

## 1. INTERPRETATION

### 1.1 Definitions. In these Conditions, the following definitions apply:

**Back Office Services:** a platform where Customers can view their endpoints in both steady and alarm states; view individual endpoint messages; change the default configuration settings; assign meaningful names to each endpoint; set up different group alert notifications; and manage alert schedules.

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

**Commencement Date:** has the meaning set out in clause 2.2.

**Conditions:** these terms and conditions as amended from time to time in accordance with clause 18.7.

**Contract:** the contract between Trak365 and the Customer for the supply of Goods and/or Services in accordance with these Conditions.

**Customer:** the person, company or firm who purchases the Goods and/or Services from Trak365.

**Customer Data:** the data inputted by the Customer for the purposes of using the Services, or collected by Trak365 during the course of performing the Services or facilitating the Customer's use of the Services.

**Data & Visualisation Services:** Data & Visualisation Services are an optional addition to the Back Office Services. Data & Visualisation Services provide the Customer with a dashboard of graphical and other visualisations from the data emanating from their endpoints and aggregations of that data, plus other related services that may be made available over time. This provides an effective way of understanding the status of endpoints in relation to the environment within which they have been placed and better inform the Customer in relation to the purpose for which they have been deployed.

**Data Controller:** has the meaning given to that term in the GDPR.

**Data Processor:** has the meaning given to that term in the GDPR.

**Delivery Location:** has the meaning set out in clause 4.2.

**Force Majeure Event:** has the meaning given to it in clause 17.1.

**GDPR:** General Data Protection Regulation (Regulation (EU) 2016/679) due to come into force on 25 May 2018.

**Goods:** the Trak365 Global, Trak365 Local, Trak365 Personal endpoints or any other goods (or any part of them) set out in the Order.

**Goods Specification:** any specification for the Goods, including any relevant plans or drawings that are agreed in writing by the Customer and Trak365.

**Initial Payment:** any initial payment required for the Goods and/or Services as agreed between Trak365 and the Customer.

**Installation Services:** the installation of the Goods.

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

**Order:** the Customer's order for the supply of Goods and/or Services, as set out in the Customer's purchase order form or the Customer's written acceptance of Trak365's quotation as the case may be.

**Personal Data:** has the meaning given to that term in the GDPR, and all applicable changes in law, including any subsequent UK legislation that may amend or supersede the Data Protection Act 1998.

**Services:** the Trak365 Back Office Services and Data Visualisation Services.

**Term:** the term set out in clause 16.

**Trak365:** Trak365 Limited registered in England and Wales with company number 09807839 whose registered office is at The Barn, Health Mill Lane, Guildford, Surrey GU3 3PR.

1.2 **Construction.** In these Conditions, the following rules apply:

- (a) a **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- (b) a reference to a party includes its personal representatives, successors or permitted assigns;
- (c) a reference to a statute or statutory provision is a reference to such statute or statutory provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted;
- (d) any phrase introduced by the terms **including, include, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms; and
- (e) a reference to **writing** or **written** includes e-mails.

## 2. BASIS OF CONTRACT

2.1 The Customer's Order constitutes an offer by the Customer to purchase Goods and/or Services in accordance with these Conditions.

- 2.2 The Customer's Order shall only be deemed to be accepted when Trak365 confirm this in writing and provide the Customer with a quotation. On receiving the Customer's written acceptance of the quotation, the Contract shall come into existence (**Commencement Date**).
- 2.3 The Contract constitutes the entire agreement between Trak365 and the Customer. The Customer acknowledges that it has not relied on any statement, promise, representation, assurance or warranty made or given by or on behalf of Trak365 which is not set out in the Contract.
- 2.4 Any samples, drawings, descriptive matter or advertising issued by Trak365 and any descriptions of the Goods or illustrations or descriptions of the Services contained on its website are published for the sole purpose of giving an approximate idea of the Goods and/or Services described in them. They shall not form part of the Contract or have any contractual force.
- 2.5 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 2.6 Any quotation given by Trak365 shall not constitute an offer, and is only valid for a period of 30 Business Days from its date of issue.
- 2.7 All of these Conditions shall apply to the supply of both Goods and Services except where application to one or the other is specified.

