

## SECTION A - TERMS AND CONDITIONS

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### TERMS AND CONDITIONS

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## 1. Definitions and Interpretation

1.1 The definitions and rules of interpretation set out in Schedule 1 (Definitions and Interpretation) apply to the Contract.

## 2. KCS Obligations

2.1 KCS' obligations to provide the Customer with the Products and Services in consideration of the Charges shall be subject to the Contract Terms.

2.2 KCS shall use reasonable efforts to supply the Products and/or Services (including any Deliverables) to the Customer in accordance with any dates specified in the Quotation or otherwise agreed in writing by the parties, but any such dates shall be estimates only. Any delay in the delivery of the Products and/or Services (including any Deliverables) shall not entitle the Customer to:

- (a) any refund of or discount to the Charges for the Products and/or Services
- (b) refuse to take delivery of the Products and/or Deliverables;
- (c) claim damages; or
- (d) terminate the Contract or the supply of the Products and/or Services.

2.3 KCS shall use reasonable efforts to ensure that, while on the Customer Premises, KCS Personnel who enter such premises with the authority of KCS for the purpose of, or in connection with, the Contract, adhere to the Customer's reasonable security procedures and health and safety regulations, as are brought to the notice of KCS Personnel by the Customer before the Contract Date. To the extent any such procedures and regulations conflict with the Contract Terms, the Contract Terms shall prevail. The Customer may, acting reasonably, remove or refuse admission to any person who is, or has been, in material breach of such procedures and regulations on providing KCS with notice and competent evidence of such material breach.

2.4 KCS shall, when accessing the Customer Systems, comply with the Customer's reasonable security requirements as are notified to and agreed by KCS before the Contract Date.

2.5 For certainty, in connection with the qualification of KCS employees, contractors and agents and any KCS Affiliates employees, contractors and agents as business visitors under the North American Free Trade Agreement, as amended, and Canadian immigration law, Customer acknowledges and agrees that pursuant to or in connection with this Agreement, Customer will or may receive Services after the Contract Date for the provision at your location or elsewhere in Canada of after-sales repair, service, implementation, training, project, professional services, research and development, maintenance support or other services, all subject to the terms of this Agreement and any Quotation, Service Level Agreement, or statements of work hereunder.

## 3. Customer Obligations

3.1 The Customer shall, at its own expense:

- (a) co-operate and collaborate with KCS to enable KCS to carry out its obligations under the Contract;
- (b) promptly provide KCS with any information and data and provide such personnel assistance, as KCS may reasonably require from time to time to enable KCS to carry out its obligations under the Contract;

(c) provide KCS Personnel with access during KCS' Normal Working Hours to the Customer Premises, together with adequate free working space and such other facilities including all suitable computer hardware, software, cabling, equipment and power and telecommunications, as is necessary for KCS to comply with its obligations under the Contract;

(d) provide KCS with remote and direct access to the Customer Systems as is necessary for KCS to carry out its obligations and exercise its rights under the Contract;

(e) comply with (and not do anything which would cause KCS to breach) all applicable laws, statutes, regulations and codes in force from time to time;

(f) comply with the Mandatory Policies;

(g) inform KCS in writing of all health and safety rules and regulations and any other reasonable security requirements that apply to the Customer's Premises as soon as reasonably practicable and in any event before the Contract Date;

(h) keep full and up to date back-up and security copies of the data processed through use of the Software, unless KCS is contracted to provide such a service to the Customer;

(i) promptly obtain, maintain and provide to KCS all required consents, licenses, permits and approvals necessary for KCS and KCS Personnel to access, use and/or modify (including creating derivative works) the Customer's or a third party's software, hardware, firmware and other products provided by and used by the Customer, KCS or KCS Personnel in the receipt or provision of the Services without infringing the ownership or license rights (including Intellectual Property Rights) of the providers or owners of such products; and

(j) comply with its obligations in the Contract including the terms of the Quotation, these Terms and Conditions and the Additional Applicable Terms.

3.2 The Customer accepts responsibility for the selection of the Products and Services to achieve the intended results and acknowledges that the Products have not been developed to meet the individual requirements of the Customer.

3.3 The Customer shall ensure that the Customer Systems are in good working order, suitable for the purposes for which they are used and conform to all relevant federal, state and local standards or requirements and accepts responsibility for any failure in the performance of KCS' obligations to the extent that the Customer Systems do not meet or exceed any specific specifications specified by KCS from time to time.

3.4 Except as expressly and specifically provided in the Contract, the Customer assumes sole responsibility for results obtained from the use of the Products and Services by the Customer and for conclusions drawn from such use.

## 4. Charges and Payment

4.1 The Charges for the Products and Services shall be as specified in the Quotation or calculated in accordance with the Quotation and these Terms and Conditions. KCS shall be entitled to require the payment of a deposit, in respect of any of the Products and/or Services. The Charges are exclusive of the costs of packaging, insurance, carriage and installation which shall be paid by the Customer.

4.2 The Customer shall pay the Charges in accordance with the Payment Terms and these Terms and Conditions.

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- 4.3** All Charges are exclusive of sales and use taxes, value added tax (VAT) and any other applicable taxes, which, if applicable will be paid by the Customer in addition to the Charges at the rates for the time being prescribed by law, at the same time as payment is due for the Charges.
- 4.4** Unless specified otherwise in the Quotation or in writing by KCS, the Services shall be provided on the basis of the KCS Rates. Where the Services are provided on the basis of the KCS Rates:
- (a) the Charges payable for the Services shall be calculated in accordance with the KCS Rates;
  - (b) the KCS Rates are calculated on the basis of a six (6) hour working day on weekdays (excluding weekends and public holidays);
  - (c) if a task is completed in less than six (6) hours, the full day rate will be charged;
  - (d) KCS reserves the right to levy an additional charge for a working day that exceeds six (6) hours at KCS' applicable prevailing hourly rate; and
  - (e) rates will be quoted separately on request for work on weekends and public holidays.
- 4.5** Services provided are exclusive of expenses incurred by KCS Personnel including travelling expenses, hotel costs, subsistence and any associated expenses ("Expenses"), which KCS shall be entitled to charge to the Customer in accordance with its standard expenses policy which is available on request.
- 4.6** KCS will invoice the Customer the Charges in accordance with the Payment Terms together with any sales and use, VAT and other taxes due in respect thereof. The Customer shall pay each invoice submitted by KCS within 30 (thirty) days of the date of the invoice (or as otherwise expressly provided in the Payment Terms or the Quotation) in full and cleared funds by wire transfer to KCS' bank account specified in the Quotation or otherwise specified in writing by KCS from time to time.
- 4.7** If the Customer disputes the correctness of any amount invoiced, it shall notify KCS of its reasons for disputing the invoice as soon as reasonably practicable and in any event within thirty (30) days of the invoice date and may withhold payment of the disputed sum. If the dispute relates to part of an invoice, the Customer shall pay the undisputed sum in accordance with this Clause 4.
- 4.8** If KCS disputes that the Customer is entitled to withhold payment of the disputed sum, KCS may refer the matter for resolution in accordance with the Dispute Resolution Procedure. KCS shall be entitled to any additional amounts which the Dispute Resolution Procedure determines are due to KCS.
- 4.9** The Customer irrevocably authorizes KCS to apply any payment received from the Customer against any part of any outstanding sums due and payable by the Customer to KCS, as KCS may elect.
- 4.10** The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding (except for any deduction or withholding required by law or as permitted in accordance with Clause 4.7). KCS may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it by the Customer against any amount payable by KCS to the Customer under the Contract or any other agreement between the parties.
- 4.11** Without prejudice to KCS' other rights and remedies:
- (a) if the Customer fails to pay any amounts payable under the Contract by the due date, KCS reserves the right to charge interest on the overdue amount at the prime rate as listed in the Wall Street Journal on the first day of the month plus 4 %. Such interest will accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment (except that KCS shall not be entitled to charge interest on late payments disputed and withheld by the Customer in accordance with this Clause 4, unless the amount not paid is subsequently determined in accordance with the Dispute Resolution Procedure to be validly due to KCS);
  - (b) in the event of late or non-payment by the Customer; (i) Customer's license to use and access KCS Software provided on a SaaS and/or Subscription License basis is terminated; and (ii) KCS may immediately upon notice to the Customer suspend the performance of all or any of its Services obligations under the Contract and such termination of the Customer's license and or suspension of KCS Services may remain in force until all overdue payments, including interest, are received by KCS in full; and
  - (c) where the Customer interrupts, delays, requests to postpone or cancels a booking for, the provision of any Services which consist of the provision of KCS Personnel or third party resources, on less than twenty-one (21) days' notice prior to the agreed start date for the provision of the relevant Services, KCS shall be entitled to charge, on the basis of the KCS Rates, for the time allocated for the provision of such Services, and which it has not, in good faith, been able to resell to any other customer to mitigate its losses.
- 4.12** All sums payable to KCS under this Contract shall become due immediately on its termination, despite any other provision. This Clause is without prejudice to any right to claim interest or other remedy available under this Contract or at law or in equity. Furthermore, where the Quotation included Services charged on a time and materials basis and discounted from the KCS Rates, then on termination all such Services shall become chargeable at the standard non-discounted KCS Rates on a retroactive basis.
- 4.13** All Charges due and payable by the Customer on a periodic basis may be varied by KCS upon two (2) months' prior written notice to the Customer. Such variations will not take place more than once per calendar year. The Customer will be deemed to have accepted such variations unless the Customer gives written notice to the contrary to KCS not less than one (1) month before the new Charges come into effect, in which case the parties, acting reasonably, shall discuss the variations.

