

Software Subscription Terms

These terms and conditions are the terms on which the Company will provide the Services to the Customer as set out in an Order Form.

1 Definitions and Interpretation

1.1 The following definitions apply in this Agreement:

Acceptance Tests: the acceptance tests for any Custom Development Work, as agreed by the parties in a Statement of Work, or if no acceptance tests are set out in a Statement of Work, the tests that are required in order to test the Custom Development Work performs the functions set out in the specification agreed for such Custom Development Work in the Statement of Work.

Active Users: the unique user accounts, through which a User may access any part of the Software, that has existed during the Initial Term or a Renewal Term, whether or not such account is subsequently suspended.

Active User Cap: the number of Active Users included as part of the Customer's Subscription, as set out in the Order Form.

Applicable Laws: all laws, statutes and regulations in force from time to time which apply to either party's obligations under this Agreement.

Business Day: a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

Commencement Date: the date of the Order Form.

Confidential Information: all information of a confidential nature or which would be deemed confidential by a reasonable business person (whether written or oral and however recorded and whether marked as confidential or not) belonging to or relating to a party which is disclosed to or received by the other party, whether before or after the Commencement Date, directly or indirectly, in connection with this Agreement, but not including any information that: (a) is or becomes available in the public domain other than by an act or omission of the receiving party; (b) is or becomes available to the receiving party without an obligation of confidence from a third party having the legal right to disclose the information; or (c) is already in the receiving party's possession before disclosure without an obligation of confidence.

Custom Development Work: any customisation or configuration of the Software, to be performed by the Company for the Customer, as set out and agreed by the parties in a Statement of Work.

Customer: the customer whose details are set out in the Order Form.

Customer Data: all text, information, data, images, content and other material of the Customer, which is uploaded to the Software by the Customer or which is otherwise provided by the Customer to the Company under this Agreement.

Customer Third Party Software: shall have the meaning given in clause 5.5.

Documentation: any user documentation and information in respect of the use of the Software, made available by the Company or Third Party Software Provider from time to time (including any operating or technical information or documentation).

End User Agreement: the end user licence agreement under which the Third Party Software Provider grants to the Customer a licence to use the Software, the terms of which the Customer must comply with in its use of the Software, a copy of which is available at <https://www.totaralearning.com/en/licence>.

Fees: the fees payable by the Customer to the Company under this Agreement, including the Subscription Fees, and the fees payable for any Professional Services, as set out in the Order Form or a Statement of Work, or as otherwise set out in this Agreement.

Force Majeure Event: any act, event, omission or accident beyond the reasonable control of a party, including but not limited to any of the following: flood, earthquake, storm or other adverse weather conditions or natural disaster; war, threat of or preparation for war or armed conflict; imposition of sanctions, embargo, breaking off of diplomatic relations or similar actions; terrorist attack, civil war, civil commotion or riots; nuclear, chemical or biological contamination; sonic boom; compliance with Applicable Laws; any change in law or other action taken by a government or public authority or compliance with any such law or action; epidemic or pandemic; fire or explosion; collapse of building structures, failure of plant, machinery, computers or vehicles; any labour dispute, including but not limited to strikes, industrial action and lockouts (not involving the workforce of the affected party); non-performance by suppliers or subcontractors; and the interruption or failure of a transport network or utility service, including but not limited to the internet, electric power, gas or water supply.

Insolvency Event: means, in respect of a company, that it suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due within the meaning of section 123 of the Insolvency Act 1986, or enters into a composition, compromise or arrangement to reschedule or restructure its debt with or for the benefit of its creditors (except for the purpose of a bona fide reconstruction or amalgamation), or it compulsorily or voluntarily enters into liquidation or

commences negotiations in respect of the same (except for the purpose of a bona fide reconstruction or amalgamation), or it has an administrator, receiver, liquidator (except for the purpose of a bona fide reconstruction or amalgamation) or manager appointed over the whole, or a substantial part, of its undertaking or assets or any petition or notice is filed or given in respect of the same by any person, or any creditor or encumbrancer 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 its assets which is not discharged within 14 days, or it ceases or threatens to cease business or is dissolved, or if any equivalent or similar event occurs or proceeding is taken, with respect to that company in any jurisdiction to which it is subject.

Intellectual Property Rights: patents, rights to inventions, copyright and neighbouring rights, trade marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

Order Form: the Order Form provided by the Company and signed by the Customer.

Professional Services: professional services to be provided by the Company to the Customer under this Agreement, including in respect of the setup of the Software or any Custom Development Work, as such services are set out in the Order Form or a Statement of Work.