### **3. GOODS**

- 3.1 The Goods are described in the Goods Specification.
- 3.2 To the extent that the Goods are to be manufactured in accordance with a specification supplied by the Customer, the Customer will indemnify Trak365 against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by Trak365 in connection with any claim made against Trak365 for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with Trak365's use of the specification. This clause 3.2 shall survive termination of the Contract.
- 3.3 Trak365 may amend the specification of the Goods if required by any applicable statutory or regulatory requirements.

### **4. DELIVERY OF GOODS**

- 4.1 Trak365 shall ensure that each delivery of the Goods is accompanied by a delivery note which shows the date of the Order, all relevant Customer and supplier reference numbers, the type

and quantity of the Goods (including the code number of the Goods, where applicable), special storage instructions (if any) and, if the Order is being delivered by instalments, the outstanding balance of Goods remaining to be delivered.

- 4.2 Trak365 shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (**Delivery Location**) at any time after Trak365 notifies the Customer that the Goods are ready.
- 4.3 Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location.
- 4.4 Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. Trak365 shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide Trak365 with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 4.5 If Trak365 fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. Trak365 shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event the Customer's failure to provide Trak365 with adequate delivery instructions for the Goods or any relevant instruction related to the supply of the Goods.
- 4.6 If the Customer fails to accept or take delivery of the Goods within 5 Business Days of Trak365 notifying the Customer that the Goods are ready, then except where such failure or delay is caused by a Force Majeure Event or by Trak365's failure to comply with its obligations under the Contract in respect of the Goods:
  - (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the 5<sup>th</sup> Business Day following the day on which Trak365 notified the Customer that the Goods were ready; and
  - (b) Trak365 shall store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance).
- 4.7 If 10 Business Days after Trak365 notified the Customer that the Goods were ready for delivery the Customer has not taken delivery of them, Trak365 may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.
- 4.8 Trak365 may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

## 5. QUALITY OF GOODS

5.1 Trak365 warrants that on delivery, and for a period of 12 months from the date of delivery (**warranty period**), the Goods shall:

- (a) conform in all material respects with their description and any applicable Goods Specification;
- (b) be free from material defects in design, material and workmanship;
- (c) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
- (d) be fit for any purpose held out by Trak365.

5.2 Subject to clause 5.3, if:

- (a) the Customer gives notice in writing during the warranty period within 3 Business Days of discovery that some or all of the Goods do not comply with the warranty set out in clause 5.1;
- (b) Trak365 is given a reasonable opportunity of examining such Goods; and
- (c) the Customer (if asked to do so by Trak365) returns such Goods to Trak365's place of business at Trak365's cost,

Trak365 shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

5.3 Trak365 shall not be liable for the Goods' failure to comply with the warranty in clause 5.1 if:

- (a) the Customer makes any further use of such Goods after giving a notice in accordance with clause 5.2;
- (b) the defect arises because the Customer failed to follow Trak365's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice;
- (c) the defect arises as a result of Trak365 following any drawing, design or specification supplied by the Customer;
- (d) the Customer alters or repairs such Goods without the written consent of Trak365;
- (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions;
- (f) the Goods differ from the Goods Specification as a result of changes made to ensure they comply with applicable statutory or regulatory standards.

5.4 Except as provided in this clause 5, Trak365 shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 5.1.

5.5 The terms of these Conditions shall apply to any repaired or replacement Goods supplied by Trak365 under clause 5.2.

**6. TITLE AND RISK**

- 6.1 The risk in the Goods shall pass to the Customer on completion of delivery.
- 6.2 Title to the Goods shall not pass to the Customer until Trak365 receives payment in full (in cash or cleared funds) for the Goods and any other goods that Trak365 has supplied to the Customer in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums.
- 6.3 Until title to the Goods has passed to the Customer, the Customer shall:
- (a) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as Trak365's property;
  - (b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
  - (c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on Trak365's behalf from the date of delivery;
  - (d) notify Trak365 immediately if it becomes subject to any of the events listed in clause 16.2(b) to 16.2(d); and
  - (e) give Trak365 such information relating to the Goods as Trak365 may require from time to time.
- 6.4 If before title to the Goods passes to the Customer, the Customer becomes subject to any of the events listed in clause 16.2(b) to clause 16.2(d), then, without limiting any other right or remedy Trak365 may have, Trak365 may at any time:
- (a) require the Customer to deliver up all Goods in its possession; and
  - (b) if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

**7. SUPPLY OF SERVICES**

- 7.1 Trak365 shall supply the Installation Services to the Customer in accordance with the Order in all material respects.
- 7.2 Trak365 shall use all reasonable endeavours to meet any performance dates specified in the Order, but any such dates shall be estimates only and time shall not be of the essence for performance of the Installation Services.
- 7.3 Trak365 warrants to the Customer that the Installation Services will be provided using reasonable care and skill.
- 7.4 Trak365 shall, during the Term, provide the Services to the Customer on and subject to these Conditions.

