



Terms and Conditions

1. Definitions and Interpretation

1.1. In this Agreement, unless the context otherwise requires, each of the following expressions has the meanings set out next to it:

“Additional Services”	any such services (other than the Backup Service) that the Service Provider makes commercially available from time to time including, for example any data recovery, disaster recovery, support, hosting, network monitoring, or remote access testing
“Backup”	the process of transferring the Data from a Client Computer to the Service Provider Server for storage using the Service Provider Software
“Backup Service”	the online data backup and retrieval services to be provided for Client’s business continuity purposes by the Service Provider (referred to at clause 2 and described in Schedule 1) during the Term using the Service Provider Software
“Client Computer”	the computer equipment (either a workstation, terminal, personal computer, server or other computer system) provided and used by the Client from time to time for the purpose of this Agreement for running the Service Provider Software, for transmitting Data to the Service Provider, and for recovering and saving Data upon its Retrieval
“Commencement Date”	the date of this Agreement
“Confidential Information”	all Data and any other information received or obtained by a party that is proprietary or confidential of the other party and (i) is clearly labelled as such; (ii) is otherwise clearly identified as such; or (iii) from its nature and/or the circumstances of its disclosure it is reasonable to infer that it is such, but not including information that: a) is or becomes publicly known other than through any act or omission of the receiving or obtaining party; b) was in the other party's lawful possession before the disclosure; c) is lawfully disclosed to the receiving or obtaining party by a third party without restriction on disclosure; d) is independently developed by the receiving or obtaining party, which independent development can be shown by written evidence; or e) is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body
“Data”	any data (including any personal data as defined by the Data Protection Act 1998), programs, or other information of the Client copied, or to be copied, from the Client Computer during a Backup

“Encryption Key”	the special unique code(s) which shall be known only to Client, generated by the Client using Service Provider Software to access and retrieve its Data stored on the Service Provider Server
“Excused Outage”	any Outage in a calendar month where the Client is unable to use the Backup Service due to its full or partial unavailability or non-function which is, or is caused by, a) a Maintenance Period; b) Force Majeure affecting the Service Provider; c) any act or omission of the Client; or d) any failure, incorrect functioning or non-functioning of or fault in any computer, telecommunications, equipment, software, facilities or services of the Client or for which the Client is solely responsible under this Agreement
“Fee”	each Fee payable to Service Provider, as described in the Order Form
“Force Majeure”	<p>event, circumstance, or cause beyond reasonable control of:</p> <p>a) the party whose obligations are affected by such event, circumstance, or cause (including, without limitation, strike, lock-out or other industrial action (whether involving the workforce of Service Provider or any other party), failure of a utility service or transport or telecommunications network, , act of God, acts of war, riot, civil unrest, acts of terrorism, malicious damage, compliance with any law,, rule or regulation, governmental action or direction, accident, breakdown of plant or machinery, hardware or software failure, power failure, fire, flood, storms, earthquake, theft, or default of suppliers or sub-contractors); or</p> <p>b) where Service Provider’s performance of its obligations is affected by such event, circumstance, or cause, the failure of Client Computer or other equipment or facilities for which Client is responsible</p>
“Intellectual Property”	any and all registered or unregistered intellectual property rights which now or in the future may subsist in any territory including but not limited to patents, trade marks, service marks, designs, trade secrets, business and company names, copyrights, database rights, know-how, rights in designs and inventions, and the right to sue for past infringements of any of the foregoing rights to which the Service Provider may be entitled
“Licence”	the licence (referred to at Clause 3) granted by the Service Provider to the Client of the Service Provider Software the terms of which comprise those set out in Schedule 2

“Maintenance Period ” any Outage in a calendar month for planned maintenance, configuration changes or upgrade of the Backup Service, which is within the following limitations: a) only the first 2 hours of such Outage in aggregate in any calendar week (Mon-Sun) shall count; b) only the first 6 hours of such Outage in aggregate in any calendar month shall count; and c) the Service Provider has given notice to the Client of any such Outage period at least 72 hours prior to its commencement.