## 5. Confidentiality

- 5.1** Each party shall keep the Confidential Information of the other party strictly confidential and neither party shall disclose during or after the Term, without the other party's prior written consent, any Confidential Information belonging to the other party except as permitted by Clause 5.2.
- 5.2** The restrictions in this Clause shall not prevent the disclosure of Confidential Information:

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- (a) to the receiving party's employees, officers, representatives, advisers, suppliers, consultants or sub-contractors who need to know such information for the purposes of carrying out the receiving party's obligations or exercising its rights under this Contract, subject to the receiving party ensuring that its employees, officers, representatives, advisers, suppliers, consultants or sub-contractors to whom it discloses the disclosing party's Confidential Information are subject to an equivalent standard of obligations as set out in this Clause. The receiving party shall procure that any such employee, officer, representative, adviser, supplier, consultant or sub-contractor complies with such obligations and the receiving party shall be responsible to the disclosing party in respect of any disclosure or use of the disclosing party's Confidential Information by any such person to whom disclosure is made;
- (b) in the event that the disclosing party has consented to such disclosure in writing;
- (c) in the proper performance of KCS' obligations under this Contract;
- (d) which is in, or has become part of, the public domain other than as a result of any breach of this Contract;
- (e) which was in its written records prior to the date when the parties commenced discussions with a view to entering into the Contract and was not subject to any existing confidentiality obligations;
- (f) which was independently disclosed to it by a third party without breaching any obligation of confidence; or
- (g) if required under any applicable law, or by order of a court or governmental body or authority of competent jurisdiction; provided that to the extent legally permissible, the receiving party shall notify the disclosing party in writing of the requirement and cooperate with the disclosing party to challenge or limit such requirement or obtain protective treatment for the Confidential Information.

**5.3** Without prejudice to KCS' rights in Clause 7.4, neither party shall use the other party's Confidential Information for any purpose other than to exercise its rights under or perform its obligations under this Contract.

**5.4** The provisions of this Clause 5 will remain in full force and effect notwithstanding the expiry or termination of this Contract.

### 6. Data Protection

**6.1** In the event that KCS receives or has access to any personally identifiable information of any individual ("Customer Personal Data") in the course of KCS's performance under this Contract, KCS will implement and maintain appropriate administrative, technical, and physical safeguards and other security measures designed to: (A) ensure the security and confidentiality of such Customer Personal Data; (B) protect against any anticipated or reasonably likely threats or hazards to the security or integrity of such Customer Personal Data; (C) protect against any unauthorized access to or use, disclosure, processing or acquisition of such Customer Personal Data (hereinafter, an "Information Security Incident"); and (D) ensure the proper disposal of Customer Personal Data, all as required under applicable law. In the event of an Information Security Incident, KCS will promptly notify Customer and/or the persons affected in the Information Security Incident as required by applicable law.

**6.2** Notwithstanding the foregoing, if the parties mutually agree that in the course of KCS's performance under this Contract the EU Regulations apply the Data Protection Provisions set forth on Schedule 2 shall apply.

### 7. Intellectual Property Rights

**7.1** All Intellectual Property Rights in and to the Software, the Materials and the Deliverables and all Intellectual Property Rights in the Services and all materials connected with or developed or produced by or on behalf of KCS in the course of providing the Services are owned by or shall be owned by KCS or its licensors and this Contract shall not operate to assign any title, interest or Intellectual Property Rights in such Software, Materials, Deliverables or any other materials connected with or developed or produced by or on behalf of KCS in the course of providing the Services.

**7.2** KCS hereby grants to the Customer for the Term (or the provision of the relevant Service if shorter) a non-exclusive, revocable, royalty-free, non-transferrable license to use such of KCS' Intellectual Property Rights which are necessary for the Customer to enjoy the benefit of any Deliverables (excluding Software) in accordance with the Contract Terms.

**7.3** The Customer hereby grants to KCS for the Term (or the provision of the relevant Service if shorter) an irrevocable, non-transferrable (other than as set forth in Clause 19.7), non-exclusive, royalty-free license to use, copy, modify, improve, enhance and make derivative works of the Customer's Intellectual Property Rights solely to the extent necessary for KCS to comply with its obligations under this Contract.

**7.4** The Customer acknowledges that KCS is entitled to incorporate any Development into the KCS Software and use, distribute or license the use of or copying of any of the Software, the Materials and/or the Deliverables to any other party at any time.

**7.5** The Customer shall have no rights in or to the Software, the Materials, the Deliverables or other materials connected with or developed or produced by or on behalf of KCS in the course of providing the Services other than the right to use or receive the benefit of them in accordance with the Contract Terms.

**7.6** The Customer shall do, and execute or arrange for the doing and executing of, each necessary act, document and thing that KCS may consider necessary or desirable to perfect the right, title and interest of KCS in and to the Intellectual Property Rights in the Software, Materials, Deliverables and any other materials connected with or developed or produced by or on behalf of KCS in the course of providing the Services.

**7.7** The Customer shall not (and shall procure that its staff and contractors shall not) do anything or cause anything to be done which would prejudice KCS' Intellectual Property Rights in and to the Software, the Materials and the Deliverables.

**7.8** The Customer shall not remove, obscure or change any notice concerning Intellectual Property Rights in or on any of the Software, Materials or Deliverables or otherwise, including any statements concerning the confidential nature of the Software.

**7.9** The Customer acknowledges that KCS may require the limited use of certain Customer branding (and the Customer shall supply the same to KCS):

- (a) in order to be able to provide any Services in accordance with the Contract; and
- (b) for the purpose of marketing, subject to the Customer's consent (such consent not to be unreasonably withheld or delayed).

**7.10** To the extent the Customer supplies any trade marks, branding or logos to KCS for the purposes of Clause 7.9, the Customer warrants that it owns, or is licensed to use and sub-license to KCS for such purposes, any such trade marks, branding or logos.

