to Kerv in the course of using the Services ("**User Content**"). The Customer shall indemnify, defend, and hold Kerv harmless from any damages incurred by or asserted against Kerv related to, arising out of or in connection with User Content, including without limitation, any claims:

12.2.1. that such User Content violates or misappropriates the intellectual property or other rights of any third party;

12.2.2. in respect of the integrity, deletion, destruction, damage, loss or failure to store User Content; and



12.2.3. any claims in respect of the Customer's use or misuse of End User Content or disclosure of User Content to third parties; or

12.2.4. the Customer's collection or receipt of such User Content.

### **Services Indemnity**

12.3. The Customer shall defend, indemnify and hold harmless Kerv against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's and/or the User's use of the Services, provided that:

12.3.1. the Customer is given prompt notice of any such claim;

12.3.2. Kerv provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and

12.3.3. the Customer is given sole authority to defend or settle the claim.

### **Third Party Intellectual Property Indemnity**

12.4. Kerv shall defend the Customer, its officers, directors and employees against any claim that the Customer's use of the Services in accordance with this Agreement infringes any United Kingdom patent effective as of the Effective Date, copyright, trade mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:

12.4.1. Kerv is given prompt notice of any such claim;

12.4.2. the Customer does not make any admission, or otherwise attempt to compromise or settle the claim and provides reasonable co-operation to Kerv in the defence and settlement of such claim, at Kerv's expense; and

12.4.3. Kerv is given sole authority to defend or settle the claim.

12.5. In the defence or settlement of any claim, Kerv 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 two (2) Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.

### **Indemnity Exclusions**

12.6. In no event shall Kerv, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:

12.6.1. a modification of the Services or Documentation by anyone other than Kerv; or

12.6.2. the Customer's and/or a User's use of the Services or Documentation in a manner contrary to the instructions given to the Customer by Kerv; or

12.6.3. the Customer's and/or a User's use of the Services or Documentation after notice of the alleged or actual infringement from Kerv or any appropriate authority.

12.7. This clause 12 states the Parties (including Kerv's employees', agents' and sub-contractors') sole and exclusive rights, remedies, entire obligations and liability, for infringement of any indemnity.



## 13. LIMITATION OF LIABILITY

- 13.1. Both Parties accept unlimited liability for:
- 13.1.1. death or personal injury caused by its negligence; or
  - 13.1.2. fraud or fraudulent misrepresentation; or
  - 13.1.3. any other act or omission for which liability cannot be limited by law.
- 13.2. Subject to clause 13.1 Kerv's entire liability to the Customer in respect of all losses arising out of or in connection with Kerv's performance or non-performance of its obligations under this Agreement:
- 13.2.1. in respect of damage to real property shall be limited to £2,000,000 (two million pounds) for each event or series of connected events; and
  - 13.2.2. in respect of any and all indemnities, other claims, losses or damages, whether arising from tort (including negligence), breach of contract or otherwise under or in connection with this Agreement shall in no event in the period of 12 months prior to the date of any claim the Charges paid by the Customer in such year, for the Service(s) directly giving rise to such claims, losses or damages; and
  - 13.2.3. in respect of any contract (including in respect of the indemnity at clause 12.4), other claims, losses or damages, whether arising from tort (including negligence or breach of statutory duty), misrepresentation, restitution, breach of contract or otherwise under or in connection with this Agreement arising in connection with the performance or contemplated performance of this Agreement; shall in no event in any year (the twelve (12) months immediately preceding the date on which the claim arose), exceed the Charges paid by the Customer in such year; for the Service(s) directly giving rise to such claims, losses or damages.
- 13.3. Subject to clause 13.1 and in respect of payment of the Charges by the Customer, neither Party shall 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, loss of reputation, loss of anticipated savings and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss (including any claims/losses arising under any End User Contract), costs, damages, charges or expenses however arising under this Agreement.
- 13.4. In no event will Kerv have any liability for non-provision or delay in the provision of the goods supplied by Kerv and/or Services which can be attributed to the acts or omissions of the Customer, its employees, sub-contractors, agents, Users or customers; and/or occurs during any period of scheduled maintenance.
- 13.5. In no event shall Kerv be liable for any damages arising directly or indirectly from the acts or omissions of the Mobile Network Operator or any other third parties not under the direct control of Kerv.
- 13.6. Kerv excludes all liabilities, costs, expenses, damages and losses suffered or incurred by the Customer arising out of or in connection with any fraudulent use of the goods and/or Services supplied by Kerv and accessed/used by the Customer's officers, agents or employees, or any third party (for example, but not limited to, Users) including any officers, agents or employees of such a third party.
- 13.7. In no event shall Kerv be liable for any losses arising from the Customers End User Contract.