Accordingly the following will not be a “Maintenance Period”:

- (i) any Outage caused by work or actions by the Service Provider or any third party which is not planned maintenance, configuration changes or upgrade of the Backup Service; or
- (ii) maintenance, configuration changes or upgrade which is not within the above limitations

“Non-excused Outage” any Outage in any calendar month which is not Excused Outage

“Order Form” an associated Order Form detailing the Fee(s) and Term for the Backup Service

“Outage” any period(s) during which the Backup Service is unavailable for use by the Client during any time that the Client is permitted by this Agreement to use it

“Retrieval” restoration and retrieval by Client of Data using the Backup Service, as detailed in Schedule 1

“Service Credits” the service credit sums payable or allowable to the Client referred to in Schedule 1 subject to the limits on such sums referred to in Schedule 1

“SLA” the Service Level Addendum set out in Schedule 3

“Service Provider Server” the computer hardware and software system/s and network/s owned by the Service Provider or supplied to it by a third party/ies and used by it to provide the Backup Service, and any other ancillary functions (but not including the Service Provider Software)

“Service Provider Software” the personal computer desktop software, media, associated documentation, manuals and other information, and any updates and supplements to them, supplied by the Service Provider for use by the Client in accordance with the Licence to enable it to access related internet services for the purpose of it using the Backup Service

“Term”	an initial period as detailed in any associated Order Form and thereafter, unless and until terminated by either party in accordance with the provisions of the Agreement
"Website"	the Service Provider’s access to which is made available to organisations and the general public via the internet from which the Client may download the Service Provider Software

1.2. Unless the context otherwise requires, any reference in this Agreement to:

- 1.2.1. “writing”, and any similar expression, includes any communication effected by electronic or facsimile transmission or similar means;
- 1.2.2. a statute or a provision of a statute is to that statute or provision as amended or re-enacted at the relevant time;
- 1.2.3. “this Agreement” is to this Agreement and each of the Schedules as amended or supplemented at the relevant time, and a Schedule is a schedule to this Agreement;
- 1.2.4. a Clause or paragraph is to a Clause of this Agreement (other than the Schedules) or a paragraph of the relevant Schedule; and
- 1.2.5. a "party" or the "parties" is to the parties to this Agreement.

1.3. In this Agreement:

- 1.3.1. The headings are for convenience only and have no effect upon the interpretation of this Agreement;
- 1.3.2. Words imparting the singular number include the plural and vice versa;
- 1.3.3. A reference to one gender includes a reference to the other genders;
- 1.3.4. A reference to a person includes a natural person, corporate or unincorporated body whether or not having separate legal personality); and
- 1.3.5. A reference to the Client or the Service Provider includes its respective employees and contractors.

2. Services

- 2.1. The Service Provider shall provide the Backup Service from the Commencement Date for the duration of the Term, as specified in, and subject, to all of the terms, conditions and other provisions of this Agreement. .
- 2.2. The use by the Client of the Backup Service shall be as specified and limited by, and subject to, all of the said terms, conditions and other provisions of this Agreement.
- 2.3. This Agreement does not include supply of any Additional Services but if the Client requests any Additional Services, the Service Provider shall use reasonable endeavours to offer such requested services on its then current standard terms and conditions.

3. Licence

- 3.1. The Service Provider Software may only be used by the Client as part of the Backup Service and under a licence of the Service Provider Software granted by the Service Provider (“Licence”).
- 3.2. Accordingly, the Service Provider hereby grants the Licence to the Client on and subject to the terms set out in Schedule 2 and all other applicable terms of this

Agreement.

4. Service Provider's obligations and responsibilities

The Service Provider:

- 4.1. shall provide the Backup Service with all reasonable skill and care;
- 4.2. shall provide the Backup Service to at least the same standard as is generally adopted by other commercial providers of similar services in the United Kingdom;
- 4.3. shall use all reasonable endeavours to maintain and make available the Backup Service;
- 4.4. without prejudice to Sub-Clauses 4.1 to 4.3, does not undertake or warrant that:
 - 4.4.1. Client's Data shall be transferred to it, or stored by it, entirely free from corruption, loss or damage, or that it will in its entirety be accessible or capable of retrieval by, or transferrable to, the Client, or that it will be inaccessible by third parties,
 - 4.4.2. the Service Provider Software will meet Client's requirements;
 - 4.4.3. the operation of the Service Provider Software will be uninterrupted or error-free; or
 - 4.4.4. the Backup Service, and in particular the Service Provider Server, will
 - 4.4.4.1. operate entirely error-free; or
 - 4.4.4.2. be available during any Excused Outage time.
- 4.5. shall not have any obligation or duty, and shall not bear any liability or responsibility, in relation to any of those matters which the Client expressly undertakes, warrants, or bears responsibility of, in this Agreement;
- 4.6. may enter into any agreement(s) with others to provide to such others similar services to the Backup Service; and
- 4.7. shall be entitled to make any changes to the Backup Service from time to time, subject to the provisions of Clause 12.2.2.