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- 7.11** The Customer hereby grants KCS a non-exclusive, non-transferable (other than as set forth in Clause 19.7) and revocable license to use the Customer's name, logo and any trade marks or branding supplied by the Customer to KCS pursuant to Clause 7.9 for the duration of the term of the relevant Service for the purpose detailed in Clause 7.9(a) and where consent is given for the purpose detailed in Clause 7.9(b), for the duration of the Contract and thereafter.
- 7.12** KCS shall not acquire any goodwill or any rights, title or interest in or to the Customer's name, logo and any other trade marks and branding supplied by the Customer to KCS pursuant to Clause 7.9 and all such rights, title and interest shall vest in and remain with the Customer.
- ### 8. Warranties
- 8.1** KCS warrants that:
- (a) it has the requisite power and authority required by any relevant law or otherwise to enter into this Contract and to carry out its obligations under this Contract and that the execution and performance of this Contract has been duly authorized by the required corporate action by KCS;
  - (b) the Software (other than Oracle Software and Additional Third Party Software) shall conform to any applicable Product Description or V4 Specification in all material respects for a period of 90 days from the Contract Date ("Warranty Period"); and
  - (c) all Services will be performed using reasonable skill and care.
- 8.2** Except as otherwise expressly set forth herein, KCS makes no other warranties or representations, express or implied, with respect to the Software or Services, and any Additional Third Party Software or Hardware, and expressly disclaims all such warranties or representations, including without limitation, any representations that the Software or any Service will be of any particular quality or any warranties with respect to merchantability, fitness for a particular use or purpose, noninfringement or reliability. Without limiting the foregoing, KCS does not warrant that the use or operation of the Software or Services will be uninterrupted or error-free or that the Software or Services will meet Customer's requirements.
- 8.3** The Customer acknowledges that the only warranties in relation to the Oracle Software, Additional Third Party Software, Hardware or the supply thereof are those provided by the third party supplier(s) of the same for the Customer's benefit, and that to the extent that any of such warranties are given to KCS, it will use its reasonable efforts to pass on the benefit of such warranties to the Customer.
- 8.4** KCS shall not be liable for any Software's or Service's failure to comply with any warranty set out in Clause 8.1 if:
- (a) such failure occurs because the Customer failed to follow KCS' instructions (whether oral or written) for the storage, commissioning, installation, use or maintenance of the Software or (if there are none) good trade practice regarding the same;
  - (b) a defect occurs as a result of KCS following any design or specification supplied by the Customer;
  - (c) the Customer alters or repairs the Software without KCS' written consent;
  - (d) a defect occurs as a result of wilful damage, negligence, or abnormal storage or working conditions by or caused by the Customer;
  - (e) the failure results from a breach by the Customer of a term of this Contract; or
  - (f) the failure results from changes made to the Software or Services which, in KCS' reasonable opinion, are required to ensure they comply with applicable statutory or regulatory requirements.
- 8.5** Subject to Clause 8.4, if the Customer notifies KCS in writing during the Warranty Period of any failure of the Software to conform with any of the warranties in Clause 8.1, KCS shall, at KCS' option, do one of the following (which shall constitute the Customer's sole and exclusive remedy for any breach of such warranty):
- (a) repair the Software;
  - (b) replace the Software; or
  - (c) terminate the provision of the relevant Software (including any license) and related Services immediately by notice in writing to the Customer and refund any of the Charges for such Software and Services paid by the Customer as at the date of termination (less a reasonable sum in respect of the Customer's use of the Software and Services to the date of termination).
- 8.6** Subject to Clause 8.4, if the Services do not conform with the warranty in Clause 8.1(c), KCS shall, at its expense, use reasonable efforts to correct any such non-conformance promptly or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of such warranty.
- 8.7** The Customer hereby undertakes, warrants and represents to KCS that:
- (a) it has the requisite power and authority required by any relevant law or otherwise to enter into this Contract and to carry out its obligations under this Contract and that the execution and performance of this Contract has been duly authorized by the required corporate action by the Customer;
  - (b) the Customer Representatives and Senior Customer Representative have full capacity to carry out their functions and to exercise the powers and authorities delegated to them;
  - (c) it and its officers, employees, agents, contractors and representatives that shall do anything on its behalf, in relation to the selection of KCS as the supplier or the performance of its obligations under the Contract, have not taken, and will not take, in the name of, for the account of or on behalf of KCS any actions in furtherance of (and have not omitted to and will not omit to take any action preventing) any act or omission in each case, which constitutes a breach of any Anti-Corruption Legislation;
  - (d) it has the authority to grant any rights to be granted to KCS under this Contract, including the right to provide any and all software, hardware, information, data (including Customer Data) and other materials to KCS as indicated in the Contract and for the same to be used by KCS in the provision of the Services;
  - (e) it will comply with and use the Services in accordance with the Contract Terms and all applicable laws, and shall not do any act that shall infringe the rights of any third party including the publishing or transmission of any materials contrary to relevant laws;
  - (f) it will not do anything that causes KCS to breach any applicable laws; and

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- (g) KCS' use in the provision of the Services of any materials, including any hardware or software, supplied by the Customer to KCS for use in the provision of the Services or otherwise in connection with the Contract, shall not cause KCS to infringe the rights, including any Intellectual Property Rights, of any third party,

and the parties acknowledge and agree that any breach of this Clause 8.7 shall constitute a material breach of a term for the purposes of Clause 11.2(a).

### 9. Indemnities

**9.1** KCS shall defend, indemnify and hold harmless the Customer against any damages and costs awarded by a court and actually paid by the Customer, or agreed to in settlement by KCS, in respect of any claim or action that the possession or use of the Software (other than Oracle Software and Additional Third Party Software) by the Customer in accordance with the Contract Terms infringes the United States Intellectual Property Rights of a third party (an "IPR Claim"), provided that the Customer:

- (a) gives notice to KCS of an IPR Claim immediately upon becoming aware of the IPR Claim or potential IPR Claim;
- (b) gives KCS the sole control and conduct of the defence and all related settlement negotiations in respect of an IPR Claim and does not at any time admit liability or otherwise settle or compromise or attempt to settle or compromise an IPR Claim except in accordance with KCS' written instructions; and
- (c) acts in accordance with KCS' instructions and gives KCS all such assistance, documents and information as KCS reasonably requires in relation to the conduct of the defence or settlement of such Claim (and KCS shall reimburse the Customer its reasonable out-of-pocket costs incurred in complying with the provisions of this Clause 9.1(c)).

**9.2** KCS shall have no liability to the Customer in respect of an IPR Claim if the same results from:

- (a) any breach of the Customer's obligations or any restrictions placed on the Customer under the Contract (including under the License Terms) or the Customer's negligence or wilful misconduct;
- (b) the use of any Software which is contrary to express written instructions provided by KCS to the Customer or which is outside the ordinary course of business;
- (c) use of the Software (or any part thereof) after KCS has provided a modification or replacement of the same;
- (d) modifications made to the Software without KCS' prior written consent;
- (e) implementation of any Business Requirements, or other detailed, written requirements or specifications provided by the Customer for any Developments; or
- (f) the combination, operation, or use of any Software with other Intellectual Property Rights, services or products not supplied by KCS wherein the infringement would not have occurred but for such combination, operation or use.

**9.3** In the event that the Software (other than Oracle Software and Additional Third Party Software) infringes the Intellectual Property Rights of a third party or if KCS reasonably believes that an IPR Claim is likely to be made, KCS shall be entitled at its own expense and option either to:

- (a) procure the right for the Customer to continue using the Software (other than Oracle Software and Additional Third Party Software);
- (b) make such alterations, modifications or adjustments to the Software (other than Oracle Software and Additional Third Party Software) (or part thereof) so that it becomes non-infringing without incurring a material diminution in performance or function; and/or
- (c) replace the Software (other than Oracle Software and Additional Third Party Software) (or part thereof) with non-infringing substitutes without incurring a material diminution in performance or function.

**9.4** If KCS in its reasonable judgement is not able to exercise any of the options set out at Clause 9.3 above then KCS, without prejudice to any other rights or remedies it may have hereunder or at law, shall be entitled to terminate the Contract by thirty (30) days' notice to the Customer and the Customer shall, in full and final satisfaction of such termination, be entitled to a refund of the Charges it has paid in respect of the Software (other than Oracle Software and Additional Third Party Software) as at the date of termination (less a reasonable sum in respect of the Customer's use of the Software (other than Oracle Software and Additional Third Party Software) up to and including the date of termination).

**9.5** Clause 9.1 shall not apply to the extent that any IPR Claim arises directly or indirectly through the possession or use of any Oracle Software, any Additional Third Party Software, or through the breach of any Third Party Terms by the Customer. KCS, if requested, shall attempt to procure for the Customer the benefit of any intellectual property indemnity from a supplier of KCS that applies to the Hardware, any Oracle Software or any Additional Third Party Software.

**9.6** Clauses 9.1 – 9.5 (inclusive) constitutes the Customer's exclusive remedy and KCS' only liability in respect of IPR Claims.

**9.7** Nothing in this Clause 9 shall restrict or limit the Customer's general obligation at law to mitigate a loss it may suffer or incur as a result of an event that may give rise to an IPR Claim.

**9.8** The Customer shall indemnify, defend and hold harmless KCS (who shall have no duty to mitigate its loss) in respect of any and all costs, awards, claims, losses, damages, liabilities, expenses (including all reasonable legal fees and costs), interest or demands incurred or suffered by or made against it whether, wholly or in part, resulting directly or indirectly from, or connected in any way with the Customer's use of any Oracle Software or Additional Third Party Software other than in accordance with the Contract Terms or the relevant Third Party Terms (as applicable), whether or not foreseeable at the date of entering this Contract.

### 10. Limits of Liability

**10.1** **THE CUSTOMER'S ATTENTION IS IN PARTICULAR DRAWN TO THE PROVISIONS OF THIS CLAUSE 10 AND CUSTOMER ACKNOWLEDGES AND AGREES THAT THE LIMITATIONS AND EXCLUSIONS CONTAINED IN THIS CLAUSE ARE REASONABLE HAVING REGARD TO THE SUBJECT MATTER, PROVISIONS AND VALUE OF THE CONTRACT.**

**10.2** Nothing in this Contract limits or excludes a party's liability for:

- (a) death or personal injury arising out of its negligence;
- (b) fraud or fraudulent misrepresentation committed by that party;
- (c) any matter for which it would be unlawful for a party to exclude liability.