- 7.5 Trak365 shall use commercially reasonable endeavours to provide 99.7% availability for the Services at no additional cost to the Customer.
- 7.6 Trak365 will, as part of the Services and at no additional cost to the Customer, provide the Customer with Trak365's standard customer support services during Normal Business Hours in accordance with Trak365's support services policy in effect at the time that the Services are provided. Trak365 may amend the support services policy in its sole and absolute discretion from time to time.

## **8. CUSTOMER DATA**

- 8.1 The Customer shall own all right, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.
- 8.2 Trak365 shall follow its archiving procedures for Customer Data as may be amended by Trak365 in its sole discretion from time to time. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for Trak365 to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by Trak365. Trak365 shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party (except those third parties sub-contracted by Trak365 to perform services related to Customer Data maintenance and back-up).
- 8.3 The following clause will apply until the coming into force of the General Data Protection Regulation (Regulation (EU) 2016/679). Where a party is to be a Data Processor of Personal Data under the Contract on behalf of the other party, the other party being a Data Controller in respect of that Personal Data, the party who is the Data Processor shall in relation to the Personal Data provided by the Data Controller:
- (a) procure that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of such Personal Data and against accidental loss or destruction of, or damage to, such Personal Data, taking into account the nature of the Personal Data;
  - (b) in relation to such Personal Data, act only on the instructions of the Data Controller;
  - (c) process such Personal Data only to the extent, and in such manner, as is necessary for the purposes of this agreement;
  - (d) operate appropriate security procedures, processes and systems to ensure that unauthorised persons do not have access to any equipment used to process such Personal Data or to the Personal Data itself;
  - (e) use reasonable endeavours to ensure the reliability of its employees with access to such Personal Data;

- (f) not transfer such Personal Data outside the EEA without the consent of the Data Controller;
- (g) provide reasonable assistance to the Data Controller to demonstrate compliance with this clause 3 and allow for and contribute to audits conducted by the Data Controller; and
- (h) on termination of this agreement or the end of carrying out data processing, delete or return all such Personal Data to the Data Controller and delete existing copies unless required by law.

8.4 The following clause will apply on and after the coming into force of the General Data Protection Regulation (Regulation (EU) 2016/679). Where a party is to be a Processor of Personal Data under the Contract on behalf of the other party, the other party being a Controller in respect of that Personal Data, then the party who is the Processor shall in relation to the Personal Data provided by the Controller:

- (a) procure that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of such Personal Data and against accidental loss or destruction of, or damage to, such Personal Data, taking into account the nature of the Personal Data;
- (b) in relation to such Personal Data, act only on the instructions of the Controller as set out in this agreement or as documented in writing;
- (c) process such Personal Data only to the extent, and in such manner, as is necessary for the purposes of this agreement;
- (d) operate appropriate security procedures, processes and systems to ensure that unauthorised persons do not have access to any equipment used to process such Personal Data or to the Personal Data itself;
- (e) use reasonable endeavours to ensure the reliability of its employees with access to such Personal Data and ensure that all such employees are under obligations of confidentiality in relation to such Personal Data;
- (f) obtain prior written consent from the Controller before transferring such Personal Data to any sub-contractor and ensure that any such sub-contractor is engaged on a written agreement giving commitments in relation to the processing of such Personal Data no less onerous than set out in this Agreement. The Processor shall remain liable to the Controller for the acts of any such sub-contractor in relation to such Personal Data;
- (g) not transfer such Personal Data outside the EEA without the consent of the Controller;
- (h) provide reasonable assistance to the Controller to assist the Controller to meet a request or complaint made by a Data Subject in respect of such Personal Data in order to meet the requirements of Chapter III of the General Data Protection Regulation (Regulation (EU) 2016/679) in respect of Data Subject rights;



- (i) provide reasonable assistance to the Controller to demonstrate compliance with this clause 4 and allow for and contribute to audits conducted by the Data Controller;
- (j) notify the Controller if, in its opinion, an instruction given by the Controller breaches the General Data Protection Regulation (Regulation (EU) 2016/679); and
- (k) on termination of this agreement or the end of the carrying out of data processing, delete or return all such Personal Data to the Controller and delete existing copies unless required by law.