5. Client's obligations and responsibilities

In relation to this Agreement and use of and access to the Backup Service:

- 5.1. the Client undertakes to Service Provider to:
 - 5.1.1. not transmit, store, receive, upload, download, use, or re-use any Data or other material that, in any jurisdiction, does or may infringe the Intellectual Property or other rights of third parties, or is illegal, tortious, defamatory, libellous, or breaches another's confidentiality or privacy rights, or is abusive, indecent, defamatory, criminally obscene or threatening, or is otherwise unlawful;
 - 5.1.2. not transmit to Service Provider for storage by Service Provider any personal or other data of another party without first obtaining any consent of that party required by law to be obtained for that purpose;
 - 5.1.3. comply with the Data Protection Act 1998;
 - 5.1.4. not knowingly Backup, or store or transmit, any material that contains software viruses or any other harmful programs, code, files or programs, such as trojan horses, worms or time bombs;

- 5.1.5. comply with all such laws and regulations as are applicable to Client's transmission, storage, and retrieval of Data using the Backup Service;
 - 5.1.6. not use the Backup Service for any purposes or in any way which in any jurisdiction is illegal or fraudulent or has any unlawful effect;
 - 5.1.7. comply with the Service Provider's guidelines, policies, procedures, arrangements and any instructions issued from time to time by the Service Provider placed on the Website;
 - 5.1.8. not to interfere with, disrupt, or attempt to gain unauthorized access to, computer systems, servers or networks connected to the Backup Service;
 - 5.1.9. not attempt to gain unauthorized access to the Backup Service or the accounts of other clients of the Service Provider who use similar services provided by the Service Provider; and
 - 5.1.10. fulfil all other Client obligations and responsibilities set out in this Agreement in a timely and efficient manner.
- 5.2. the Client assumes the sole responsibility for:
- 5.2.1. selecting the Backup Service and deciding whether it meets its business needs;
 - 5.2.2. completing the process of downloading, installing and activating the Service Provider Software and initial activation of the Backup Service using the Service Provider Software;
 - 5.2.3. Backing-up its Data whenever it requires a Backup of it;
 - 5.2.4. using a Client Computer suitable for the purpose of using the Backup Service;
 - 5.2.5. establishing and maintaining all telecommunications, internet and computer equipment, software, data, storage media, arrangements, services, facilities and resources (including, but not limited to, telecoms links, power, modem, router, cabling, switches, firewall) necessary for the purpose of using the Backup Service;
 - 5.2.6. implementing Client's own internal policies and procedures for opening potentially dangerous attachments (and is encouraged to install antivirus software on all access points or computers);
 - 5.2.7. the consequences to the Client and to Service Provider Server storage devices and media of the Client transmitting Data containing any virus or malicious code;
 - 5.2.8. loss or corruption of or damage to Data unless due to any breach of any of the Service Provider's obligations under this Agreement;
 - 5.2.9. the supply, operation, control and support of all necessary resources not included within the Backup Service;
 - 5.2.10. Encryption Key received or obtained by Client;
 - 5.2.11. all security arrangements necessary and appropriate to Client's use of the Backup Service including, without limitation, passwords, pass codes, audit controls, operating methods and procedures;
 - 5.2.12. all results it obtains from the Backup Service;
 - 5.2.13. the integrity and the suitability of the Data that is to be Backed up and is to be restored by Client unless the defect in the integrity or the suitability of the Data is due to any breach of any of the Service Provider's obligations under this Agreement; and

5.2.14. its use of the Service Provider Software unless any failure of the Service Provider Software or adverse consequence of such use is due to any breach of any of the Service Provider's obligations under this Agreement.