Renewal Term: the renewal term set out in clause 17.1, unless otherwise expressly agreed by the parties in the Order Form.

Services: any services provided by the Company to the Customer under this Agreement, including those services covered under the Customer's Subscription, as set out in the Order Form, and any Professional Services set out in the Order Form or a Statement of Work.

Software: the third party software learning platform set out in the Order Form, which is hosted by the Company and provided to the Customer on a "software as a service" basis.

Software Updates: any update or release to the Software which is issued by the Third Party Provider, primarily to overcome a defect or error in the Software, excluding any new versions of or upgrades to the Software.

Statement of Work: a statement of work agreed and signed by the parties, setting out any Professional Services to be provided by the Company to the Customer under this Agreement.

Subscription: the Customer's subscription to use the Software and Support during the Subscription Term, as set out in the Order Form.

Subscription Fees: the fees payable for the Customer's Subscription, as set out in the Order Form.

Subscription Term: shall have the meaning given in clause 17.1.

Support: support services to be provided by the Company to the Customer, as set out in the Support Schedule.

Support Schedule: the support schedule setting out the Support to be provided by the Company to the Customer, which is available at https://buildempire.co.uk/docs/support_schedule.pdf, and as may be updated by the Company from time to time.

Third Party Software Provider: the provider of the Software which is provided by the Company under this Agreement.

Users: those employees, agents and independent contractors of the Customer who are authorised by the Customer to access and use the Software.

Virus: any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, or 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 affects the user experience, including worms, trojan horses, viruses and other similar things or devices.

- 1.2 References to clauses and Schedules are to the clauses and schedules of this Agreement, and references to paragraphs are to paragraphs of a Schedule. The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement and any reference to this Agreement includes the Schedules.

- 1.3 Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
- 1.4 A reference to: (i) a **party** includes that party's personal representatives, successors and permitted assigns; (ii) **persons** include individuals, trusts, partnerships, unincorporated bodies, government entities, companies and/or corporations (in each case whether or not having separate legal personality); (iii) a **company** includes any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 A reference to **writing** or **written** includes email but not fax.
- 1.6 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time and includes all subordinate legislation made from time to time under that statute or statutory provision.
- 1.7 Any obligation on a party not to do or omit to do anything includes an obligation not to allow that thing to be done or omitted to be done by any other person.
- 1.8 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.9 Any words following the terms **including, include, for example, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- 1.10 The terms **subsidiary** and **holding company** shall have the meanings set out in section 1159 of the Companies Act 2006.

2 Agreement

- 2.1 This Agreement consists of these terms and conditions, the Order Form, any Statement of Work, and any other documents incorporated by reference, to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by law, trade custom, practice or course of dealing.
- 2.2 In the case of any conflict:
- (a) between these terms and conditions, and the Order Form, these terms and conditions shall prevail;
 - (b) between these terms and conditions, and the Statement of Work, these terms and conditions shall prevail.
- 2.3 The Customer's use of the Software under this Agreement is also subject to the End User Agreement, and by entering into this Agreement, the Customer agrees to comply at all times with the End User Agreement in its use of the Software.

3 Professional Services

- 3.1 The Company shall provide any Professional Services agreed by the parties in a Statement of Work.
- 3.2 The Customer acknowledges that the Company is dependent on input from and the cooperation of the Customer in performing the set up and activation of the SaaS Software and in the provision of any Professional Services. The Customer shall provide all such information, materials and documents as the Company may request, and shall complete all tasks allocated to the Customer in a Statement of Work by a suitably qualified person, in a timely manner and in accordance with any timescales set out in the Statement of Work.
- 3.3 The Customer shall:
- (a) cooperate and consult with the Company in its performance of the Professional Services;
 - (b) provide all such information, materials and documents as the Company may request, in connection with the performance of the Professional Services;
 - (c) provide such access for the Company to the Customer's IT systems, communications equipment, software and networks as may be required in order for the Company to perform such services.
- 3.4 Any dates set out in the Statement of Work for the performance of the Professional Services are estimates only and time shall not be of the essence.
- 3.5 Unless expressly stated otherwise in an Order Form or Statement of Work:
- (a) the Fees payable for Professional Services are charged on a time and materials basis; and
 - (b) any Fees set out in the Order Form or Statement of Work are an estimate of the time required for the provision of the Professional Services set out in the Order Form or Statement of Work. Time spent in excess of the estimate, or any time spent on Professional Services outside the scope of services set out in the Order Form or Statement of Work, shall be chargeable at the Company's then standard rates.
- 3.6 The Company shall provide the Professional Services in a workmanlike manner, with all due skill and care.
- 3.7 The Company may provide the Professional Services onsite or remotely, at its discretion. Where the Company provides the Professional Services at the

Customer's premises, the Customer must make available free of charge all facilities and services that the Company may reasonably require in performing its obligations.