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- 10.3** Subject to Clause 10.2 and except to the extent expressly provided otherwise in the Contract, neither party shall have any liability, whether in contract, tort (including negligence), for breach of statutory duty, misrepresentation (whether innocent or negligent) or otherwise, arising under or in connection with the Contract, for:
- (a) loss of revenue or profits;
  - (b) loss of anticipated savings;
  - (c) loss of goodwill or injury to reputation;
  - (d) loss of business opportunity; or
  - (e) any special, indirect or consequential losses of any kind whatsoever and however caused,
- in each case regardless of whether the party knew or had reason to know of the possibility of the loss or damage in question.
- 10.4** Subject to Clause 10.2, the total liability of each party under or in connection with the Contract for all loss of or damage to any tangible property of the other party resulting from negligence or willful misconduct shall be three million US dollars (\$3,000,000) in respect of all such claims in aggregate.
- 10.5** Subject to Clause 10.2 and other than in respect of the liability limited pursuant to Clause 10.4, KCS' total liability, whether in contract, tort (including negligence), for breach of statutory duty, misrepresentation (whether innocent or negligent) or otherwise, arising from or in connection with the supply, provision, acquisition or receipt of a Product or Service under the Contract shall not exceed an amount equivalent to the Charges paid for the Product or Service that is the subject of the claim in the prior twelve (12) months, provided at all times that KCS' total liability for all claims in aggregate, whether in contract, tort (including negligence), for breach of statutory duty, misrepresentation (whether innocent or negligent) or otherwise arising under or in connection with the Contract, will not exceed one million US dollars (\$1,000,000).
- 10.6** Subject to Clause 10.2 and without prejudice to its other rights and remedies under the Contract, KCS shall not have any liability, whether in contract, tort (including negligence), for breach of statutory duty, misrepresentation (whether innocent or negligent) or otherwise, arising under or in connection with the Contract, for:
- (a) any breach of the Customer's obligations or any restrictions placed on the Customer under the Contract (including under the License Terms);
  - (b) the Customer's use of a Release or Version of any of the Software which is no longer supported by KCS;
  - (c) any error or omissions in any information, instructions or scripts provided to KCS by the Customer in connection with the Services, or any actions taken by KCS at the Customer's direction;
  - (d) any loss, destruction, alteration or unauthorized disclosure of Customer Data caused by any third party except those third parties sub-contracted by KCS to perform services related to Customer Data maintenance and back-up;
  - (e) loss or damages arising from or related to any inaccuracies, inconsistencies or errors in any Oracle Software and/or Additional Third Party Software;
- (f) loss or damage to Customer Data, unless KCS provides Services for the storage and management of Customer Data to the Customer under the Contract, in which case in the event of any loss or damage to Customer Data as a result of KCS' breach of the relevant agreed data back-up processes, KCS' sole liability and the Customer's sole and exclusive remedy shall be for KCS to use reasonable efforts at its own cost to promptly restore or correct the lost or damaged Customer Data from the latest backup of such Customer Data;
  - (g) any delay in delivery beyond any estimated dates, including performance of its obligations under Clause 2.2; and/or
  - (h) any delay in performing or failure to perform its obligations under this Contract as a result of compliance with Clause 2.3.
- 10.7** Nothing in the Contract shall limit the Customer's obligation to pay the Charges due and payable to KCS under the Contract.
- 10.8** Nothing in this Clause 10 will affect either party's right to terminate the Contract in accordance with its terms or any entitlement of either party to injunctive relief.
- 11. Term and Termination**
- 11.1** The Contract shall come into force on the Contract Date and shall continue in force until the last to expire of each relevant "term" for the Products and Services as set out in the Quotation (as may be amended or extended in writing by the parties), or if none for the term set out in the Additional Applicable Terms or if none, until the completion of the supply or provision of the applicable Product or Service pursuant to the Contract (with the exception of perpetual licenses) ("Term").
- 11.2** Either party may terminate the Contract with immediate effect by notice in writing to the other party if:
- (a) the other party commits a material breach of the Contract, which is either incapable of remedy (other than as to time of performance) or, if capable of remedy, the party in default fails to remedy the breach within thirty (30) days of receiving notice to do so from the other party; or
  - (b) the other party becomes insolvent, enters into liquidation, whether voluntary or compulsory, passes a resolution for its winding up, has a receiver or administrator appointed over the whole or any part of its assets, makes any composition or arrangement with its creditors, takes or suffers any similar action in consequence of debt, ceases or threatens to cease to carry on business or (being an individual) is the subject of a bankruptcy petition or order.
- 11.3** KCS may terminate the Contract with immediate effect by notice in writing to the Customer if:
- (a) the Customer commits a breach of any of the License Terms, which is either incapable of remedy or, if capable of remedy, the Customer fails to remedy the breach within thirty (30) days of receiving notice to do so from KCS;
  - (b) the Customer is in persistent breach of the Contract (and for the purpose of this Clause, a persistent breach means either: (i) a series of two or more defaults by the Customer which are incapable of remedy and which taken together amount to a material breach; (ii) a series of two or more defaults by the Customer which are capable of remedy but which are not remedied within thirty (30) days of written notice from KCS specifying the defaults and requiring the same to be remedied; or

## SECTION A - TERMS AND CONDITIONS

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(c) the Customer fails to pay any amount due and payable under the Contract on the due date for payment and remains in default not less than thirty (30) days after being notified in writing to make such payment.

**11.4** Where KCS has a right to terminate the Contract for cause including pursuant to Clauses 11.2 and 11.3 above, it may instead at its option, terminate only the provision of the Product(s) and/or Service(s) in relation to which the breach has occurred and the provisions of Clause 12 shall apply in respect of the relevant Product(s) and/or Service(s). Except where otherwise expressly provided in the Contract, and without prejudice to any right of either party to terminate the Contract in its entirety, termination of a Product(s) and/or Service(s) (as the case may be) in accordance with this Clause or in accordance with the terms of any Additional Applicable Terms shall not affect the remainder of the Contract (nor the other licenses, Products and/or Services provided under it), which shall continue in full force and effect.

**11.5** Without limiting its other rights or remedies, KCS may suspend the provision of the Products and/or Services under the Contract if the Customer becomes subject to any of the events listed in Clause 11.2(b), or KCS reasonably believes that the Customer is about to become subject to any of them.

**11.6** The Customer acknowledges that KCS may take such steps as are reasonably required (which may include accessing the Customer Systems in order to amend the license file) to enable KCS to exercise its rights and remedies under the Contract, including the termination or suspension of any Products and/or Services.

### 12. Consequences of Termination

**12.1** Subject to Clause 12.2 and Clause 12.3, on expiry or termination of the Contract for any reason:

- (a) the Customer shall immediately pay to KCS any Charges and other sums due and payable to KCS under the Contract;
- (b) the Customer shall return all of KCS' equipment and materials, failing which KCS may peaceably enter the relevant premises and take possession of them (and until such time, the Customer shall be solely responsible for their safe-keeping);
- (c) the Customer shall cease all use of the Software, the Deliverables and the Materials and KCS shall be entitled to, and is authorized by the Customer to, take all steps necessary to effect the cessation of use of the Software;
- (d) all licenses granted under or in connection with this Contract shall immediately terminate;
- (e) except as otherwise expressly provided in the Contract, KCS shall immediately cease provision of the Services;
- (f) the Customer shall (at KCS' election) return to KCS or permanently destroy (or make unusable if destruction is not possible) all copies of the Software (including all back up copies), the Deliverables, the Materials and any equipment, property or other items belonging to KCS (including the deletion of the same from the Customer Systems and associated storage means). The Customer shall certify its compliance with this Clause 12.1(f) to KCS by way of written communication signed by a director of the Customer;
- (g) the Customer shall return to KCS, or at KCS' election destroy, all copies of documents and materials containing, reflecting, incorporating or based on KCS' Confidential Information. The Customer shall certify its compliance with this Clause 12.1(g) to KCS by way of written communication signed by a director of the Customer; and

(h) KCS shall, at the Customer's request, return to the Customer (or at KCS' election destroy) all copies of documents and materials containing, reflecting, incorporating or based on the Customer's Confidential Information and the Customer shall reimburse KCS for all costs of returning or destroying such documents and materials on the basis of the KCS Rates.

**12.2** If a party is required by any law, regulation, or government or regulatory body to retain any data, documents or materials (including Customer Data) which it would otherwise be obliged to return or destroy under this Contract, it shall notify the other party in writing of such retention, giving details of the documents or materials that it must retain; provided, however, that any such data, documents or materials shall remain the property of the owning party and subject to the confidentiality and other protections herein. .

**12.3** Where the term of the licenses granted pursuant to Clause 2 of Section B (Software) or pursuant to Clause 2 of the Third Party Terms for any ASFU Oracle Software is perpetual, such licenses shall survive expiry or termination of the Contract (subject to the applicable License Terms and Clause 11.3(a)) unless KCS terminates the Contract or such license(s) and the provision of any affected Products and/or Services for cause, in which case all rights granted to the Customer in accordance with such licenses shall immediately cease and the provisions of Clause 12.1 shall apply.