6. Charges and payment

- 6.1. The Client shall pay the Fee's set out in any associated Order Form monthly in arrears for that period. The Fee shall be in consideration for the provision and use of Backup, Retrieval and the Licence.
- 6.2. All Fee amounts and other amounts stated or referred to in this Agreement are exclusive of Value Added Tax, which shall be added to the Service Providers invoice(s) at the appropriate rate.
- 6.3. The Service Provider will issue invoices monthly in arrears for the Fee set out in any associated order form, based on actual usage for that period.
- 6.4. Each invoice will be due and payable by the Payment Term as specified on the invoice. If payment is not made with the Payment Term, or in the case where payment is made by Direct Debit the Direct Debit request is rejected, and without prejudice to any other rights or remedies of the Service Provider:
 - 6.4.1. the Service Provider may terminate or temporarily suspend provision of the Backup Service while the invoice concerned remains unpaid; and
 - 6.4.2. the Client shall pay interest on demand on the overdue amount at the rate of 4% per annum above Barclay's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Client shall pay the interest together with the overdue amount.
- 6.5. The Service Provider may, subject to the provisions of Clause 12.2.2, from time to time increase the Fee with effect from any anniversary of the Commencement Date on not less than 30 days' prior notice provided that the percentage of that increase over the then current rate of Fee is no more than the percentage increase of the Retail Prices Index for the twelve month period up to that anniversary.

7. Personal Data

- 7.1. The Client warrants and undertakes that in connection with the Backup Service:
 - 7.1.1. all personal data and other data used by the Client or disclosed or transmitted by it to the Service Provider will be properly in the possession of, and properly disclosed and transmitted by the Client; and
 - 7.1.2. at all appropriate or material times it will maintain and have maintained a registration under the Data Protection Act 1998 as the same may be varied and amended from time to time.
- 7.2. The Client (but not the Service Provider) shall, in using the Services and in relation to any personal data processed by the Client, operate as both data controller and data processor and, accordingly, the Client shall ensure that its processing of personal data complies with the Data Protection Act 1998 and that it is entitled to transfer the relevant personal data to the Service Provider so that the Service Provider may lawfully store and deal with such personal data in accordance with this Agreement.
- 7.3. In so far as the Service Provider processes any Data which is personal data, it shall process such personal data only in accordance with the Data Protection Act 1998, the terms of this Agreement and any lawful instructions reasonably given by the Client from time to time.
- 7.4. Each party shall take appropriate technical and organisational measures against unauthorised or unlawful processing of the personal data or its accidental loss,

destruction or damage.

8. Confidentiality

8.1. Each party may receive or obtain Confidential Information of the other party from that other party under this Agreement. Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make that other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement, or divulge the other's Confidential Information to any of its employees who do not need to know it. Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.

9. Indemnity by Client to Service Provider

9.1. Subject to Clause 10.3, the Client undertakes to defend and indemnify the Service Provider against and hold it harmless from any third party claims, actions, and proceedings, and all losses, damages, expenses and costs (including without limitation legal costs) associated therewith, where any of the same arise out of or in connection with either the Client's use of or access to the Backup Service, or possession of Data by the Service Provider pursuant to this Agreement, or any breach by the Client of any warranty, undertaking or other terms or conditions of this Agreement, unless, and to the extent that, the same arise from any breach of any of the Service Provider's obligations under this Agreement.

10. Service Provider Warranty and Indemnity

10.1. Subject to Clauses 4 and 5, the Service Provider warrants that the Service Provider Software will during the Term perform substantially in accordance with its specification as described in the manual provided with the Service Provider Software provided that it is properly used on the Client Computer and with the operating system for which it was designed.

10.2. If the Client notifies the Service Provider of significant errors or defects in the Service Provider Software during the warranty period (being ninety (90) days from the date upon which the Service Provider Software or any part thereof is first supplied to the Client), the Service Provider will repair or replace the Service Provider Software within a reasonable time or (at its sole discretion) provide or authorise a refund of any Fee previously paid by the Client. This will be the Client's sole remedy for any breach of Clause 10.1 or for any errors or defects in the Service Provider Software or its operation.

10.3. Service Provider undertakes that it has good title to or a right to licence the Service Provider Software and further undertakes to indemnify Client against any claims by third parties of infringement of Intellectual Property arising out Client's use of, or Service Provider's provision of, the Backup Service to the Client, provided that Service Provider shall have no liability to indemnify Client if the alleged infringement is attributable either to modification by anyone other than Service Provider of any of the Service Provider Software or to Client's use of Service Provider Software contrary to any instructions given by Service Provider.

11. Liability

11.1. The Client accepts that the level of the Fee takes fully into account the limits of the Service Provider's entire financial liability (set out below) for the Backup Service, the Client's use of it, and for anything else in connection with this Agreement.