## **9. TRAK365'S OBLIGATIONS**

9.1 Trak365 undertakes that the Services will be performed with reasonable skill and care.

9.2 The undertaking at clause 9.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Trak365's instructions, or modification or alteration of the Services by any party other than Trak365 or Trak365's duly authorised contractors or agents. If the Services do not conform with the foregoing undertaking, Trak365 will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in clause 9.1. Notwithstanding the foregoing, Trak365:

- (a) does not warrant that the Customer's use of the Services will be uninterrupted or error-free; or that the Services, and/or the information obtained by the Customer through the Services will meet the Customer's requirements; and
- (b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

9.3 Trak365 warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under the Contract.

## **10. CUSTOMER'S OBLIGATIONS**

10.1 The Customer shall:

- (a) ensure that the terms of the Order and (if submitted by the Customer) the goods specification are complete and accurate;
- (b) co-operate with Trak365 in all matters relating to the Services;
- (c) provide Trak365, its employees, agents, consultants and subcontractors, with access to the Customer's premises, office accommodation and other facilities as reasonably required by Trak365 to provide the Services;

- (d) provide Trak365 with such information and materials as Trak365 may reasonably require to supply the Services, and ensure that such information is accurate in all material respects;
  - (e) prepare the Customer's premises for the supply of the Services;
  - (f) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start;
  - (g) comply with all applicable laws and regulations with respect to its activities under these terms;
  - (h) carry out all other Customer responsibilities set out in these terms in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, Trak365 may adjust any agreed timetable or delivery schedule as reasonably necessary;
  - (i) ensure that its network and systems comply with the relevant specifications provided by Trak365 from time to time; and
  - (j) be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to Trak365's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.
- 10.2 If Trak365's performance of any of its obligations in respect of the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (**Customer Default**):
- (a) Trak365 shall without limiting its other rights or remedies have the right to suspend performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays Trak365's performance of any of its obligations;
  - (b) Trak365 shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from Trak365's failure or delay to perform any of its obligations as set out in this clause 10.2; and
  - (c) the Customer shall reimburse Trak365 on written demand for any costs or losses sustained or incurred by Trak365 arising directly or indirectly from the Customer Default.

## 11. CHARGES AND PAYMENT

- 11.1 The price for Goods shall be the price set out in the Order or, if no price is quoted, the price set out in Trak365's price list as at the date of delivery. The price of the Goods is exclusive of all costs and charges of packaging, insurance, transport of the Goods, which shall be paid by the Customer when it pays for the Goods.

- 11.2 Trak365 reserves the right to increase the price of the Goods, by giving notice to the Customer at any time before delivery, to reflect any increase in the cost of the Goods to Trak365 that is due to:
- (a) any factor beyond the control of Trak365 (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
  - (b) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Goods Specification; or
  - (c) any delay caused by any instructions of the Customer in respect of the Goods or failure of the Customer to give Trak365 adequate or accurate information or instructions in respect of the Goods.
- 11.3 Unless agreed otherwise, the Customer shall pay the Initial Payment on or before the Commencement Date and any subsequent payment at the commencement of each Renewal Period (as defined in clause 16.1).
- 11.4 Subject to clause 11.3, the total invoiced price shall be paid to Trak365 as provided in clause 11.6. All amounts due under the Contract shall be paid by the Customer to Trak365 in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law). Trak365 shall invoice the Customer for the charges at each relevant stage, together with expenses (and VAT, where appropriate), calculated as provided in clause 11.5.
- 11.5 Any fixed price excludes:
- (a) the cost of any materials or services reasonably and properly provided by third parties required by Trak365 for the supply of the Services. Such expenses, materials and third party services shall be invoiced by Trak365; and
  - (b) VAT, which Trak365 shall add to its invoices at the appropriate rate.
- 11.6 The Customer shall be responsible for all bank charges associated with the payment of the fees and shall pay each invoice submitted to it by Trak365 in full, and in cleared funds, within 30 days of receipt or other agreed period.
- 11.7 If Trak365 has not received payment within 30 days or other agreed period after the due date, and without prejudice to any other rights and remedies of Trak365:
- (a) Trak365 may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and Trak365 shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
  - (b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 4% over the then current base lending rate of Santander Bank from time to time,

commencing on the due date and continuing until fully paid, whether before or after judgment.