**12.4** Expiry or termination of the Contract for any reason shall be without prejudice to the accrued rights and remedies of each party existing at expiry or termination, including any claim either party may have against the other for breach or non-performance of the Contract and shall not affect any provision of the Contract which is expressly or by implication intended to come into effect on, or to continue in effect after such expiry or termination, including Clause 5 (Confidentiality), Clause 7 (Intellectual Property Rights), Clause 9 (Indemnities), Clause 10 (Limits of Liability), Clause 12 (Consequences of Termination), Clause 15 (Audit), Clause 17 (Force Majeure), Clause 18 (Third Party Rights), Clause 19 (Miscellaneous Provisions), Clause 2 of Section B (Software) (where the license survives expiry or termination of the Contract), Clauses 5, 6, 7, 8 and 9 of Section B (Software) and the Third Party Terms for the ASFU Oracle Software (where the license survives expiry or termination of the Contract).

**12.5** Termination or expiry of this Contract shall not affect any of either party's rights, remedies, obligations or liabilities available under the Contract that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of this Contract which existed at or before the date of termination or expiry.

### 13. Change

**13.1** If a Product to be delivered by KCS is no longer readily available or is in short supply at the agreed time of delivery, KCS may substitute another product in its place. The substituted product will have at least equivalent performance and function and will be provided at no additional cost to the Customer.

**13.2** KCS may:

- (a) make changes to the Services and/or Products; or
- (b) modify the KCS Systems, its network, system configurations or routing configuration,

provided that such changes do not have a material adverse effect on KCS' obligations under this Contract, its provision of the Services and/or Products or any relevant service level arrangements. If in KCS' reasonable opinion such a change constitutes a material change, KCS will provide thirty (30) days' prior written notice to the Customer of such material change.



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- 13.3** Notwithstanding any other provision, KCS may from time to time and without notice, change the Products and/or Services in order to comply with any applicable health, safety, security or other statutory or legal requirements. KCS shall inform the Customer of any material changes made under this Clause 13.3 as soon as reasonably practicable after any such changes have been made.
- 13.4** If KCS considers that a requested product and/or service does not qualify as part of any Product and/or Service, the request will be discussed with the Customer and KCS may supply a quote for the cost of the excluded work. If KCS agrees to undertake the service, KCS shall be entitled to charge and the Customer shall pay for the work done on the basis of the KCS Rates or, where applicable, as specified in a quotation.
- 13.5** Save as expressly provided otherwise in this Contract, if either party wishes to change the scope or execution of the Products and/or Services, it shall submit details of the requested change to the other party in writing ("Change Request").
- 13.6** If KCS originates a Change Request, it shall provide, with the Change Request, written details of the impact which the proposed change will have on: the Products and/or Services, the existing Charges, any relevant timetable and any Contract Terms.
- 13.7** If the Customer originates a Change Request, KCS shall, as soon as reasonably practicable after receiving the Change Request, provide a written estimate to the Customer setting out the likely time required to implement the proposed change and details of the impact which the proposed change will have on: the Products and/or Services, the existing Charges, any relevant timetable and any Contract Terms.
- 13.8** Save as expressly provided otherwise in this Contract, unless both parties consent to a Change Request, there shall be no change to the Products and/or Services or any other terms of this Contract.
- 13.9** If either party is unwilling to accept a Change Request suggested by the other, then the other party may require the disagreement to be dealt with in accordance with the Dispute Resolution Procedure.
- 13.10** KCS may charge for the time it spends on dealing with Change Requests originating from the Customer on the basis of the KCS Rates in accordance with Clause 4.
- 14. Governance and Personnel**
- 14.1** The Customer will nominate Customer Representatives (being up to five named individuals or as otherwise agreed in writing with KCS) and a Senior Customer Representative and will notify KCS, in writing, of the identity and contact details of the Customer Representatives and Senior Customer Representative and of any replacements from time to time.
- 14.2** The Senior Customer Representative will:
- (a) ensure that the contacts for KCS are identified to KCS;
  - (b) be an escalation point for members of the Customer's personnel for issues relating to the Products and/or Services;
  - (c) be the escalation point for KCS; and
  - (d) take strategic decisions regarding the use of the Products and/or Services.
- 14.3** The parties will hold periodic review meetings at a frequency to be agreed between the parties to monitor and review the performance of the Contract, to discuss any issues relating to the Services and jointly agree any necessary actions to be taken thereafter. Such meetings will be attended by the Senior Customer Representative and a senior representative from KCS.
- 14.4** KCS will maintain relevant contact and information pertaining to the Customer. In the event that Customer employees are no longer responsible or authorized to be contacted by KCS, it will be the responsibility of the Customer to notify KCS.
- 14.5** If the parties have agreed that a named person shall provide any or all of the Services, KCS may replace such person with one or more other persons with reasonably suitable qualifications and experience.
- 15. Audit**
- 15.1** The Customer shall, during the Term and for a period of twelve (12) months following its expiry or termination for any reason, permit KCS to inspect and have remote or physical access to the Customer Systems and access to any Customer Premises on or at which the Software is being or has been kept or used and/or the Services are or have been supplied or received, and have access to any records kept in connection with the Contract, for the purposes of ensuring that the Customer is complying or has complied with the terms of this Contract, provided that KCS provides reasonable advance notice to the Customer of such inspections, which shall take place at reasonable times, save where KCS reasonably believes that there has been unauthorized use of the Software and/or the Services in which case KCS may conduct such an inspection remotely immediately upon giving notice to the Customer. Where such an audit finds that the Customer is in breach of any of the Contract Terms, without prejudice to any other rights or remedies available to KCS with respect to such breach, the Customer shall pay the costs of the audit.
- 15.2** Without prejudice to KCS' other rights and remedies, the Customer shall pay for broadening the scope of the licenses or other rights granted under this Contract (or any other contract between the parties) to cover any unauthorized use of the Products and/or Services, being an amount equal to the Charges which KCS would have levied (in accordance with its normal commercial terms then current) had it licensed any such unauthorized use on the date when such use commenced together with interest at the rate provided for in Clause 4.11, from such date to the date of payment.
- 16. Relief**
- 16.1** If KCS' performance of any of its obligations under the Contract is prevented or delayed by any act or omission of the Customer or its officers, employees, agents, consultants or third party contractors or by Customer failure to perform or any delay in performing any of its relevant obligations ("Customer Failure"):
- (a) KCS shall, without prejudice its other rights and remedies: (i) have the right to suspend supply of the relevant Products and/or Services until the Customer remedies the Customer Failure; (ii) have the right to rely on the Customer Failure to relieve it from the performance of any of its obligations to the extent the Customer Failure prevents or delays KCS' performance of any of its obligations; and (iii) be given a corresponding extension of any timetable for performance of its obligations;
  - (b) KCS shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from such prevention or delay; and
  - (c) notwithstanding Clause 10.3, the Customer shall reimburse KCS on written demand for any costs or losses (including loss of opportunity to deploy resources elsewhere) sustained or incurred by KCS arising directly or indirectly from the Customer Failure.
- 16.2** The parties acknowledge that the planned time of completion of the Services is dependent on the Customer:

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- (a) fulfilling its obligations under the Contract in a timely manner; and
- (b) co-operating with KCS and providing such assistance as is reasonably required by KCS.

### 17. Force Majeure

- 17.1** Neither party shall be responsible for a failure to fulfil its obligations under the Contract to the extent that any such failure results from a Force Majeure Event. Neither party shall have any liability as a result of any such non-performance, delay or termination as a result of a Force Majeure Event and the time for performance of such obligations shall be extended accordingly. If such Force Majeure Event continues for more than three (3) months, either party may terminate the provision of the affected Product(s) and/or Service(s) forthwith by notice to the other.

### 18. Third Party Rights

- 18.1** Save as provided in Clauses 18.2 and 18.3, no person will have the right to enforce or require the enforcement of any provision of the Contract as a third party beneficiary. The rights of the parties to terminate, rescind or agree any variation, waiver or settlement under the Contract are not subject to the consent of any person that is not a party to the Contract.
- 18.2** All references to KCS in Clause 10 shall, for the purposes of Clause 10 only, be treated as including all Affiliates of KCS and all employees, sub-contractors and suppliers of KCS and its Affiliates, all of whom shall have the benefit of the exclusions and limitations of liability set out in Clause 10. It is agreed that it is intended to confer a benefit on KCS and its Affiliates and their employees, sub-contractors and suppliers, by extending to them the benefit of the exclusions and limitations of liability set out in Clause 10, provided that the rights of such persons under the Contract shall only be enforceable by KCS on their behalf (but KCS shall owe no duty to them to enforce such rights and it may conduct or compromise any relevant proceedings as it sees fit).
- 18.3** The Customer agrees that, without prejudice to any rights of KCS:
- (a) CDK shall be deemed a third party beneficiary for the purposes of this Contract, including the License Terms, in respect of the KCS Core Software, and CDK has the right to bring a claim directly against the Customer for any breach of this Contract, including any of the License Terms, in respect of the KCS Core Software; and
  - (b) Oracle shall be deemed a third party beneficiary for the purpose of this Contract, including the License Terms, in respect of the Oracle Software and Oracle has the right to bring a claim directly against the Customer in respect of the Oracle Software.