- 11.2. The Service Provider will be liable to the Client for Service Credits (as set out in Schedule 1) for any and all Non-excused Outage in any calendar month, but the Service Provider will have no further financial liability to the Client for any or all Non-excused Outage in that calendar month. The Client accordingly accepts Service Credits as its exclusive remedy available for any and all Non-excused Outage.
- 11.3. Occurrence of any Excused Outage is not within the scope of the Backup Service and accordingly the Service Provider will not have any financial or other liability for any Excused Outage.
- 11.4. Except as expressly set out in this Agreement the Service Provider gives no warranties or guarantees and makes no representations concerning the Backup Service, and all such warranties, guarantees, representations, and all conditions and any other terms whatsoever implied by statute or otherwise, are hereby excluded from this Agreement to the fullest extent permitted by applicable law.
- 11.5. Nothing in this Agreement limits or excludes the liability of the Service Provider for:
- 11.5.1. death or personal injury caused by the Service Provider's negligence; or
 - 11.5.2. direct damage to property caused either by any breach of this Agreement by, or negligence of, the Service Provider limited to £500,000 for any one event or series of events; or
 - 11.5.3. fraud or fraudulent misrepresentation.
- 11.6. Subject to clause 11.5, the Service Provider hereby excludes all liability, whether in contract, tort (including for negligence or breach of statutory duty), or for negligent or innocent misrepresentation, or otherwise, for:
- 11.6.1. loss of business, revenue or profits, loss of anticipated savings, loss or corruption of or damage to data, in each case whether it is direct, special, or indirect or consequential loss or damage; and
 - 11.6.2. any other special, indirect or consequential loss, damage, cost or expense.
- 11.7. Subject to Clause 11.5, any liability of the Service Provider for breach of this Agreement (excluding liability under the indemnity at clause 10.3) or tort (including negligence or breach of statutory duty), or for negligent or innocent misrepresentation, or otherwise in connection with this Agreement, shall be limited in the aggregate to the total amount paid by the Client for the Backup Service during the 12 month period up to the date the liability arose.
- 11.8. The limitations and exclusions in this clause 11 are cumulative.

12. Period and termination of Agreement

- 12.1. This Agreement shall come into force on the Commencement Date, and shall continue from that date for the Term unless and until either party gives at least 30 days' prior notice expiring either at the end of the first initial period of the Term or on any anniversary of the end of that initial period, subject to the provisions in this clause.
- 12.2. Without affecting any other right or remedy available to either party under this Agreement or at law or any accrued rights or liabilities of either party:
- 12.2.1. the Service Provider may terminate this Agreement with immediate effect by giving written notice if the Client fails by the due date for payment to pay any sums due under this Agreement;
 - 12.2.2. if the Service Provider notifies the Client pursuant to clause 4.7 of a change to the Backup Service that would materially and adversely affect the Client's use of the Backup Service for business continuity purposes, or if the Service Provider

notifies the Client pursuant to clause 6.5 of any increase of the Fee, the Client may at any time within 30 days after the date of the Service Provider's notice elect to terminate this Agreement with immediate effect;

12.2.3. either party may terminate this Agreement with immediate effect by giving written notice to the other party if the other party:

12.2.3.1. commits a material or continuing breach of any of its obligations under this Agreement and fails to remedy the breach (if it is capable of remedy) within 30 days after written notice; or

12.2.3.2. has not for a continuous period of 30 days been able to perform its obligations as a result of Force Majeure; or

12.2.3.3. is generally unable to pay its debts within the meaning of section 123 or Section 268 of the Insolvency Act 1986; or

12.2.3.4. is involved in any legal proceedings concerning its solvency, or ceases trading, or commits an act of bankruptcy or is adjudicated bankrupt or enters into liquidation, whether compulsory or voluntary, other than for the purposes of an amalgamation or reconstruction, or makes an arrangement with its creditors or petitions for an administration order or if a trustee, receiver, administrative receiver or general officer is appointed over all or any part of its assets.

12.3. On any termination of this Agreement, the Client shall cease to use and shall delete/return to the Service Provider all property of the Service Provider, and, unless the parties have previously agreed otherwise, the Service Provider may, without notice to the Client, delete or dispose of the Client's Data or other items in its possession without thereby incurring any liability for loss or damage for doing so.

13. Waiver and rights and remedies

13.1. No failure or delay by a party to enforce its rights will prejudice or restrict its rights. No waiver of any such rights or of any breach of any contractual terms will be deemed to be a waiver of any other right or of any later breach.

14. Force majeure

14.1. Subject to Clause 12.2.3.2, no party shall be liable for any failure or delay in performing its obligations where such failure or delay results from Force Majeure. Where Force Majeure occurs, the affected party shall be entitled to a reasonable extension of time for performing those obligations.