- 3.8 In the event that the Company agrees to provide any Custom Development Work, as set out in a Statement of Work, the Company shall notify the Customer once the Custom Development Work is complete, and the Customer shall carry out and complete the Acceptance Tests, within 20 days from the date of the Company's notification (**Acceptance Test Period**).
- 3.9 If the Custom Development Work fails to pass the Acceptance Tests, the Customer shall provide a written notice to this effect to the Company, detailing such failures, and the Company shall remedy the defects and/or deficiencies. If after the Company has remedied the defects or deficiencies, the Custom Development Work fails to pass any further Acceptance Tests, the Company shall remedy the defects, and the relevant Acceptance Tests shall be repeated within a reasonable time, of no more than 7 days.
- 3.10 Acceptance of the Custom Development Work shall be deemed to have occurred on whichever is the earliest of:
- (a) written confirmation by the Customer to the Company that the Custom Development Work passes the Acceptance Tests;
 - (b) the expiry of the Acceptance Test Period, unless the Customer has given written notice to the Company under clause 3.9; or
 - (c) the use of the Software by the Customer in the normal course of its business.

4 Users

- 4.1 The Customer may set up Users on the Software. Each User shall be issued a unique user-ID and password which may not be shared or used by more than one person. In the event that a User is no longer employed or should otherwise be denied access to the Software, it is the Customer's responsibility to ensure that such User's access to the Software is disabled.
- 4.2 The Customer undertakes that:
- (a) each User shall keep the Customer's password and/or its own password for accessing the Software secure and confidential at all times; and
 - (b) it shall maintain a written, up to date list of current Users and provide such list to the Company within five Business Days of its written request at any

time, and shall notify the Company if it becomes aware of any unauthorised use of a password used to access the Software.

- 4.3 The Subscription Fees are based on the number of Active Users, by reference to different tiers applicable to the relevant number of Active Users. The maximum number of Active Users in each tier is the Active User Cap. The Active User Cap applicable to the Customer's Subscription is set out in the Order Form. The Customer may increase the Active User Cap at any time, to a higher tier offered by the Company, and subject to payment of the then current subscription fees for the relevant tier. In the event that the number of Active Users exceeds the Active User Cap at any time, the Customer's Subscription shall automatically be upgraded by the Company to the next tier, with an Active User Cap of at least the number of additional Active Users, and the Company shall raise an invoice for the then current subscription fees for the relevant tier. Such invoice shall be payable in accordance with clause 10.4. Unless otherwise agreed in writing, the number of Active Users set out in the Order Form cannot be reduced during a Subscription Term.
- 4.4 The Customer shall ensure that only properly trained staff use the Services.

5 Use of Software

- 5.1 The Company shall provide to the Customer, and allow Users, access to the Software during the Subscription Term.
- 5.2 The Customer agrees to comply, and shall procure that its Users comply, at all times with the End User Agreement in respect of its use of the Software.
- 5.3 The Customer shall, and shall procure that all Users shall:
- (a) comply with all Applicable Law and any instructions issued by a regulatory body in its use of the Software;
 - (b) use the Software and Documentation in accordance with this Agreement and shall be responsible for any User's use of the Software or breach of this Agreement;
 - (c) obtain and shall maintain all necessary licences, consents and permissions which are necessary to enable it to use the Software and comply with its obligations under this Agreement;
 - (d) provide the Company with all necessary cooperation and access to such information, premises, hardware, systems and network, as are required by the Company in order to perform the Services (including Customer Data, security access information and systems and technical information), and shall ensure that such information is accurate and complete;

- (e) ensure that it has all necessary hardware, desktop software, internet, network communications and other technology, and that the Customer's computer equipment, systems, network and browser meet all technical requirements applicable to access and use of the Software specified by the Company from time to time;
- (f) use reasonable endeavours to prevent any unauthorised access to, or use of, the Software (including implementing and maintaining adequate security measures and policies in accordance with good industry practice) and, in the event of becoming aware of any such unauthorised access or use, shall immediately notify the Company and shall give the Company all assistance that it reasonably requires to prevent such unauthorised access; and
- (g) comply at all times with the restrictions imposed on the Customer and acceptable use policy set out in the End User Agreement.