### 19. Miscellaneous Provisions

- 19.1** All notices given to the other party under or in connection with this Contract shall be in writing and shall be either: (a) delivered by hand; or (b) sent by first class post or other next working day delivery service providing proof of postage or delivery, to the address set out in the Quotation or to such other address as a party may designate by notice to the other party from time to time. Any such notice will be deemed to have been served, if by hand, when delivered on signature of a delivery receipt; or if by first class post or other next working day delivery service, by 9.00 am on the second Business Day after posting or at the time recorded by the delivery service.
- 19.2** No variation of this Contract shall be binding on the parties unless agreed in writing by an authorized representative of each party.

- 19.3** The Contract constitutes the entire agreement and understanding between the parties in respect of the subject matter of the Contract and supersedes all prior contracts, arrangements, representations, quotations and understandings in respect of the same subject matter, whether oral or written, between the parties.

- 19.4** Each of the parties acknowledges and agrees that in entering into the Contract it does not rely on, and will have no remedy in respect of, any statement, representation, warranty or assurance (whether negligently or innocently made) of any person (whether party to the Contract or not) other than as expressly set out in the Contract. Each party waives all rights and remedies against the other in respect of any such statement, warranty or representation or assurance except in respect of any statement, warranty, representation or assurance expressly made in the Contract.

- 19.5** If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this Clause shall not affect the validity and enforceability of the rest of the Contract.

- 19.6** A waiver of any right or remedy under this Contract or by law is only effective if given in writing and signed by an authorized officer of the waiving party and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any of its rights or remedies under the Contract or at 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.

- 19.7** The Customer may not assign, transfer, charge, subcontract, or deal in any other manner with the Contract (in whole or in part) or any or all of its rights and/or obligations under the Contract without the prior written consent of KCS. KCS may freely subcontract, assign, transfer, charge or deal in any other manner with any or all of its rights and/or obligations under the Contract, provided in the case of assignment that it gives written notice of the same to the Customer. For the avoidance of doubt, KCS shall remain liable for any acts or omissions of its subcontractors in performance of this Contract.

- 19.8** Each party agrees that during the Term and for one (1) year following the expiry or termination of the Contract, it will not directly or indirectly solicit (or seek to attempt to solicit or permit any Affiliate to solicit), the employment of any person who is employed by the other party in the course of the provision or receipt of the Products and/or Services or any of them. This does not prohibit either party from considering any application for employment submitted on an unsolicited basis or in response to a general advertisement of employment opportunities.

- 19.9** Each party will do and execute, or arrange for the doing and executing of, each necessary act, document and thing reasonably within its power to implement and give effect to the Contract Terms, at its own cost.

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- 19.10** The Contract may be executed in any number of counterparts, each of which is an original and all of which evidence the same agreement between the parties. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal E-SIGN Act of 2000, *e.g.*, [www.docusign.com](http://www.docusign.com)) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes. Slight variations in the form of signature page counterpart executed by any party hereto (including different footnotes or document numbers) shall be considered immaterial and shall not invalidate any such counterpart signature.
- 19.11** Nothing in the Contract creates a joint venture or partnership between the parties. The Contract will not create an agency relationship between the parties and neither party has any authority to, and will not, act, make representations or contract on behalf of the other party.
- 19.12** In the event of a dispute between the parties arising out of or in connection with the Contract or the performance, validity or enforceability of it ("Dispute") then the Chief Executive Officer (or equivalent) of each of the parties shall meet with the objective of achieving a resolution before implementing the dispute resolution procedure set out in Clauses 19.13 – 19.15.
- 19.13** If the Dispute is not resolved within thirty (30) days by the parties in accordance with Clause 19.12 for any reason, either party will have the right to initiate arbitration as set forth herein. Except as otherwise expressly set forth herein, all Disputes shall be determined by binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Unless otherwise agreed by the parties, the arbitrator will be jointly selected by the parties and experienced in the matters at issue in the Dispute; provided that if the parties cannot agree on an arbitrator within fifteen (15) days after the notice of commencement of arbitration, either party may request the AAA to appoint a qualified arbitrator. Time is of the essence for any arbitration under this Contract and arbitration hearings shall take place within ninety days of filing and awards rendered within one hundred twenty (120) days. Arbitrator(s) will agree to these limits prior to accepting appointment. All arbitration proceedings shall be held in Wake County, North Carolina, United States, or any other place agreed to by the parties and the arbitrator. All costs and expenses incurred in connection with any arbitration proceeding (including reasonable attorneys' fees) shall be borne by the party against which the decision is rendered, or, if no decision is rendered, each party will be responsible for its own costs and expenses associated with the arbitration and the costs of the arbiter shall be borne equally by the parties. If the arbitrator's decision is a compromise, the determination of which party bears the costs and expenses incurred in connection with the arbitration proceeding shall be made by the arbitrator on the basis of the arbitrator's assessment of the relative merits of the parties' positions. The awards of the arbitrator shall be specifically enforceable by any court of competent jurisdiction.
- 19.14** The Customer agrees that any violation of its confidentiality obligations hereunder or of KCS' Intellectual Property Rights, including a breach of the License Terms, would substantially and irreparably harm KCS, which harm shall not be susceptible of cure solely by payment of monetary damages. Accordingly, if the Customer violates or threatens to violate its confidentiality obligations or KCS's Intellectual Property Rights, KCS will be entitled to obtain injunctive and/or other equitable relief, in addition to other remedies afforded by law or under this Contract, and without the requirement to post a bond or other security. KCS shall have the right to seek such injunctive or other equitable relief from any court of competent jurisdiction without going through the dispute resolution and arbitration requirements set forth in Clauses 19.12 and 19.13.
- 19.15** Notwithstanding Clause 19.13, if a Dispute is not resolved by the parties pursuant to discussions under Clause 19.12 within ten (10) business days, or if either party fails to participate in any such discussions, either party will have the right to initiate litigation in connection with any Dispute in accordance with Clause 19.16 related to the Customer's payment obligations, protection or a party's Confidential Information or Intellectual Property Rights, and provided further that if arbitration is commenced pursuant to Clause 19.13, but the arbitration proceedings are terminated without a decision or are not concluded within the time period set forth therein, either party may initiate litigation in regards to such Dispute.
- 19.16** Each party irrevocably agrees that this Contract shall be interpreted, construed and governed by the laws of the State of North Carolina and the United States and that any Dispute not resolved by the parties pursuant to Clause 19.12 or the arbitration proceedings as set forth in in Clause 19.13, shall be subject to the exclusive jurisdiction and venue of the federal and state courts of North Carolina and each party irrevocably agrees to submit to the personal jurisdiction of such courts.

## Schedule 1 - Definitions and Interpretation

1.1 In the Contract, unless the context otherwise requires, the following expressions shall have the following meanings:

"**Additional Applicable Terms**" has the meaning given to that term in the Quotation;

"**Additional Third Party Software**" means any software proprietary to a third party other than any of the KCS Software specified in the Quotation or which may be supplied by KCS to the Customer from time to time pursuant to Section B (Software) and which is not embedded in any of the KCS Software;

"**Affiliates**" means in respect of an undertaking, an undertaking which, from time to time, is its subsidiary undertaking or parent undertaking or a subsidiary undertaking of that parent undertaking (and the terms "subsidiary undertaking" and "parent undertaking" have the meanings set out in s.1162 and schedule 4 of the Companies Act 2006);

"**Anti-Corruption Legislation**" means shall mean any and all laws, rules or regulations relating to corruption or bribery, including, but not limited to, the Foreign Corrupt Practices Act of 1977, as amended from time to time;

"**ASFU Oracle Software**" means any Additional Third Party Software specified in the Quotation which is owned or distributed by Oracle and which is not embedded in the K8 Software, but is used in conjunction with the K8 Software;

"**Authorized User**" means a person authorized by the Customer to access and use the KCS Software, ASFU Oracle Software and/or Managed Services (as applicable);

"**Automotive Market**" means the market for the sale, distribution, hire, repair, servicing and/or modification of Vehicles by Vehicle Manufacturers/Assemblers, Vehicle Dealers, Vehicle Rental Businesses and Service Centre Businesses excluding the Parts Market;

"**Business Days**" means Monday to Friday except statutory holidays in the United States and any other day on which the commercial banks in the State of New York are, or are authorized, to be closed;

"**Business Requirements**" means the Customer's documented business requirements in relation to a Development, as agreed by the parties;

"**CDK**" means CDK Global (UK) Limited (formerly called ADP Dealer Services UK Limited) a company incorporated in England and Wales with company number 01281651 whose registered office is at Cygnet Way, Charnham Park, Hungerford RG17 0YL, UK);