13.8. Except as expressly and specifically provided in this Agreement:

13.8.1. the Customer assumes sole responsibility for results obtained from the use of the Services and Software by the Customer, and for conclusions drawn from such use;

13.8.2. Kerv shall have no liability for any damage caused by errors or omissions in any information, recordings, instructions or scripts provided to Kerv by the Customer in connection with the Services, or any actions taken by Kerv at the Customer's direction;

13.8.3. 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

13.8.4. the Services and the Documentation are provided to the Customer on an "as is" basis.

13.9. Neither Party will be liable for delay in or for failure to perform its obligations if a Force Majeure Event causes that delay or failure. However, the affected Party's obligation to perform the relevant obligations under this Agreement shall (during the continuation of the Force Majeure Event) be read and construed as an obligation to perform such obligations to the best level reasonably achievable in the circumstances.

13.10. Both Parties shall use their reasonable endeavours to mitigate any loss, damage, liability, expenses and costs suffered by them under or arising out of this Agreement.

## 14. WARRANTY

14.1. Kerv warrants that the Services under this Agreement will be performed with reasonable skill and care; in accordance with all applicable regulations; using suitably qualified personnel; and in accordance with the service description set out in the Schedules. The warranty is valid for a period of ninety (90) days from the date of performance of the relevant Services.

14.2. Kerv warrants that the software (where Kerv is the developer) supplied by Kerv under this Agreement will operate substantially in accordance with the functional specification supplied with the software and that it will be free from material defects for a period of ninety (90) days from the date of Delivery.

14.3. Kerv shall use reasonable endeavours to transfer to the Customer the benefit of any third party warranty given to Kerv in respect of any third party hardware and software supplied by Kerv under this Agreement.

14.4. Where the Customer makes a valid claim under a warranty set out in:

14.4.1. clauses 14.1 to 14.2, Kerv shall, within a reasonable time, and at its option either:

14.4.1.1. repair or replace any such hardware;

14.4.1.2. correct any defects in such software;

14.4.1.3. re-perform any Service to the extent it considers necessary to remedy any defect;  
or

14.4.1.4. refund the Customer the amount paid for the affected hardware, software and/or Service.

14.4.2. this clause 14, Kerv shall (where agreed with the Customer) manage such claim provided the Customer has complied with the conditions of the warranty.