5.4 The Customer shall not, and shall procure that its Users shall not:

- (a) use the Software in any way that breaches any Applicable Law, or to commit any fraud or fraudulent activity;
- (b) use any of the Software to transmit any material that:
 - (i) is unlawful, harmful, threatening, defamatory, obscene, indecent, infringing, harassing, racially, religiously or ethnically offensive, or otherwise objectionable;
 - (ii) infringes any Intellectual Property Rights, rights of privacy, personality or publicity or other third party rights;
 - (iii) contains unsolicited or unauthorised advertising or promotional content;
 - (iv) facilitates or promotes illegal activity;
 - (v) threatens the security and/or confidentiality of the Software Services; and/or
 - (vi) causes damage to injury to any person or property;
- (c) store, distribute or transmit any Viruses (or attempt to do the same) during the course of its use of the Software, or attack the Software via a denial-of-service attack or a distributed denial-of-service attack;
- (d) attempt to access without authority, interfere with, damage or disrupt any part of the Software;

- (e) attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form, all or any part of the Software, or copy, modify, translate, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit or distribute all or any part of the Software and/or Documentation in any form or media or by any means (including by using any robot, spider or other automated device or manual process);
 - (f) access all or any part of the Software and/or Documentation in order to build a product or service which competes with any of the Software; or
 - (g) license, sell, rent, lease, transfer, assign, distribute, display, disclose or otherwise commercially exploit, or otherwise make the Software or Documentation available to any third party (except the Users), or use the Software to provide services to third parties.
- 5.5 The Customer's use of any third party applications, software, services or products that are licensed by a third party to the Customer (other than the Software provided by the Company) and which are used in connection with the Software (**Customer Third Party Software**), and any exchange or other transfer of any information between the Customer and any third party provider, is solely between the Customer and the applicable third party. The Company makes no warranties of any kind and assumes no liability whatsoever for the Customer's or its Users' use of any Customer Third Party Software, or any such exchange or transfer of data.
- 5.6 The Customer shall permit the Company or its designated representative, at any time, to audit the use of the Software by the Customer and Users, to verify the number of Active Users and to establish whether such use is in compliance with this Agreement. If such audit reveals that the Customer has underpaid any Fees under this Agreement, the Company may invoice the Customer for such Fees, which shall be payable by the Customer on receipt.
- 5.7 The Customer acknowledges and agrees that the Company shall not be liable to the Customer for any service disruptions, interruptions, delays or failures to the Software, as a result of the Customer's breach of its obligations under this clause 5.
- 5.8 The Customer shall indemnify the Company on demand against all losses, liabilities, damages, claims, costs and expenses (including legal fees and all other professional costs) suffered or incurred by the Company arising out of or in connection with any breach by the Customer of its obligations under this clause 5.

6 Software Updates

- 6.1 The Company shall provide and implement Software Updates to the Software, which are released by the Third Party Software Provider, at the frequency set out in the Order Form. In the event that the implementation of any Software Update is known in advance to be likely to cause downtime in the Software, the Company will use reasonable efforts to give notice electronically to the Customer of such downtime.

7 Company Obligations

- 7.1 The Company shall provide the Services with all reasonable skill and care, using personnel who are suitably qualified and trained.

8 Support

- 8.1 The Company shall provide the Services in accordance with the Support Schedule. The Company may make changes to the Support Schedule from time to time.

9 Suspension of the Software

- 9.1 The Company shall be entitled, without liability and without prejudice to any other of its rights or remedies under this Agreement, to suspend access to and use of the Software:
- (a) to the extent required in order to update, maintain or repair, the Software;
 - (b) where required by any regulatory, governmental or other competent authority;
 - (c) in the event that the Customer's or any User's use of the Software is in breach of any of the provisions of clause 5;
 - (d) in the circumstances set out in clause 10.5; or
 - (e) as a result of, to deal with, or to protect the Software against, any actual, suspected or threatened security breach, Virus, or attack on the Software.

10 Fees and Payment

- 10.1 The Customer shall pay the Fees in accordance with this clause 10.
- 10.2 Unless otherwise agreed by the Company in the Order Form:
- (a) the Subscription Fees shall be payable annually in advance;
 - (b) the Fees for any Professional Services shall be payable monthly in arrears.