15. Severance

15.1. In the event that one or more of the provisions of this Agreement is found to be unlawful, invalid or otherwise unenforceable, that/those provision(s) shall be deemed severed from the remainder of this Agreement. The remainder of this Agreement shall be valid and enforceable.

16. Assignment

16.1. This Agreement is personal to the parties.

16.2. The Client's right to use the Backup Service is personal to it, and it agrees not to make available to any other person or to resell or make any commercial use of the Backup Service.

- 16.3. Neither party may assign, mortgage, charge (otherwise than by floating charge) or sub-licence or otherwise delegate any of its rights hereunder, or sub-contract or otherwise delegate any of its obligations hereunder without the written consent of the other party, such consent not to be unreasonably withheld.

17. Third party rights

- 17.1. No part of this Agreement is intended to confer rights on any third parties and accordingly the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement.

18. No partnership or agency

- 18.1. Nothing in this Agreement shall constitute or be deemed to constitute a partnership, joint venture, agency, or other fiduciary relationship between the parties other than the contractual relationship expressly provided for in this Agreement.

19. Notices

- 19.1. All notices under this Agreement shall be in writing and be deemed duly given if signed by, or on behalf of, a duly authorised officer of the party giving the notice.
- 19.2. Notices shall be deemed to have been duly given:
- 19.2.1. when delivered, if delivered by courier or other messenger (including registered mail) during normal business hours of the recipient; or
 - 19.2.2. when sent, if transmitted by e-mail and a successful transmission return receipt is generated; or
 - 19.2.3. on the fifth business day following mailing, if mailed by national ordinary mail, postage prepaid.
 - 19.2.4. In each case notices shall be addressed to the most recent address or e-mail address, notified to the other party.

20. Dispute Resolution (Arbitration)

- 20.1. The parties shall attempt to resolve any dispute arising out of or relating to this Agreement through negotiations between their appointed representatives who have the authority to settle such disputes.
- 20.2. If negotiations under sub-Clause 20.1 do not resolve the matter within 21 days of receipt of a written invitation to negotiate, the parties will attempt to resolve the dispute in good faith through an agreed Alternative Dispute Resolution ("ADR") procedure.
- 20.3. If the ADR procedure under sub-Clause 20.2 does not resolve the matter within 28 days of the initiation of that procedure, or if either party will not participate in the ADR procedure, the dispute may be referred to arbitration by either party.
- 20.4. The seat of the arbitration under sub-Clause 20.3 shall be England and Wales. The arbitration shall be governed by the Arbitration Act 1996 and Rules for Arbitration as agreed between the parties. In the event that the parties are unable to agree on the arbitrator(s) or the Rules for Arbitration, either party may, upon giving written notice to the other party, apply to the President or Deputy President for the time being of the Chartered Institute of Arbitrators for the appointment of an arbitrator or arbitrators and for any decision on rules that may be required.
- 20.5. Nothing in this Clause 20 shall prohibit either party or its affiliates from applying to a court for interim injunctive relief.

20.6. The parties hereby agree that the decision and outcome of the final method of dispute resolution under this Clause 20 shall not be final and binding on both parties.

21. Entire Agreement

21.1. This Agreement contains the entire agreement and understanding between the parties, and supersedes any previous agreement between them with respect to its subject matter and it may not be modified except by an instrument in writing signed by the duly authorised representatives of the parties.

21.2. Each party acknowledges that in entering this Agreement, it does not rely on any representation, warranty, assurance or other provision (made innocently or negligently) except as expressly provided in this Agreement except if made or given fraudulently.

21.3. Except as expressly provided in this Agreement, the rights and remedies provided under this Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

21.4. The express terms of this Agreement are in lieu of all warranties, conditions, undertakings, terms and obligations implied by statute, common law, trade usage, course of dealing or otherwise all of which are hereby excluded to the fullest extent permitted by law.

22. Governing law and jurisdiction

22.1. This Agreement (including any non-contractual matters and obligations arising therefrom or associated therewith) shall be governed by, and construed in accordance with, the laws of England and Wales.

22.2. Subject to the provisions of Clause 21 (dispute resolution), any dispute, controversy, proceedings or claim between the parties relating to this Agreement (including any non-contractual matters and obligations arising therefrom or associated therewith) shall fall within the jurisdiction of the courts of England and Wales.