- 14.5. The warranties granted under this clause 14 do not include, and Kerv expressly disclaims any liability for, defects resulting from either i) an Excused Delay; ii) any act or omission of any MNO; or iii) any act or omission of other third parties beyond Kerv's direct control.
- 14.6. In the event Kerv carries out any Services as a result of the Customer's failure to perform its obligations under this Agreement and/or due to any of the exclusions set out in the above clause 14.5, Kerv shall be entitled to charge for such Services on a time and materials basis, in accordance with its then current rates. The remedies provided by this clause 14.6, will be in addition to any rights Kerv then currently has, but will otherwise be the Customer's sole and exclusive remedy for breach of the warranties set out in this clause.
- 14.7. Kerv does not represent or warrant that the Services shall be interruption or fault free or warrant that every defect in the Services can or will be repaired or that the functions of the Services will meet the Customer's requirements.
- 14.8. 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.
- 14.9. Kerv makes no representation, warranty or commitment and shall have no liability or obligation whatsoever in relation to:
- 14.9.1. 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; or
  - 14.9.2. the Services meeting the Customer's legal obligations including, but not limited to, regulations in respect of the recording of communications related to the execution of a trade.
- 14.10. Kerv does not warrant that:
- 14.10.1. the Customer's use of the Services will be uninterrupted or error-free; or
  - 14.10.2. that the Services, Order, Documentation and/or the information obtained by the Customer through the Services will meet the Customer's and/or User's requirements; or
  - 14.10.3. the Software or the Services will be free from vulnerabilities; or
  - 14.10.4. that any faults with the Software will be resolved in any timescale, or at all. Kerv will, however endeavour to comply with the terms of the Service Level Agreement;
  - 14.10.5. the Customer's use of the Services and Software will relieve the Customer or any User of any compliance fines issued in the course of the Customer's or User's business operations;
  - 14.10.6. It is responsible for any Excused 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 may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 14.11. Any warranty provided in this Agreement are made for the benefit of the Customer only and are expressly subject to the Customer meeting its payment obligations to Kerv.

14.12. Pursuant to clause 14.6, any contract entered into, and any transaction completed via any third-party website is between the Customer and the relevant third party, and not Kerv. Kerv 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.

14.13. Kerv does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

## **15. ESCALATION AND DISPUTE RESOLUTION**

15.1. Any dispute which arises between the Parties as to this Agreement or the performance of the Parties' respective obligations under this Agreement, shall first be discussed, and if possible, resolved by appointed representatives of each Party; as set out below:

15.1.1. Escalation should be used in the following cases:

15.1.1.1. a workaround is not provided within the target workaround time;

15.1.1.2. the solution proposed by Kerv, does not fit the Customer's reasonable expectations.

15.1.2. Escalation should be made by the Customer's compliance or IT manager via the contact email, provided by below or as otherwise provided by Kerv. The following management escalation process shall be applied where the Customer has duly contacted Kerv pursuant to this clause:

15.1.2.1. Level 1 Escalation: The Customer shall raise the escalation, to the Kerv Service Desk (support@kerv.com);

15.1.2.2. Level 2 Escalation: Where the matter has not been actioned to the Customers reasonable satisfaction within five (5) Business Days of the Level 1 escalation, the Parties shall escalate to Kerv's Head of Service Operations (Steven.Gulley@kerv.com), for further Kerv awareness and action;

15.1.2.3. Level 3 Escalation: Where the matter has not been actioned to the Customers reasonable satisfaction within five (5) Business Days of the Level 2 escalation, the Parties shall escalate to final escalation point (the Managing Director) (Brad.Gorton@kerv.com);

15.1.3. In the event the matter has not been resolved to either Party's satisfaction, the Parties shall act in accordance with the dispute resolution provisions set out below in clause 15.2.

15.2. In the event the Party's representatives fail to resolve the dispute; either Party (by giving notice in writing to the other), may enter into an alternative dispute resolution procedure with the assistance of a mediator agreed by the Parties, or in default of such agreement within seven (7) days of receipt of such request, appointed at the request of either Party by the UK Centre for Dispute Resolution (CEDR) or such other similar body as is agreed.

15.3. In the event of any mediation, the Parties shall bear the cost of the mediation equally between themselves, for example (but not limited to) cost of the mediator and venue of the mediation. Any and all costs or expenses incurred in a Party's preparation for the mediation shall be borne by the individual Party and not divided between the Parties. The Parties shall work in good faith to ensure the cost of the mediation itself (excluding costs arising as a result of the mediation) are kept as low as possible.