- 10.3 The Customer shall be responsible for all reasonable expenses incurred by the Company in the provision of the Services, in respect of which receipts or other evidence of payment has been provided.
- 10.4 Unless set out otherwise in the Order Form, the Customer shall pay each invoice in full and cleared funds within 30 days of the date of invoice to the bank account specified on the invoice.
- 10.5 If the Customer fails to make any payment due to the Company by the due date for payment, the Company may, without prejudice to any other rights and remedies it may have:
- (a) suspend the Customer's use of and/or access to the Software and Services, and the Company shall be under no obligation to provide any of the Services while the invoice(s) concerned remain unpaid;
 - (b) charge the Customer interest on a daily basis in respect of the overdue amount at the rate of 4% per annum above the Bank of England's base rate from time to time, from the due date and continuing until payment of the overdue amount is received in full by the Company, whether before or after judgment; and/or
 - (c) recover from the Customer any fees incurred by the Company (including debt recovery agency fees, legal fees and court costs) in recovering the overdue amount.
- 10.6 All amounts and fees stated or referred to in this Agreement:
- (a) shall be payable in pounds sterling, unless otherwise agreed in the Order Form, are non-refundable, and are exclusive of value added tax payable upon such sums, which shall be payable by the Customer in addition at the applicable rate;
 - (b) shall be paid in full without any deduction, discount, set off or abatement except as required by law and the Customer shall not be entitled to assert any credit, set off or counterclaim against the Company in order to justify withholding payment of any such amount in whole or in part.
- 10.7 The Company may:
- (a) increase the Subscription Fees at any time, on giving at least 30 days' notice to the Customer, such increase to take effect:
 - (i) in the next Renewal Term in respect of the Customer's Subscription for which the Customer has already paid the Subscription Fees (provided that the number of Active Users does not exceed the

Active User Cap during the relevant Initial Subscription Term or Renewal Term, as applicable); and

- (ii) on the date set out in the notice, in respect of any additional Active Users in excess of the Active User Cap during the relevant Initial Subscription Term or Renewal Term, as applicable; and
- (b) increase the Fees payable for Professional Services at any time, save that this shall not affect the Fees payable for any Professional Services already agreed in a Statement of Work.

11 Intellectual Property Rights

- 11.1 The Customer acknowledges and agrees that the Company and/or its licensors owns all Intellectual Property Rights subsisting in and/or relating to the Software and Documentation, and any modifications, customisations and/or enhancements made thereto, including any Intellectual Property Rights created by the Company during or as a result of any Custom Development Work.
- 11.2 The licence for the Customer to use the Software is granted on and subject to the terms set out in the End User Agreement.
- 11.3 In respect of any modifications, customisations and/or enhancements made to the Software by the Company in the performance of any Custom Development Work (**Software Modifications**), the Company and/or its licensors shall own the Intellectual Property Rights in such Software Modifications, and the Company shall grant to the Customer a non-exclusive licence to use such Software Modifications, during the term of this Agreement, for its own internal business purposes, in accordance with the terms of this Agreement. Except as expressly granted under this Agreement or the End User Agreement, the Customer shall not have the right to use, or acquire any right, licence, title or interest in or to, any Intellectual Property Rights of the Company or its licensors.
- 11.4 In the event that the Customer makes any comments, suggestions, or feedback regarding the Software, including in respect of improvements, modifications, or enhancements thereto (collectively **Feedback**), the Customer hereby grants to the Company and its licensors, a worldwide, non-exclusive, irrevocable, perpetual, transferrable, sub-licensable, fully paid-up and royalty free licence to use, reproduce, distribute, modify or otherwise exploit or commercialise such Feedback.
- 11.5 The Customer Data is the property of the Customer and/or its licensors. The Customer hereby grants a royalty-free licence to the Company to use the Customer Data as necessary to provide the Software to the Customer. The

Customer warrants that it has all necessary rights in and to the Customer Data in order to grant the rights under this clause.

- 11.6 The Customer may not remove or obscure any trade marks, or any copyright, trade mark or proprietary notices featured or displayed on the Software.
- 11.7 The Company shall, unless otherwise stated in the Order Form, have the right to use the Customer's name and logo on the Company website and in any marketing and promotional material, and to refer to the Customer's use of the Software as a case study in potential tenders and demonstrations of the Software.

12 Change Control

- 12.1 Either party may, by giving written notice to the other at any time during this Agreement, request a change to the Services (including the scope of any Services set out in a Statement of Work) or this Agreement (**Change Request**).
- 12.2 If either party makes a Change Request, the Company shall, at its then standard rates, prepare for the Customer a change order, setting out the details of the change, any timescales for carrying out such change, the Fees payable for the change, and the impact of the change on any other aspects of this Agreement (**Change Order**). The Company shall not be required to make the change unless and until the parties have agreed and signed a written Change Order.