- 11.8 All amounts and fees stated or referred to in these Conditions:
- (a) are non-cancellable and non-refundable;
  - (b) are exclusive of value added tax, which shall be added to Trak365's invoice(s) at the appropriate rate.
- 11.9 Time for payment shall be of the essence of the Contract.
- 11.10 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding except as required by law. Trak365 may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by Trak365 to the Customer.

## **12. PROPRIETARY RIGHTS**

- 12.1 The Customer acknowledges and agrees that Trak365 and/or its licensors own all Intellectual Property Rights in the Goods and Services. Except as expressly stated herein, this agreement does not grant the Customer any rights to, or in, patents, copyright, database right, trade secrets, trade names, trademarks (whether registered or unregistered), or any other rights or licences in respect of the Services and the use of the Goods.
- 12.2 Trak365 confirms that it has all the rights in relation to the Goods and Services that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this agreement.

## **13. CONFIDENTIALITY**

- 13.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under the Contract. A party's Confidential Information shall not be deemed to include information that:
- (a) is or becomes publicly known other than through any act or omission of the receiving party;
  - (b) was in the other party's lawful possession before the disclosure;
  - (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
  - (d) is independently developed by the receiving party, which independent development can be shown by written evidence; or
  - (e) is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.

- 13.2 Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party or use the other's Confidential Information for any purpose other than the implementation of the Contract.
- 13.3 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 these Conditions.
- 13.4 Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.
- 13.5 The Customer acknowledges that details of the Goods and Services, and the results of any performance tests of the Goods and Services, constitute Trak365's Confidential Information.
- 13.6 Trak365 acknowledges that the Customer Data is the Confidential Information of the Customer.
- 13.7 The above provisions of this clause 13 shall survive termination of the Contract, however arising.

#### **14. INDEMNITY**

- 14.1 The Customer shall defend, indemnify and hold harmless Trak365 against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's use of the Goods and Services provided that:
- (a) the Customer is given prompt notice of any such claim;
  - (b) Trak365 provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and
  - (c) the Customer is given sole authority to defend or settle the claim.
- 14.2 Trak365 shall defend the Customer, its officers, directors and employees against any claim that the Goods or Services infringes any United Kingdom patent effective as of the Commencement Date, copyright, trade mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:
- (a) Trak365 is given prompt notice of any such claim;
  - (b) the Customer provides reasonable co-operation to Trak365 in the defence and settlement of such claim, at Trak365's expense; and
  - (c) Trak365 is given sole authority to defend or settle the claim.

- 14.3 In the defence or settlement of any claim, Trak365 may procure the right for the Customer to continue using the Goods and/or Services, replace or modify the Goods and/or Services so that they become non-infringing or, if such remedies are not reasonably available, terminate the Contract on 5 Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.
- 14.4 In no event shall Trak365, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:
- (a) a modification of the Goods and/or Services by anyone other than Trak365; or
  - (b) the Customer's use of the Goods and/or Services in a manner contrary to the instructions given to the Customer by Trak365; or
  - (c) the Customer's use of the Goods and/or Services after notice of the alleged or actual infringement from Trak365 or any appropriate authority.
- 14.5 The foregoing states the Customer's sole and exclusive rights and remedies, and Trak365's (including Trak365's employees, agents and sub-contractors) entire obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

## **15. LIMITATION OF LIABILITY**

- 15.1 This clause 15 sets out the entire financial liability of Trak365 (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer:
- (a) arising under or in connection with these Conditions;
  - (b) in respect of any use made by the Customer of the Goods or the Services or any part of them; and
  - (c) in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with these Conditions.
- 15.2 Except as expressly and specifically provided in these Conditions:
- (a) the Customer assumes sole responsibility for results obtained from the use of the Goods and/or Services by the Customer, and for conclusions drawn from such use. Trak365 shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Trak365 by the Customer in connection with the Goods and/or Services, or any actions taken by Trak365 at the Customer's direction;
  - (b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from the Contract; and
  - (c) the Goods and/or Services are provided to the Customer on an "as is" basis.

- 15.3 Nothing in this agreement excludes the liability of Trak365:
- (a) for death or personal injury caused by Trak365's negligence; or
  - (b) for fraud or fraudulent misrepresentation.
- 15.4 Subject to clause 15.2 and clause 15.3:
- (a) Trak365 shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under the Contract; and
  - (b) Trak365's total aggregate liability in contract (including in respect of the indemnity at clause 14.2), tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement shall be limited to the sums paid by the Customer to Trak365 during the 12 months immediately preceding the date on which the claim arose.