## 16. FORCE MAJEURE

- 16.1. Neither Party will be liable, except as specified in this clause 16.1, for any failure to perform, delay in performing or imperfect performance of any obligation under this Agreement, except for failure to pay the Charges.
- 16.2. If either Party is affected by the restrictions imposed by government controls, as a direct result of a pandemic, it shall promptly notify in writing, the other Party of the nature of the effect, the nature of any actual or anticipated failure, delay or imperfect performance and the anticipated consequence and length of such failure, delay or imperfect performance. For the avoidance of doubt, where a Party places the other on notice pursuant to this clause 16.2, the other Party shall not unreasonably withhold or delay the acceptance of the notice.

## 17. SUSPENSION OF SERVICE

- 17.1. Kerv reserves the right to suspend the Services without liability to the Customer or any User with immediate effect upon notice to the Customer in the event that:
- 17.1.1. Kerv reasonably believes or has cause to believe that the Services are being used in an unauthorised or illegal manner;
  - 17.1.2. the Customer and/or any User is in material breach of any of its obligations under this Agreement;
  - 17.1.3. any regulatory authority requires Kerv to suspend the Services;
  - 17.1.4. continued use of the Services provides any security risk whether related to the Service provided by Kerv or to any third-party rights;
  - 17.1.5. the Customer fails to make payment within thirty (30) days of the due date for such payment, provided always that Kerv has notified the Customer that such payment is overdue; or
  - 17.1.6. to carry out emergency maintenance.

## 18. TERM AND TERMINATION

- 18.1. This Agreement shall, unless otherwise terminated as provided in this clause 18, commence on the Effective Date and shall continue for a five (5) year term and, thereafter, this Agreement shall be automatically renewed for successive periods of twelve (12) months (each a “**Renewal Term**”), unless:
- 18.1.1. either Party notifies the other Party of termination, in writing, at least ninety (90) days before the end of the Initial Term or any Renewal Term; in which case this Agreement shall terminate upon the expiry of the applicable Initial Term or Renewal Term; or
  - 18.1.2. otherwise terminated in accordance with the provisions of this Agreement.
- 18.2. The Initial Term of an individual Order will commence from the Service Commencement Date, unless otherwise set out in an Order and may be:
- 18.2.1. less than the remaining duration of this Agreement (in which case, the relevant Order will terminate automatically at the end of the period specified in the Order); or

18.2.2. more than the remaining duration of this Agreement (in which case the terms and conditions of this Agreement shall continue to apply to the relevant Order until the end of the applicable Order's Initial Term).

- 18.3. After the Initial Term of an Order; the Order will be renewed for periods of twelve (12) months (the “**Renewal Term**”), commencing on the anniversary date of the Service Commencement Date (the “**Renewal Date**”); unless another date is specified within the Order. For the avoidance of doubt, the Renewal Term may consist of multiple durations of twelve months, as the contract auto-renews. Any additional Users added during an Orders Renewal Term shall, where possible and practicable, co-terminate with the Users provided under that Order.
- 18.4. The Services shall commence on the Service Commencement Date or the Renewal Date for each relevant Service and shall continue thereafter until terminated in accordance with this Agreement.
- 18.5. After the Initial Term or during the Renewal Term, either Party may terminate an Order by giving at least one hundred and eighty (180) days prior written notice to the other Party (such notice to expire at the end of the Initial Term or Renewal Term, as agreed between the Parties).
- 18.6. Without affecting any other right or remedy available to it, either Party may terminate this Agreement with immediate effect by giving written notice to the other Party if:
- 18.6.1. the other Party fails to pay any amount due under this Agreement on the due date for payment and remains in default no less than thirty (30) days after being notified in writing to make such payment;
  - 18.6.2. the other Party commits a material breach of any other term of this Agreement and (if such breach is remediable) fails to remedy that breach within a period of thirty (30) days after being notified in writing to do so;
  - 18.6.3. the other Party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 (“**IA 1986**”) as if the words *"it is proved to the satisfaction of the court"* did not appear in sections 123(1)(e) or 123(2) of the IA 1986;
  - 18.6.4. the other Party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;
  - 18.6.5. the other Party applies to court for, or obtains, a moratorium under Part A1 of the IA 1986;
  - 18.6.6. In the event the Corporate Insolvency and Governance Act 2020 applies, the Parties hereby agree to promptly enter into reasonable discussions to mitigate and resolve any potential losses (financial or otherwise) for either Party. The Parties recognise that the application of the Corporate Insolvency and Governance Act 2020 may place unreasonable hardship on Kerv in certain circumstances and that the Parties will act in good faith to mitigate same (within the meaning of section 233B (5)(a-c).
  - 18.6.7. a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other Party other than for the sole purpose of a

scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;