13 Liability

- 13.1 The Company gives no warranty or representation in respect of the Software. The Customer shall be solely responsible for ensuring that the Software meets its requirements. The Software is provided "as is" and all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this Agreement, including any implied conditions, warranties and other terms as to satisfactory quality, merchantability, fitness for purpose, or non-infringement.
- 13.2 The Company gives no warranty or representation that use of the Software will be uninterrupted, available or error free, or that any defects in the Software will be corrected.
- 13.3 Subject to clause 13.5, the Company shall have no liability:
 - (a) for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Software may be subject to limitations, delays and other problems inherent in the use of such communications facilities;

- (b) for any impaired performance or non-performance of the Software arising from a failure to comply with any specifications or technical requirements relating to use of the Software notified by the Company from time to time; or
 - (c) for any fault, failure or unavailability of any of the Software caused by the Customer's or any third party's software, or as a result of any failure, unavailability, speed or limitations of the Customer's internet and network communications, computer equipment and/or web browser.
- 13.4 The Company shall not be liable whether in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise for any of the following types of losses, howsoever arising under this Agreement:
 - (a) loss of profits;
 - (b) loss of sales or business;
 - (c) loss of agreements or contracts;
 - (d) loss of anticipated savings;
 - (e) loss of opportunity;
 - (f) loss of goodwill;
 - (g) loss of use or corruption of software, data or information; or
 - (h) special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.
- 13.5 Nothing in this Agreement excludes the liability of either party for: (a) death or personal injury caused by its negligence; (b) fraud or fraudulent misrepresentation; or (c) any other liability that cannot be limited or excluded under Applicable Law.
- 13.6 The Company's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement, in each year, shall not exceed the Fees paid by the Customer under this Agreement for the relevant year.
- 14 Data Protection**
 - 14.1 In respect of any personal data processed by the Company on behalf of the Customer in connection with the Software, the parties shall comply with the Data Processing Schedule appended to this Agreement.

14.2 The Customer shall be solely responsible for the integrity, legality and accuracy of the Customer Data held on or processed using the Software.

14.3 The Customer is responsible for taking reasonable steps and observing good industry practice to maintain the security of the Customer Data.

15 Compliance with Laws

15.1 The Company will comply with Applicable Laws, relevant to its provision of the Services. However, the Company is not responsible for compliance with any laws or regulations applicable to the Customer or the Customer's industry that are not generally applicable to information technology service providers.

15.2 The Customer shall comply with all Applicable Laws, relevant to its use of the Services.

16 Confidentiality

16.1 Each party agrees to keep confidential all Confidential Information belonging to the other party and to not, either during or after the Term, use or disclose any such Confidential Information, except with the prior written consent of the other party or as permitted by this clause 16. Each party may, for the purposes of performing its rights and/or obligations under this Agreement and/or seeking professional advice in respect of the same, use the other party's Confidential Information and/or disclose it under obligations of confidence to that party's employees, officers, agents, personnel and/or professional advisors. Each party shall take all reasonable steps and precautions to ensure that the persons to whom it makes such disclosures comply with the confidentiality obligations contained in this clause 16 as though they were a party to this Agreement.

17 Term and Termination

17.1 This Agreement shall commence on the Commencement Date and shall continue in force for the Initial Subscription Term, unless terminated earlier in accordance with its terms. Thereafter, this Agreement shall automatically renew for further periods of 12 months (each a **Renewal Term**), unless either party gives to the other party not less than 30 days' written notice to terminate this Agreement prior to the expiry of the Initial Term or then current Renewal Term (as applicable). The Initial Subscription Term and each Renewal Term (if applicable) shall together be the **Subscription Term**.

17.2 Without prejudice to any other rights or remedies to which either party may be entitled, either party may terminate this Agreement with immediate effect without liability to the other party, upon written notice to the other party, if:

- (a) the other party commits a material breach of any term of this Agreement (other than a payment obligation) which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so; or
- (b) the other party suffers an Insolvency Event.

17.3 Without prejudice to any other rights or remedies to which it may be entitled, the Company may terminate this Agreement with immediate effect without liability to the Customer, upon written notice to the other party, if:

- (a) the Customer fails to pay any amount due under this Agreement within 14 days of the due date for payment;
- (b) the Customer or any of its Users use the Software in breach of clause 5.2, 5.3 or clause 5.4.

18 Consequences of Termination

18.1 On termination of this Agreement (howsoever caused):

- (a) all rights and licences granted under this Agreement shall immediately terminate and the Customer shall immediately cease using, and the Company may with immediate effect terminate, the Customer's and all Users' access to and use of the Software and Services;
- (b) each party shall return and make no further use of any equipment, property, Confidential Information and other items (as applicable), and all copies of them, belonging to the other party;
- (c) the Customer shall immediately pay to the Company all sums due to the Company under this Agreement, and in respect of any sums which have not yet been invoiced, the Company may raise invoices for such sums which shall become immediately payable;
- (d) the Customer may download the Customer Data held on the Software at any time during the Subscription Term. The Company will, if requested by the Customer during the Subscription Term, and subject to payment of all sums due to the Company in accordance with clause 18.1(c), agree to provide to the Customer a copy of the Customer Data held on the Software, in such format determined by the Company, subject to the parties signing a Statement of Work for such work. Such work shall constitute Professional Services, and the Company may charge the Customer for providing such services at its then current rates, as set out in the Statement of Work;

- (e) after termination of the Agreement, the Company shall delete the Customer Data held on the Software;
- (f) 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 the Agreement which existed at or before the date of termination shall not be affected or prejudiced; and
- (g) the continuation after termination of any provision expressly stated to survive or implicitly surviving termination shall not be affected or prejudiced.