"**Charges**" means the charges for the Products and Services set out in and/or calculated in accordance with the Quotation and these Terms and Conditions, including any deposit and Expenses;

"**Confidential Information**" means all information relating to KCS or the Customer and their respective Affiliates, suppliers, agents, customers and contractors, in any form or medium which is secret or otherwise not publicly available (either in its entirety or in part including the configuration or assembly of its components) including commercial, financial, marketing, or technical information, know-how, trade secrets, business methods and other information (including without limitation the content of the Contract and, in respect of KCS' Confidential Information, information in or relating to the Software

(including for the avoidance of doubt, any Developments)) in any form or medium whether disclosed orally or in writing or before or after the date of the Quotation, together with any reproductions of such information in any form or medium or any part(s) of such information;

"**Consultancy Services**" means implementation, installation, consultancy, training, programme and project management and/or other services specified in the Quotation;

"**Contract**" has the meaning given to that term in the Quotation;

"**Contract Date**" has the meaning given to that term in the Quotation;

"**Contract Terms**" has the meaning given to that term in the Quotation;

"**Customer**" means the party specified as such in the Quotation;

"**Customer Data**" means any data and information which is provided by the Customer to KCS in relation to the Contract including personal data, any data or records and information relating to the Customer or its operations, facilities, personnel and assets that is processed by KCS on behalf of the Customer in relation to the Contract, in each case in whatever form that data and information may exist and of whatever nature;

"**Customer Personal Data**" has the meaning given to that term in Schedule 2;

"**Customer Portal**" means the portal through which the Customer can log a support call and access relevant information in respect of a Managed Service;

"**Customer Premises**" means the Customer's and/or its Affiliates' premises and/or other premises where the Products and/or Services are supplied or received, subject to change by agreement of the parties in writing from time to time;

"**Customer Representative**" means a member of the Customer's personnel appointed by the Customer to act as contact between the parties;

"**Customer Systems**" means those telecommunications systems, computer programs, software, computer and communications networks, hardware, firmware, servers, devices, related equipment, databases, the tangible media on which they are recorded and their supporting documentation, operated or used by the Customer (excluding the Products and the KCS Systems);

"**Data Conversion Services**" means the services specified as such in the Quotation and provided by KCS to assist the Customer to convert the Customer's data into a format suitable for use with the relevant Software;

"**Deliverables**" means any output of the Services (in whatever form) including any and all Developments, Materials, Specifications and all other deliverables which are produced by or on behalf of KCS pursuant to the Contract;

"**Delivery**" means completion of delivery of the Hardware in accordance with Clause 2.1 or Clause 2.2 of Section E;

"**Development**" means modifications and/or developments of the KCS Core Software and/or the KCS Other Software (including any accompanying help files) and related Materials, developed by KCS pursuant to the Development Services or otherwise;

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"**Development Services**" means the services specified in the Quotation to develop a Development for the Customer on a non-exclusive basis;

"**Dispute Resolution Procedure**" means the dispute resolution procedure set out at Clauses 19.12 to 19.15 (inclusive);

"**Existing Agreement**" has the meaning given to that term in the Quotation;

"**Expenses**" has the meaning given to that term in Clause 4.5;

"**EU Regulations**" means the Data Protection Act 2018 and the EU General Data Protection Regulation ("GDPR") and such other regulations that may be promulgated from time to time during the Term as applicable to data subjects in the EU.

"**Force Majeure Event**" means any circumstance not within a party's reasonable control including, without limitation,: (a) acts of God, flood, drought, earthquake or other natural disaster; (b) epidemic or pandemic; (c) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations; (d) nuclear, chemical or biological contamination, or sonic boom; (e) any law or any action taken by a government or public authority, including imposing an export or import restriction, quota or prohibition, or failing to grant a necessary license or consent; (f) collapse of buildings, fire, explosion or accident; (g) any labor or trade dispute, strikes, industrial action or lockouts (other than in each case by the party seeking to rely on this Clause, or companies in the same group as that party); (h) non-performance by suppliers or subcontractors (other than by companies in the same group as the party seeking to rely on this Clause); and (i) interruption or failure of utility service.

"**Hardware**" means the items specified as such in the Quotation;

"**Hardware Support Services**" means the maintenance services to be provided by KCS for the Supported Hardware in accordance with the terms of Section E and the Contract Terms;

"**Installation Site**" means the location(s) at which the Hardware is to be installed as agreed in writing by the parties;

"**Intellectual Property Rights**" means all patents, trade marks, service marks, registered designs, utility models, design right, goodwill, database rights, copyright, trade secrets and other confidential information, know-how, and all other rights of a similar or corresponding nature in any part of the world, whether registered or not or capable of registration or not and including the right to apply for and all applications for any of the foregoing rights, the right to claim priority and any renewals, extensions or restorations, and divisional, continuation and reissued applications of the foregoing rights;

"**K8 Software**" means a software programme designated as such in the applicable Product Description;

"**KCS**" means Kerridge Commercial Systems (KTX) Ltd., with offices at 333 N Sam Houston Parkway E #1100, Houston, TX, 77060, USA, Registered Number 13-2981437;

"**KCS Core Software**" means the software programmes specified as such in the applicable Product Description;

"**KCS' Normal Working Hours**" means the hours 8:00 AM – 6:00 PM (eastern) of a Business Day;

"**KCS Other Software**" means the software programmes specified as such in the applicable Product Description;

"**KCS Personnel**" means KCS' officers, employees, agents, consultants, contractors and sub-contractors (and their officers, employees, agents, consultants, contractors and sub-contractors);

"**KCS Rates**" means KCS' standard daily rates applicable at the time a Service is provided to the Customer, available on request and as amended from time to time;

"**KCS Service Partner**" means a 3<sup>rd</sup> party sub-contractor who KCS appoints to provide a Managed Service

"**KCS Software**" means the KCS Core Software, KCS Other Software, the Developments and any Third Party Software/Databases;

"**KCS Systems**" means all telecommunications systems, software, computer programs, computer and communications networks, hardware, firmware, servers, devices, cabling and related equipment, databases, the tangible media on which they are recorded and their supporting documentation, including input and output format, program listings and narrative descriptions owned or licensed to KCS or any of its Affiliates and which are used in the provision of the Products and/or Services, but not including any Customer Systems;

"**License Terms**" means the provisions of Clauses 5 and 18 of Section A, Clauses 2, 3, 5, 6, 7 and 8 of Section B (Software) and any Third Party Terms in respect of the ASFU Oracle Software;

"**Managed Services**" means any of the managed services specified in the Quotation and described in the Managed Services: Service Description (each individually a "**Managed Service**");

"**Managed Services Process, Procedure and Responsibilities Document**" means the document which describes the support, maintenance and management services provided by the relevant KCS Managed Services team and the corresponding responsibilities of the Customer, as may be updated or modified from time to time during the Term by KCS;

"**Managed Services: Service Description**" means the document setting out the service descriptions and service level arrangements for the Managed Services;

"**Mandatory Policies**" means KCS' bribery policy and health and safety policy (for when on KCS premises) and such other corporate and ethics policies which are made available on the Customer Portal and as may be amended by KCS from time to time;

"**Materials**" means any documentation including all operating, instruction, training and user materials and guides, procedures and technical literature, flow diagrams, file descriptions, reports, instructions, information, data and other materials (in whatever form and in any medium) produced or provided by KCS in supplying the Products and/or Services or carrying out its other obligations pursuant to the Contract;

"**Open Source**" means any computer program, including any modification, improvement, derivative work, release or correction, governed by the terms and conditions of a license compliant with the Open Source Initiative ("**OSI**") principles defined in the following website : <http://www.opensource.org/docs/definition.php>, and/or

## SECTION A - TERMS AND CONDITIONS

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certified by the OSI (cf. list of such licenses in <http://www.opensource.org/licenses/>);

"**Oracle**" means Oracle Corporation UK Limited (company number 01782505) whose registered office is Oracle Parkway, Thames Valley Park, Reading, Berkshire RG6 1RA or its licensors;

"**Oracle Software**" means the software owned or distributed by Oracle which is embedded in the KCS Software and constituting a Third Party Software/Database;

"**Parts Market**" means the market for the sale and distribution of Vehicle parts and spares;

"**Payment Terms**" has the meaning given to that term in the Quotation;

"**Products**" means the Software and/or Hardware specified in the Quotation;

"**Product Description**" means a document describing certain Products provided by KCS to the Customer as signposted in the Quotation;

"**Professional Services**" means Development Services, Data Conversion Services and Consultancy Services;

"**Quotation**" means the quotation for the supply of Products which forms part of this Contract including its attachments (if any) and any documents incorporated by reference therein;

"**Release**" means a subset of a Version of the KCS Core Software or the KCS Other Software (as applicable) denoted by the number after the point in the version number;