18.6.8. an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other Party (being a company, partnership or limited liability partnership);

18.6.9. the holder of a qualifying floating charge over the assets of that other Party (being a company or limited liability partnership) has become entitled to appoint or has appointed an administrative receiver;

18.6.10. a person becomes entitled to appoint a receiver over the assets of the other Party or a receiver is appointed over the assets of the other Party;

18.6.11. a creditor or encumbrancer of the other Party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other Party's assets and such attachment or process is not discharged within fourteen (14) days;

18.6.12. any event occurs, or proceeding is taken, with respect to the other Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 18.6.3;

18.6.13. the other Party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;

18.6.14. the other Party's financial position deteriorates so far as to reasonably justify the opinion that its ability to give effect to the terms of this Agreement is in jeopardy; or

18.6.15. A Party has committed an act of bribery directly linked to this Agreement.

18.7. In the event of termination of this Agreement by Kerv either as a result of a breach by the Customer under clause 18.6.2 27above or any other such termination, as invoked by the Customer (save for termination as a result of Kerv's breach):

18.7.1. the Customer shall immediately pay to Kerv the Early Termination Charge and/or the relevant Minimum Commitment (depending on the Services) as applicable; and

18.7.2. all rights granted to the Customer and/or Users under any licence granted in this Agreement shall cease and the Customer and/or User shall cease all activities authorised by the applicable licence; and

18.7.3. to the extent that any Customer goods supplied by Kerv have not been paid for in full, Kerv may exercise its right to reclaim the goods supplied by Kerv.

18.8. In the event and reasonable opinion of Kerv, this Agreement becomes commercially unviable; Kerv may terminate this Agreement by providing ninety (90) days' notice to the Customer or as otherwise agreed between the Parties.

18.9. On termination of this Agreement by the Customer for any reason prior to the expiry of any (i) Initial Term (ii) Renewal Term or (iii) term of any Order(s), the Customer shall:

18.9.1. pay to Kerv an Early Termination Charge together with any interest due; and



- 18.9.2. confirm in writing the details of the Cease Notification, giving no less than one hundred and twenty (120) days prior written notice.
- 18.10. For the avoidance of doubt and where applicable, on termination of this Agreement for any reason the Customer shall be bound by any minimum Service commitment/term, and the respective payments for same. Particularly (but not limited to) where such Services have been purchased by Kerv specifically to provide such to the Customer.
- 18.11. On termination of this Agreement for any reason:
- 18.11.1. all licences granted under this Agreement shall immediately terminate and the Customer and any User shall immediately cease all use of the Services;
  - 18.11.2. 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;
  - 18.11.3. Kerv may destroy or otherwise dispose of any of the Customer Data in its possession unless Kerv receives, no later than ten (10) days after the effective date of the termination of this Agreement, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. Kerv shall use reasonable commercial endeavours to deliver the back-up to the Customer within thirty (30) days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and Charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by Kerv in returning or disposing of Customer Data; and
  - 18.11.4. any rights, remedies, obligations or liabilities of the Parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of this Agreement which existed at or before the date of termination, shall not be affected or prejudiced.
- 18.12. On termination of this Agreement, the Customer shall permit Kerv to recover any items of Kerv's property on the Customer site(s) without delay.
- 18.13. On termination of this Agreement for any reason, Kerv may submit invoices for any Charges not yet invoiced and the Customer shall immediately pay these invoices and any outstanding unpaid invoices together with interest due to Kerv.