19 Force Majeure

- 19.1 If a party (the **Affected Party**) is prevented from or delayed in performing its obligations under this Agreement due to a Force Majeure Event, the Affected Party shall not be in breach of this Agreement or otherwise liable for any such failure or delay in the performance of such obligations.
- 19.2 The Affected Party shall as soon as practicable after the start of the Force Majeure Event, notify the other party in writing of the Force Majeure Event and its expected duration and the effect of the Force Majeure Event on the Affected Party's ability to perform its obligations under this Agreement.
- 19.3 If a Force Majeure Event prevents or delays the Affected Party's performance of its obligations for a continuous period of more than 60 days, either party may terminate this Agreement with immediate effect by giving written notice to the other party.

20 Notices

- 20.1 Any notice given by a party under or in connection with this Agreement shall be in writing and shall be delivered by hand or by pre-paid first-class post or other next working day delivery service, or by email, to the other party's address as stated in the Order Form or such other address as notified to it (in accordance with this clause) from time to time.
- 20.2 Notices shall be deemed to have been delivered: (a) at the time of delivery where delivered by hand; (b) two Business Days after the date of posting where sent by domestic post; (c) five Business Days after the date of posting where sent by international post; or (d) one Business Day after transmission in the case of email (provided that no delivery failure notification is received by the sender).
- 20.3 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

21 Non-solicitation

- 21.1 Except as expressly permitted by this Agreement, neither party will without the written consent of the other party, at any time during the term of this Agreement or for six months after termination or expiry of this Agreement, directly or indirectly solicit, engage, employ or endeavour to entice away from the other party any person who is or was during the preceding six months an employee of the other party and engaged in the provision of the Services.

22 General

- 22.1 **Assignment.** The Customer shall not, without the Company's prior written consent, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.
- 22.2 **Entire agreement.** This Agreement, and any other documents referred to in it, constitutes the entire agreement between the parties and supersedes, replaces and extinguishes any previous arrangement, understanding or agreement between them, whether written or oral, relating to its subject matter. Each party acknowledges that it has not been given, nor entered into this Agreement in reliance on, any warranty, statement, promise or representation other than as expressly set out in this Agreement. Nothing in this clause limits or excludes any liability for fraud or fraudulent misrepresentation.
- 22.3 **Waiver.** No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.
- 22.4 **Severance.** If any provision or part-provision of this Agreement is found by any court to be invalid, unenforceable or illegal, the other provisions shall remain in force. If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.
- 22.5 **Variation.** Save as expressly permitted otherwise in this Agreement, no variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
- 22.6 **No partnership or agency.** Nothing in this Agreement is intended to, or shall be deemed to, establish or imply any partnership or joint venture between any of the parties, constitute any party the agent or employee of another party, or authorise any party to make or enter into any commitments for or on behalf of any other

party. Each party confirms it is acting on its own behalf and not for the benefit of any other person.

22.7 **Third party rights.** Except as expressly provided in this Agreement, a person who is not a party to this Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

22.8 **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.

23 **Governing Law and Jurisdiction**

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

Data Protection Schedule

This Data Protection Schedule applies in respect of personal data which is processed by the Company on behalf of the Customer.

The parties acknowledge that the Company may process the Customer Personal Data on behalf of the Customer in providing the Services under this Agreement.

1 Definitions

The capitalised terms used in this Schedule shall have the meanings given to them in the Agreement, unless otherwise defined herein. The following definitions will apply in this Schedule:

Customer Personal Data: any personal data which is processed by the Company on behalf of the Customer in providing the Services.

Data Protection Legislation: all applicable legislation and regulations relating to personal data in force from time to time which apply to a party, relating to the processing of personal data, including the Data Protection Act 2018 (the **UK DPA**), the UK GDPR as defined in section 3(10) (as supplemented by section 205(4)) of the UK DPA (the **UK GDPR**), the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended, and in each case as may be further amended, extended, consolidated, re-enacted, replaced or superseded from time to time.