Schedule 1

The Backup Service

The Backup Service provided by Service Provider comprises the following offsite backup, storage, restoration and retrieval of data services and facilities, subject both to the terms of the Licence of the Service Provider Software set out in Schedule 2:

1. The Backup Service provides the capability during the Term to store Data on Service Provider Server and Retrieval of that Data from the Service Provider Server. The Service Provider Server stores two separate copies of Data. For additional data security, the secondary copy is stored on a separate server at a different physical location from the server storing the primary copy.
2. The Backup Service operates via the internet using an internet control product comprising the Service Provider Software installed on one or more Client Computers which interact with the Service Provider Server. The Service Provider Software on Client Computers connect to a server network infrastructure that is deployed on the internet and managed by Service Provider.
3. Client's Backup of Data which the Client wishes to be Backed up will be effected by the Service Provider Server which will make and store a copy of that Data when the Service Provider Server is accessed by the Client by means of the Service Provider Software and the Client effects a Backup of that Data. The Data which will be Backed up on the first and each subsequent occasion that the Customer conducts a Backup will be configured by the
4. The Backup Service will be operational and available to Client 100% of the time in each calendar month less any Excused Outage in that month. (The first calendar month begins on the Commencement Date.) The Service Provider has no obligation to make the Backup Service available during the period of any Excused Outage.
5. If there is any Non-excused Outage in any calendar month, Service Provider will allow or pay to Client Service Credit sums calculated as set out in paragraph 7 below for that Non-excused Outage, subject to the following limits for Service Credit sums for Non-excused Outage:
 - 5.1 the total of Service Credit sums for any calendar month will not exceed the Maximum Monthly Service Credit Amount. The Maximum Monthly Service Credit Amount shall be £250.00; and
 - 5.2 the total of all Service Credit sums for each succeeding period of 12 calendar months (the first of which begins on the Commencement Date) will not exceed the Maximum Annual Service Credit Amount. The Maximum Annual Service Credit Amount shall be £2,000.00.
6. Subject to paragraph 6 above, if on any day (midnight to midnight) in any calendar month there is/are any period/s of Non-excused Outage cumulatively exceeding 1 hour, the Service Credit sum for that day shall be 2 times the portion of the Fee payable by Client for that day. For this purpose the portion of the Fee deemed to be payable for any day is deemed to be one 30th of the total Fee payable for the month period in which that day falls.
7. Subject to any limits on times or days set out in the Specification:
 - 7.1 Backups, and storage of the Data on the Service Provider Server, are selected and scheduled in advance by Client using the Service Provider Software such that the Backup is then run automatically by the Service Provider Software on the days and at the times scheduled; and
 - 7.2 A Retrieval is performed manually by Client as and when Client has a need for

it. It is not pre-scheduled or initiated or run automatically. It is subject to the limitations on scope and other limits set out in the Specification. Retrieval is effected by using the Service Provider Software to initiate transmission of Data from the Service Provider Server to a Client Computer.

8. Service Provider is not responsible for:
 - 8.1 either loss of data or absence of backup of it occurring between each Backup; or
 - 8.2 Client's deletion or failure to store data; or
 - 8.3 delay in or failure of any Backup or Retrieval due to any factors, equipment, facilities, or services which are not provided or managed by the Service Provider or for which it is not responsible, including slow transmission speed, transmission failure or defect, inadequate transmission size or capacity, route of internet connection, and instability or failure of internet connection.
9. Service Provider does not monitor use of the Backup Service, content of Data, or Client Data transmission or storage and Service Provider is a mere conduit. Client accordingly is solely responsible in relation to Data (including without limitation Data licensing, integrity, content, dissemination, format, Backup scheduling and transfers).

Schedule 2

The following shall apply in conjunction with all other terms of the Agreement

The following are the terms of the Licence of the Service Provider Software:

1. The Licence is non-exclusive.
2. At all times, all Intellectual Property in the Service Provider Software is vested in and controlled solely by Service Provider and/or its licensors, and ownership of all Service Provider Software and copies thereof shall be exclusively retained by Service Provider. Client acknowledges and agrees that save as expressly set out in this Agreement it will not have any right, title, or interest in the Service Provider Software or the Intellectual Property in it.
3. Save as expressly set out in this Agreement, Client may not use or access the Service Provider Software, or copy or modify it in any way, without the express written permission of Service Provider.
4. Client is permitted, solely for the purpose of and in connection with carrying out Backups and Retrievals as expressly set out in this Agreement to do the following (“the Permitted Use”):
 - 4.1. download multiple copies of the Service Provider Software from the Website;
 - 4.2. save the Service Provider Software on an unlimited number of Client Computers which are under Client’s control and use it only on Client Computers, subject to paragraph 4.3 below;
 - 4.3. make a backup copy of the Service Provider Software for its own Backup purposes. That backup copy must be a complete copy and must not contain any change to the original. Any copyright notice of the Service Provider or third party included in the software, manuals or other material comprising the Service Provider Software must be included unchanged in the backup copy of the same;
 - 4.4. use the manuals, documentation and other information which are part of the Service Provider Software; and
 - 4.5. use the Service Provider Software only for lawful purposes.
5. Client is not permitted to:
 - 5.1. do any of the following to or in relation to the whole or any part of the Service Provider Software:
 - 5.1.1. rent, lease, sub-licence, loan, copy (except as expressly provided in this Agreement), modify, adapt, merge, or translate it; or
 - 5.1.2. decompile, disassemble, or otherwise reverse engineer it except, in relation to the purposes of this Agreement, as may be permitted by the Copyright, Designs and Patents Act 1988; or
 - 5.1.3. create derivative works from it;
 - 5.2. except as expressly provided in this Agreement, use, reproduce, or deal in the Service Provider Software in any way;

- 5.3. transfer any of the Service Provider Software and/or the Licence to any other person whether on a permanent or temporary basis. If Client transfers possession of any copy of the Service Provider Software to another person, the Licence will automatically terminate without prejudice to any other rights and remedies Service Provider may have in respect of such unauthorised use;
- 5.4. use the Service Provider Software on a Client Computer on which there is a computer virus of any type regardless of whether the virus is capable of causing any damage;
or
- 5.5. do, authorise, or permit anything in relation to the Service Provider Software which is outside the Permitted Use.
6. Any and all rights in relation to the Service Provider Software not expressly granted in accordance with the terms of this Agreement are hereby reserved to Service Provider.
7. The Licence shall commence upon the Commencement Date and shall continue until the termination of the Term in accordance with the terms of the Agreement or in any other manner.
8. Upon termination of the Licence (by whatever means) Client will destroy all of the Service Provider Software, including any electronic copies stored on any Client Computer under its control.
9. In the event that Client loses its Encryption Key neither Client nor Service Provider will be able to access Client's Data stored by the Backup Service. Service Provider will not be liable in any way for any loss or damages arising out of Client's loss of the Encryption Key.

Schedule 3
Service Level Addendum

1 Problem Reporting

The Client may request technical support from the Supplier by the following means:

- (a) by e-mail

2 Supplier's Contacts

E-mail: support@assurestor.com

3 Normal Support Hours

Normal Support Hours are 0900hrs to 1700hrs (UK local time) Mondays to Fridays excluding English Bank and Public Holidays.

4 Problem Categories

Problems will be categorised as set out in the table below by the Supplier in its reasonable opinion at the time each Problem is reported. The Supplier may subsequently change the priority of such a Problem if it is reasonable to do so in the circumstances.

Problem Category	Problem Description
Critical	A Problem affecting a complete Service such as a full outage or a complete outage or disaster event (where the service provides DR support) at the Client's site
High Priority	A Problem that results in an interruption to a Service such as a failed snapshot or backup or issues with any core component of the service
Standard	a Problem or query that does not interfere with a Service such as a request for a repeat invoice or assistance with reviewing systems and backup sets.

5 Acknowledgement Times

- 5.1 Once the Client's Problem has been received by the Supplier then the Supplier shall send acknowledgement to Client as follows:

Reporting Method	Problem Category	Acknowledgement Time
E-mail	Critical	1 working hours
	High Priority	2 working hours
	Standard	8 working hours

Note that the speed of e-mail communications is dependent on the integrity and performance of the Internet and related networks.

- 5.2 The Client must clearly state the subject of the e-mail to begin with 'Critical' if it believes the Problem to be such.
- 5.3 When acknowledging the Problem the Supplier shall ascribe an incident number to the said Problem and the Client must quote such incident number in all related communications thereafter.

6 Response Times

The Supplier shall provide a resolution, workaround or plan to provide either of the foregoing within the following times-scales:

Problem Category	Response Time
Critical	4 working hours
High Priority	16 working hours
Standard	2 weeks

7 Progress Reports

The Supplier will provide the Client with regular updates on the status of a Problem at a frequency to be agreed with the Client at the time except that for a Critical the Supplier shall provide such every two hours.