## 19. NOTICES

- 19.1. Any notice to be served on Kerv by the Customer (save for Cease Notifications) under this Agreement shall be in writing and delivered as an attachment to an email to [legal@kerv.com](mailto:legal@kerv.com) or to any other address notified in writing to the Customer. The attachment shall be either:
- 19.1.1. a Customer letterhead; or
  - 19.1.2. an otherwise authorised/recognised form (to protect the Customer from unauthorised notifications).
- 19.2. Any notice to be served on the Customer by Kerv under this Agreement shall be in writing and delivered by either email to a nominated email address (or in the absence of a nominated email address) to a recognised email address of the Customer, or the Services landing webpage [HERE](#) served



on the day they are delivered. Notices sent by first class post will be deemed served on the second Business Day after the date they are posted.

- 19.3. This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any method of dispute resolution.

## **20. INSURANCE**

- 20.1. Kerv shall during the term of this Agreement maintain in force an insurance policy or policies which cover(s) the following:
- 20.1.1. Employers' liability five million pounds (£5,000,000) in any one occurrence;
  - 20.1.2. Public/Products liability the lower of i) up to five (5) times the total Order form value or ii) two million pounds (£2,000,000) in the aggregate;
  - 20.1.3. Professional indemnity the lower of i) up to five (5) times the total Order form value or ii) two million (£2,000,000) in the aggregate.
- 20.2. The Customer shall have adequate cover for any equipment or software equitably owned or leased by them (which may or may not form part of the Customer equipment, for example equipment installed in data racks) but may fall under the control of either Party or form part of the provision of Services herein. For the avoidance of doubt the cover required under this clause 19.2 shall be sufficient to meet any liability and/or loss that may flow from such Services.
- 20.3. The Customer shall maintain adequate insurance cover for any reasonably foreseeable claim resulting from the Services being delivered by Kerv.
- 20.4. Each Party shall supply evidence of such policy or policies to the other Party within ten (10) Business Days of a written request by the other Party.

## **21. ASSIGNMENT**

- 21.1. The Customer shall not, without the prior written consent of Kerv, assign, novate, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.
- 21.2. Kerv may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

## **22. NON-SOLICITATION**

- 22.1. Recognising that this Agreement will bring the Customer's employees to Kerv's attention and Kerv's employees to the Customer's attention, the Parties agree that during the term of this Agreement, and for a period of twelve (12) months after this Agreement has expired or has been terminated for any reason whatsoever, neither Party will directly, or by use of an agent, induce or try to induce any respective employees of the other Party to leave their current employer except with the consent of the CEO of the current employer.

## **23. ANTI BRIBERY**

- 23.1. For the purpose of this clause 23, the meaning of adequate procedures and foreign public official shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively.

23.2. Both Parties:

- 23.2.1. shall comply with all applicable laws, regulations, codes and sanctions relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010;
  - 23.2.2. shall not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
  - 23.2.3. shall have and shall maintain in place throughout the term of this Agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010;
  - 23.2.4. shall promptly report to the other Party any request or demand for any undue financial or other advantage of any kind received in connection with the performance of this Agreement;
  - 23.2.5. warrant that they have no foreign public officials as officers, employees or direct or indirect owners at the Effective Date of this Agreement and agree to immediately notify the other Party if during the validity of this Agreement a foreign public official becomes an officer or employee or acquires a direct or indirect interest.
- 23.3. Either Party shall, upon the reasonable written request of the other Party provide such supporting evidence of compliance with this clause 23 as may be reasonably required.
- 23.4. In the event that the Customer sub-contracts the provision of any element of this Agreement to any person, or receives any services in connection with its performance of the Agreement from any person, (each such person being an “**Associated Person**”), it shall impose upon such Associated Person anti-bribery obligations that are no less onerous than those imposed upon the Customer in this Agreement.
- 23.5. The Customer shall be liable to Kerv for the acts and omissions of each Associated Person in relation to compliance with such anti-bribery obligations (or, where the Customer has failed to impose such obligations, the obligations that the Associated Person would be under if the Customer had complied with the obligation under this clause) as if such acts or omissions were those of the Customer itself.
- 23.6. The Customer shall indemnify Kerv against any losses, liabilities, damages, costs and expenses incurred by, or awarded against, Kerv as a result of any breach of this clause 23 (Anti Bribery) including any liability that the Customer has to Kerv, by virtue of the acts or omissions of any Associated Person.