Data Subject Request: a request from a data subject to exercise the data subject's rights under and in accordance with the Data Protection Legislation, including requests for access to personal data, rectification or erasure of personal data, restrictions of processing personal data, and portability of personal data.

The terms **controller**, **processor**, **personal data**, **data subject**, **data protection impact assessment** and **personal data breach** shall each have the meanings set out in the Data Protection Legislation.

2 Customer's obligations

2.1 It shall be the Customer's responsibility to:

- (a) ensure that the Customer has a lawful basis and has all necessary appropriate consents and notices in place, to enable the Customer to process and to authorise the Company to process the Customer Personal Data in the manner envisaged by this Schedule; and

- (b) ensure that instructions for the processing of Customer Personal Data comply with the Data Protection Legislation, and it shall be responsible for the provision of fair processing information, as required under the Data Protection Legislation, to relevant data subjects.
- 2.2 The Customer shall determine what Customer Personal Data is held on the Software, and shall be solely responsible for the accuracy, integrity and security of the Customer Personal Data, and shall determine the access granted to such Customer Personal Data and the retention periods and/or deletion of such Customer Personal Data.
- 2.3 The Company shall have no liability to the Customer arising from the Customer's failure to comply with the requirements set out in paragraph 2.1 above.

3 Processing obligations

- 3.1 The Company shall, in relation to any Customer Personal Data processed by the Company on the Customer's behalf, in connection with the provision of the Services:
 - (a) process that Customer Personal Data to the extent necessary to perform the Company's obligations under the Agreement and in accordance with the Customer's instructions, as set out in this Agreement, unless otherwise required by law, regulation, court of competent jurisdiction or any other governmental or regulatory body;
 - (b) ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful processing of Customer Personal Data and against accidental loss or destruction of, or damage to, Customer 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;
 - (c) ensure that all personnel who have access to and/or process Customer Personal Data are obliged to keep the Customer Personal Data confidential;
 - (d) provide reasonable assistance, at the Customer's request and cost, in responding to any request from a Data Subject, where the Customer does not have access to such information to be able to respond to the request, and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
 - (e) notify the Customer without undue delay on becoming aware of a personal data breach affecting the Customer Personal Data;

- (f) maintain records and information regarding its processing activities in relation to the Customer Personal Data to demonstrate its compliance with this Schedule.
- 3.2 The Company shall allow for audits by the Customer or the Customer's designated auditor of the Company's procedures relevant to the processing of Customer Personal Data, provided that in the case of any audit, the Customer shall:
 - (a) comply with any reasonable requirements or security restrictions that the Company may impose to safeguard the Company's systems, data held on the Company's systems, and the Company's own confidential or commercially sensitive information and to avoid unreasonable disruption to the Company's business and operations; and
 - (b) reimburse the Company for the time it expends in respect of such audit, at the Company's then current professional services rates, which costs shall be reasonable, taking into account the resources expended by the Company, and before the commencement of any audit, the parties shall mutually agree on the scope, timing and duration of the audit.
- 3.3 The Customer consents to the Company appointing third party processors, including hosting provider, in respect of the Customer Personal Data under the Agreement, and shall maintain a list of processors on its website. The Company shall notify customers of any intended changes concerning the addition or replacement of such processors and provide the Customer with the opportunity to object to such changes on information security grounds. If the Customer has not objected to any such changes within a period of 14 days of the date of notification of the changes, the Customer shall be deemed to have accepted such changes. The Company shall have a written contract in place with such third-party processors which imposes obligations on the processors that are equivalent to those set out in this Schedule.
- 3.4 If at any time the Customer has reason to believe that the processing of any Customer Personal Data under the Agreement is in breach of the Data Protection Legislation, the Customer shall immediately notify the Company.

4 Liability

The Company's liability under or in connection with this Schedule shall be subject to the limitations and exclusions of liability set out in clause 13 of the Agreement.

Appendix to Data Schedule

The Company may process personal data on behalf of the Customer as follows:

Nature and purpose of processing

In the hosting of the Software, the Company will process Customer Personal Data held on the Software.

The Company may also have access to Customer Personal Data held on the Software in the provision of the Support.

Categories of data subjects

The categories of data subjects whose personal data is held on the Software are as follows:

- Employees of the Customer

Types of personal data

The types of personal data that may be uploaded to, processed using or held on the Software are determined by the Customer, but may include the following:

- Employee name
- Employee user information
- Details of the courses completed by the employee and dates of completing such courses
- Certificates held by the employee in respect of courses completed

Duration of processing

The Company shall process Customer Personal Data, for the period that it is held on the Software, during the term of this Agreement.