## 16. TERM AND TERMINATION

- 16.1 The Contract shall, unless otherwise terminated as provided in this clause 16, commence on the Commencement Date and shall continue for a minimum initial term of 12 months or longer period as agreed between Trak365 and the Customer (the "Initial Term") and, thereafter, the Contract shall be automatically renewed for successive periods of 12 months (each a **Renewal Period**), unless:
- (a) either party notifies the other party of termination, in writing, at least 60 days before the end of the Initial Term or any Renewal Period, in which case the Contract shall terminate upon the expiry of the applicable Initial Term or Renewal Period; or
  - (b) otherwise terminated in accordance with the provisions of this clause 16;
- and the Initial Term together with any subsequent Renewal Periods shall constitute the **Term**.
- 16.2 Without limiting its other rights or remedies, either party may terminate the Contract with immediate effect by giving written notice to the other party if:
- (a) the other party commits a material breach of any term of the Contract and (if such a breach is remediable) fails to remedy that breach within 14 days of that party being notified in writing to do so;
  - (b) the other party takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent

- restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;
- (c) the other party suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
  - (d) the other party's financial position deteriorates to such an extent that in the terminating party's opinion the other party's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.
- 16.3 Without limiting its other rights or remedies, Trak365 may suspend the supply of the Goods and/or Services or all further deliveries of Goods under the Contract or any other contract between the Customer and Trak365 if the Customer fails to pay any amount due under the Contract on the due date for payment, the Customer becomes subject to any of the events listed in clause 16.2(b) to clause 16.2(d), or Trak365 reasonably believes that the Customer is about to become subject to any of them.
- 16.4 On termination of the Contract for any reason:
- (a) the Customer shall immediately pay to Trak365 all of Trak365's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has yet been submitted, Trak365 shall submit an invoice, which shall be payable by the Customer immediately on receipt;
  - (b) the Customer shall return all of Trak365 Goods which have not been fully paid for. If the Customer fails to do so, then Trak365 may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with the Contract;
  - (c) the accrued rights and remedies of the parties as at termination shall not be affected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry; and
  - (d) clauses which expressly or by implication have effect after termination shall continue in full force and effect.

## 17. FORCE MAJEURE

- 17.1 For the purposes of these Conditions, **Force Majeure Event** means an event beyond the reasonable control of Trak365 including but not limited to strikes, lock-outs or other industrial disputes (whether involving the workforce of Trak365 or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or subcontractors.



17.2 Trak365 shall not be liable to the Customer as a result of any delay or failure to perform its obligations under the Contract as a result of a Force Majeure Event.

17.3 If the Force Majeure Event prevents Trak365 from providing any of the Goods and/or Services for more than 8 weeks, the Customer shall, without limiting its other rights or remedies, have the right to terminate the Contract immediately by giving written notice to Trak365.

## **18. GENERAL**

### **18.1 Assignment and other dealings.**

- (a) Trak365 may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party.
- (b) The Customer shall not, without the prior written consent of Trak365, assign, transfer, charge, subcontract, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.

### **18.2 Notices.**

- (a) Any notice or other communication given to a party under or in connection with this Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally or sent by prepaid first-class post or other next working day delivery service, or by commercial courier, or by e-mail.
- (b) A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address notified by either party from time to time; if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by e-mail, one Business Day after transmission.
- (c) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action

### **18.3 Severance.**

- (a) 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.

- (b) If one party gives notice to the other of the possibility that any provision or part-provision of this Contract is invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.
- 18.4 **Waiver.** A waiver of any right under the Contract or law is only effective if it is in writing and shall not be deemed to be a waiver of any subsequent breach or default. No failure or delay by a party in exercising any right or remedy under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor prevent or restrict its 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.
- 18.5 **No partnership or agency.** Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, nor constitute either party the agent of another party for any purpose. Neither party shall have authority to act as agent for, or to bind, the other party in any way.
- 18.6 **Third parties.** A person who is not a party to the Contract shall not have any rights to enforce its terms.
- 18.7 **Variation.** Except as set out in these Conditions, no variation of the Contract, including the introduction of any additional terms and conditions shall be effective unless it is agreed in writing and signed by Trak365.
- 18.8 **Governing law.** This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
- 18.9 **Jurisdiction** Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes or claims).