## 24. AUDIT

- 24.1. Kerv hereby agree for the Customer to perform an annual audit of Kerv, pursuant to this clause 24:
- 24.1.1. An audit shall be agreed in advance between the Parties and such agreement shall confirm the scope and procedure of the audit; and
  - 24.1.2. The annual audit shall require no more than four (4) hours of Kerv time; and
  - 24.1.3. The audit shall reasonably rely on:
    - 24.1.4. the provision of Kerv (business practice) standard certifications (including Kerv security certificates);
    - 24.1.5. readily available information from public sources and



24.1.6. the Kerv website.

- 24.2. An audit which, at Kerv's sole determination, is expected to exceed the provision of Kerv standard certifications and publicly available information, will be chargeable on a Kerv professional services hourly rate. Costs for such shall be borne by Customer, unless agreed otherwise in writing.

## **25. ENTIRE AGREEMENT**

- 25.1. This Agreement together with the Schedules to it (together with any variations and/or amendments) constitutes the entire understanding between the Parties concerning the subject matter hereof and supersedes all prior or contemporaneous discussions, agreements and representations, whether oral or written and whether or not made by the Customer and Kerv. The Parties have had equal opportunity to take legal advice and the contra proferentem rule shall not apply to the interpretation of this Agreement. Neither Party places any reliance on any representation, warranty or other statement relating to the subject matter of this Agreement save as expressly set out in this Agreement.
- 25.2. Neither Party shall have any liability or remedy in tort in respect of any representation, warranty or other statement (including any contained in this Agreement) being false, untrue, inaccurate or incomplete unless it was made fraudulently except to the extent that either Party has any outstanding liability to the other under a previous arrangement or contract. The Customer acknowledges to Kerv (and Kerv executes this Agreement and any Order in reliance on such acknowledgement) that it has not been induced to enter into this Agreement by, nor relied upon, any representation or warranty other than the representations and/or warranties contained herein.
- 25.3. The Customer irrevocably and unconditionally waives any right it may have to claim damages or to rescind this Agreement by reason of any misrepresentation and/or warranty not set forth in this Agreement.
- 25.4. Each Party acknowledges and agrees for the purposes of the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977, that the provisions of this Agreement are reasonable.
- 25.5. If any other document, such as a purchase order, invoice or confirmation contains terms that are in addition to, inconsistent or in conflict with the terms of this Agreement, the Parties hereby agree that such terms shall be null and void and the terms of this Agreement shall prevail in their entirety.

## **26. CONFLICT**

- 26.1. This Agreement including each Order and any other Documentation, to the extent reasonably possible, shall be construed so as to be consistent with each other. If, and to the extent this Agreement, an Order and any other Documentation cannot reasonably be construed as consistent with each other; the various documents will have the following order of precedence with respect to their respective subject matters:
- 26.1.1. the Order;
- 26.1.2. the Schedules;
- 26.1.3. the terms and conditions of the Kerv Linked Master Services Agreement;
- 26.1.4. the Documentation with regard to changes to the Order(s)
- in that order.



- 26.2. Notwithstanding Kerv's acknowledgment of receipt or acceptance of a purchase order issued by the Customer, any boiler plate, pre-printed term or condition of such purchase order, that is in addition to or in conflict with this Agreement, shall be void and of no effect and is hereby rejected by Kerv.