"**Senior Customer Representative**" means a senior member of the Customer personnel with sufficient authority to make important decisions and contractually bind the Customer on matters relating to the Products;

"**Service Centre Businesses**" means those businesses whose principal activity is the provision of servicing for Vehicles and those businesses which specialise in the replacement, repair and fitting of specific Vehicle parts such as tyres, exhaust systems, brake components and batteries;

"**Service Credits**" has the meaning given to that term in the Managed Services: Service Description;

"**Service Description**" means a document describing certain Services provided by KCS to the Customer as specified in the Quotation;

"**Service Level Agreement**" means a document detailing the service levels associated with various Services to be supplied by KCS to the Customer under the Contract as signposted in the Quotation and as may be modified and updated from time to time by KCS;

"**Services**" means the services specified in the Quotation;

"**Software**" means the KCS Software and the Additional Third Party Software;

"**Software as a Service**" or "**SaaS**" means access to all or part of the Software provided to the Customer through a virtual portal hosted by or on behalf of KCS;

"**Software Support Services**" means the services to be provided by KCS in support of the Supported Software in accordance with Section B, the relevant Service Level Agreement for Software Support Services and the Contract Terms;

"**Specification**" means a set of instructions to address the Business Requirements in relation to the functionality of the KCS Software which forms the basis for a particular Development;

"**Supported Hardware**" means the Hardware to be supported by the Hardware Support Services as specified in the Quotation or otherwise agreed by the parties in writing from time to time;

"**Supported Software**" means the Software to be supported by the Software Support Services as specified in the Quotation or otherwise agreed by the parties in writing from time to time;

"**Term**" has the meaning given to that term in Clause 11.1;

"**Terms and Conditions**" has the meaning given to that term in the Quotation;

"**Third Party Software/Databases**" means any third party-owned software and/or databases (including the Oracle Software) which are embedded in any of the KCS Core Software, KCS Other Software, and/or the Developments;

"**Third Party Terms**" means the terms and conditions of use for the applicable Additional Third Party Software which may either be the third party licensor's terms and conditions of use or third party terms between KCS and the Customer which form part of this Contract;

"**Use Data**" means the traffic and other statistical or analytical data derived from monitoring use and usage patterns in respect of any of the Managed Services;

"**User**" means a single, unique device with a maximum of two logged on sessions concurrently connected to the KCS Core Software;

"**V4 Specification**" means a Specification approved by the Customer in accordance with Clause 3.1(d) of Section D;

"**Vehicle**" means cars and other passenger vehicles, vans, trucks, lorries, buses, motorcycles, caravans, boats, forklift trucks and/or vehicles used for the purpose of construction and agriculture;

"**Vehicle Dealer(s)**" means any of the following:

- (a) Vehicle Manufacturer/Assemblers;
- (b) Vehicle dealers owned or controlled directly or indirectly by a Vehicle Manufacturer/Assembler;
- (c) franchised Vehicle dealers;
- (c) independent Vehicle dealers;
- (d) used Vehicle dealers;
- (e) Vehicle supermarkets;
- (f) Vehicle warehouses; and

other businesses whose principal activity is the sale, distribution, repair and modification of Vehicles;

"**Vehicle Manufacturer/Assembler**" means an entity which is the original manufacturer or assembler of Vehicles and any of its group companies;

"**Vehicle Rental Businesses**" means those businesses whose principal activity is the daily rental or long-term leasing of Vehicles or the provision of fleet management services; and

"**Version**" means a version of the KCS Core Software or the KCS Other Software (as applicable) denoted by the number before the point in the version number.

## SECTION A - TERMS AND CONDITIONS

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- 1.2** In the Contract a reference to:
- (a) "the parties" shall unless otherwise expressly stated, be construed as references to KCS and the Customer, and the term "party" shall be construed accordingly;
  - (b) a statutory provision, includes a reference to the statutory provision as modified or re-enacted from time to time and any subordinate legislation made pursuant to the statutory provision;
  - (c) persons or entities, includes a reference to natural persons, any body corporate, unincorporated association, trust, partnership or other entity or organisation;
  - (d) a person or entity, includes a reference to that person's or entity's successors or assigns;
  - (e) the Contract or any other document, includes a reference to the Contract or that document as amended from time to time;
  - (f) a "Clause", unless the context otherwise requires, is a reference to a Clause in the relevant Section in which it is referenced;
  - (g) "writing" or "in writing" may include email communications; and
  - (h) the singular includes the plural and vice versa, unless the context otherwise requires and words importing gender include every gender.
- 1.3** The headings and contents table in the Contract are for convenience only shall not affect the interpretation of the Contract.
- 1.4** Whenever the words "other", "include", "includes", "including" or "in particular" (or similar derivatives) are used in the Contract, they are deemed to be followed by the words "without limitation".

## SECTION A - TERMS AND CONDITIONS

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### Schedule 2- EU Data Protection Provisions

1. For the purposes of this Clause and the Contract, the terms Data Subject, Data Processor, Data Controller, Process, Personal Data Breach and Personal Data shall have the meanings set out in the Data Protection Act 2018 and the EU General Data Protection Regulation ("GDPR") together "Applicable Data Protection Law".
2. All Personal Data supplied to KCS, or otherwise obtained by it, in connection with the Contract (the "Customer Personal Data") is processed by KCS, as Data Processor on behalf of the Customer and the Customer is the Data Controller of the Customer Personal Data.
3. KCS will Process Customer Personal Data only on documented instructions from the Data Controller, including with regard to transfers of Customer Personal Data to a third country or an international organisation, unless required to do so by Applicable Data Protection Law; in such case, KCS shall inform the Customer of that legal requirement before processing unless the Applicable Data Protection Law prohibits such information on grounds of public interest.
4. Unless otherwise specified, Customer agrees that for the purposes of Clause 6.3, the Contract represents the Customer's documented instructions and hereby instructs KCS to Process Customer Personal Data to the extent and in such a manner as is reasonably necessary to provide the Services in accordance with this Contract; and/or (ii) as is required by any Applicable Data Protection Law.
5. Customer acknowledges that KCS when fulfilling its obligations under the Contract may need to transfer Customer Personal Data outside of the European Economic Area and Customer hereby gives its consent for KCS to make such transfers provided that the following conditions are fulfilled:
  - (a) KCS has provided appropriate safeguards in relation to the transfer;
  - (b) The Data Subject has enforceable rights and effective legal remedies;
  - (c) KCS complies with its obligations under Applicable Data Protection Law by providing an adequate level of protection to any Customer Personal Data that is transferred; and
  - (d) KCS complies with reasonable instructions notified to it in advance by with respect to the processing of Customer Personal Data.
6. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing, KCS agrees to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including protecting against accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to Customer Personal Data transmitted, stored or otherwise Processed.
7. KCS shall notify the Customer without undue delay after becoming aware of a Personal Data Breach.
8. KCS shall ensure that persons who are processing Customer Personal Data under the Contract are informed of the confidential nature of the Customer Personal Data and have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality.
9. KCS shall make available to the Customer all information necessary to demonstrate KCS compliance with KCS's obligations laid down in this Clause 6 and on reasonable notice of not less than 20 (twenty days) written notice at Customer expense allow for and contribute to audits, including inspections, conducted by the Customer or another auditor mandated by the Customer provided that such audit or inspection shall occur no more than once per year during the term of the Contract and subject to any Customer auditor signing obligations of confidentiality towards KCS in the KCS Non-Disclosure Agreement.
10. Customer consents to KCS appointing processors in order to carry out its obligations under this Contract provided that KCS appoints such processors on terms providing equivalent protection in relation to Customer Personal Data to those set out in this Clause 6 and KCS shall remain fully liable to the Customer for the performance of that other processor's obligations. KCS agrees to inform Customer of any intended changes to the appointed processors.
11. At the written direction of the Customer, KCS shall delete or return all Customer Personal Data to the Customer at the end of the Contract unless the Applicable Data Protection Law requires the storage of Customer Personal Data.
12. Taking into account the nature of the processing, assist the Customer by appropriate technical and organisational measures, insofar as this is possible, KCS shall, at the Customer's expense, assist the Customer with the fulfilment of the Customer's obligations to respond to requests for exercising the Data Subject rights laid down in Chapter III GDPR that the Customer and/or KCS may receive under this Contract.
13. KCS shall assist the Customer at the Customer's expense in ensuring Customer's compliance with the obligations pursuant to Articles 32 to 36 GDPR taking into account the nature of the processing and the information available to KCS.
14. As the Data Controller, the Customer shall comply with its requirements under Applicable Data Protection Law and warrants that it has collected the Customer Personal Data lawfully in accordance with the Applicable Data Protection Law and has the necessary appropriate consents and notices in place to enable lawful transfer of Customer Personal Data to KCS for the purposes of the Contract.