## **27. VARIATION**

- 27.1. No variation of this Agreement shall be effective unless it is in writing and signed on behalf of both Parties, by the Party's authorised signatory.

## **28. WAIVER**

- 28.1. A waiver of any right or remedy is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.
- 28.2. A delay or failure to exercise, or the single or partial exercise of, any right or remedy shall not waive that or any other right (including the right to enforce a subsequent breach of the same obligation) or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy.
- 28.3. This Agreement, or any rights or obligations hereunder, may be amended, waived or modified only in writing and signed by the Parties.

## **29. RIGHTS AND REMEDIES**

- 29.1. Unless there is express provision to the contrary in this Agreement, no remedy conferred by any terms of this Agreement is intended to be exclusive of any other remedy available under this Agreement or at law. Each and every remedy is cumulative and is in addition to each and every other remedy available under this Agreement or existing at law (whether in equity, by statute, at common law or otherwise).

## **30. SEVERANCE**

- 30.1. If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.
- 30.2. If any provision or part-provision of this Agreement is deemed deleted under clause 30.1 the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.
- 30.3. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.
- 30.4. Both Parties hereby agree to contract the Services specified within this Agreement, for the duration specified therein, unless otherwise agreed.

## **31. NO PARTNERSHIP OR AGENCY**

- 31.1. Nothing in this Agreement is intended to or shall operate to create a partnership between the Parties, or authorise either Party to act as agent for the other. Neither Party shall have the authority to act in the name or on behalf of or otherwise to bind the other, in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

## 32. SECURITY

- 32.1. The Customer explicitly acknowledges and accepts that it is the Customer's sole responsibility to control (at all times) the use and access to connection information, protect the confidentiality of connection and other user passwords, and change passwords after the termination of any employees or agents of the Customer.
- 32.2. The Customer is at all times solely responsible for the passwords that Kerv may provide to it in relation with the performance of this Agreement and undertakes to keep them secret and to ensure their confidentiality. The Customer shall be liable for any and all consequences of a malfunction of the Services resulting from any use (either by members of its staff or by any person to whom Customer has supplied its password(s)) in a manner that does not comply with the terms of this Agreement.
- 32.3. Notwithstanding the above, the Customer undertakes that it shall:
  - 32.3.1. regularly change the passwords controlling access to Kerv's resources, used in the context of the Services and use complex passwords;
  - 32.3.2. notify Kerv if it detects or reasonably suspects, malicious action or a security incident that could affect the resources of Kerv, using the procedures and contacts determined between the Parties (e.g. virus crisis or intrusion). Such incident that might threaten the security of Kerv's resources, may require Kerv to suspend connection and/or access to the Service, without notice, for the period necessary for total resolution of the problem;
  - 32.3.3. not knowingly transmit any electronic and/or logic item via the Services that would cause or be likely to cause damage of any nature whatsoever to the computer systems of Kerv.
- 32.4. In addition to the above and when relevant to the delivery of Services, Kerv confirms that they are a PCI DSS Level 1 Third Party Service Provider and agree to maintain compliance to the Payment Card Industry Data Security Standard for the duration of the Initial Term. Whilst doing so, Kerv commits to the following:
  - 32.4.1. to provide a valid Attestation of Compliance for the payments related Services being provided to the Customer;
  - 32.4.2. to take responsibility for the security of the Customers payment card account data whilst within Kerv's control;
  - 32.4.3. to provide documentation showing which PCI DSS Requirements that Kerv are responsible for, which the Customer is responsible for, and which are shared.

## 33. THIRD PARTY RIGHTS

- 33.1. Except as expressly set out in this Agreement, no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a Party to this Agreement. The consent of any third party is not required for any variation (including any release or compromise of any liability under this Agreement) or termination of this Agreement.
- 33.2. The rights provided under this Agreement are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer (save where otherwise agreed in writing between the Parties).



## 34. GOVERNING LAW

- 34.1. This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and interpreted in accordance with the law of England and Wales.
- 34.2. Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

End