

IT SYSTEMS

THE AGREEMENT

This Agreement is made the () day of ()

Between:

() a company
incorporated in {India} whose registered office is at
()
() ("the Customer"),
and ()
a company incorporated in {India } whose registered office is at ()
() ("the Supplier").

1. RECITALS

Whereas:

- 1) the Supplier is engaged in the business of designing and providing information systems, together with associated hardware, software and other related services, and:
- 2) both parties agree to be bound by the terms and conditions set out in this Agreement.

Then:

2. SUPPLIER'S PRINCIPAL OBLIGATIONS

The Supplier shall provide to the Customer a complete integrated information system (hereinafter called 'the System') as described in Schedule 3 which shall meet the Customer's requirements as set out in Schedule 3 and satisfy the Acceptance Tests as described in Schedule 7. The Supplier shall also provide related services (hereinafter referred to as 'Services') which shall meet the requirements set out in Schedules 8, 9 and 10.

3. DEFINITIONS

Wherever they occur in this Agreement, including its Schedules and Appendices, the terms defined below shall have the meanings applied to them as set out in this Clause:

'Acceptance' means written confirmation by the Customer that the System, together with all Equipment, Software and other Services to be provided are accepted as being in accordance with the Specification.

'Acceptance Tests' means the activities to be carried out to verify that the System, together with all Equipment and Software is in accordance with the Specification.

'Agreement' means this Agreement and all Schedules and Appendices referred to herein.

'Appendices' means documents which may be referred to as Appendices in the Schedules and which shall set out additional details specific to the Agreement.

'Deliverables' means all Equipment, Software, Documentation and other things that the Supplier is required to deliver under this Agreement.

Notes & Guidance

This model agreement is in a modular form. As written it is intended as a guide for purchasing a complete information system comprising hardware, software and other services. However, it can be edited and amended to serve a number of purposes. For example, Schedule 5 'Software License' could be modified and used separately as a License Agreement for either bespoke or proprietary software packages. Other sections could also be used independently or in combination with each other. If sections are used independently care must be taken to ensure 'definitions' and other appropriate clauses are included.

The model is written from the point of view of the Buyer of a system. However, it aims to establish a reasonable position for both parties. Buyers wanting a very pro-buyer position should instruct specialist IT solicitors to draft a bespoke contract for them.

The recitals section should be drafted to reflect the actual nature of the procurement involved.

'Documentation' means all written material including instructions and descriptions, test results and training material to be supplied with the System and other Services.

'Change Control Procedure' means the procedure included in Schedule 2

'Equipment' means the computer hardware together with its operating system software necessary to comply with the requirements of Schedule 3.

'Key Person' means an individual who is to carry out work under the Agreement and is critical to its success and is named in Schedule 2.

'Licensed Software' means the software program(s) and documentation which is to be licensed to the Customer in accordance with this Agreement including the latest version which the Licensee is entitled to use.

'Licence' means the right granted by the Supplier to the Customer to use the Licensed Software in accordance with Schedule 5 of this Agreement.

'Maintenance and Support Services' means the services described in Schedules 8 and 9 and which set out details for the support and upgrade of the System, together with the terms and conditions that will apply to the provision of such services.

'Site' means the location(s) set out in the Agreement where the System is to be installed and used and to which other Services are to be provided.

'Developed Software' means the software program(s) and documentation described in the Agreement and which are to be developed and delivered under the Agreement.

'System' means the combination of Licensed Software, Developed Software and Equipment to be delivered under the Agreement.

'Software' means either the Licensed Software or Developed Software and the combination of both.

'Services' means the provision of all work and Deliverables, which are to be provided under the terms of the Agreement in support of the System.

'User' means a person who is to use the System for the business purposes of the Customer.

'Version' means a new version of the Licensed Software or Developed Software and which is released to the Customer by the Supplier incorporating new features, functionality or other attributes.

4. CONTENT OF AGREEMENT

The System and Services provided under this Agreement shall be in accordance with the documents and terms and conditions set out below:

'The Plan' (Schedule 1) sets out key activities which shall be undertaken to design, develop, supply, install and commission the System, together with the Services. It includes contractual completion dates and, for key activities, milestones start and end dates, together with responsibilities and the resources which shall use.

A number of the Schedules attached and referred to in Clause 4 can be used as written to form the basis of an agreement. However, owing to the diverse nature of systems that could be purchased using this model agreement many of the Schedules are written as

'Management and Change Procedure' (Schedule 2) sets out the procedures which shall be adopted by both parties in managing delivery and completion of the System and Services, together with procedures that will apply when agreeing any changes that may be proposed by either party to the System or Services or any terms of this Agreement. 'The Specification' (Schedule 3) setting out work to be undertaken to finalise any details for the specification of the System and Services, Acceptance Tests and Training Plans together with the functions, service levels and performance requirements that the System shall meet.

'Services for Software Development, Integration and Implementation' (Schedule 4) sets out the procedures that shall be followed to produce the Developed Software to comply with the Specification and to integrate with other software which the Customer may already have or which is to be supplied by the Supplier as part of this Agreement.

'Software License' (Schedule 5) the terms and conditions which will apply to the supply and ongoing use of all Licensed Software provided under this Agreement.

'Supply and Installation of Equipment' (Schedule 6) being terms and conditions specific to the supply and installation of Equipment.

'Acceptance Tests' (Schedule 7) setting out details of the processes to be followed for defining System tests, criteria for carrying out the tests, the collection of test data and provision of reports.

'Maintenance and Support' (Schedule 8) setting out details for the ongoing support and upgrades to the System. 'Equipment Maintenance' (Schedule 9) setting out the terms and conditions that shall apply to any Equipment Maintenance agreement that may be entered into.

'Training' (Schedule 10) setting out details of any initial and ongoing training that the Supplier shall deliver, together with the terms that shall apply to the provision of such training.

'Terms of Payment' (Schedule 11) setting out details of the prices that shall apply for all Equipment, Software and Services provided under this Agreement, together with the terms that shall apply for payment.

'General Conditions of Agreement' (Schedule 12) being the terms and conditions that shall apply to the execution of all work carried out under this Agreement.

Guidance documents which provide Checklists for preparing the actual content of the agreement. Where a Schedule is written as guidance this is stated in the guidance notes. Other standalone Model Forms such as software licensing L or maintenance M or development SD provide other examples of the contracts scheduled to this agreement

Agreements for information systems may be very complex, negotiations may take place over a protracted period and, even when an agreement is finalised, ongoing investigative and development work may be necessary to finalise details. For this reason, it may be appropriate to allow written representations that are not included in the Agreement to form part of the Agreement.

SCHEDULE 1 THE PLAN

The Supplier shall carry out the activities and deliver the System and Services in accordance with the plan set out below. The critical dates for delivery and which shall be firm contractual obligations on the Supplier are set out below. The Supplier shall be responsible for taking all action necessary that complies with the terms of the Agreement to ensure that these dates are achieved.

1. Commence development
2. Complete Phase X development
3. Deliver System ready for Acceptance Tests
4. Achieve Acceptance

The dates below are for project management purposes and set out the key milestone dates that the parties aim to meet.

Activity	Responsibility	Resources	Start	End
Appoint Project Managers				
Develop Detailed Plan				
Agree Detailed Plan				
Develop Specification				
Agree Specification				
Commence development				
Provide facilities on Site				
Recruit development team				
Develop detailed design				
Agree detailed design				
Deliver development environment				
Licence Licensed Software for development				
Develop and Plan Acceptance Tests				
Develop Phase X				
Test Phase X				
Deliver Phase X				
Integrate all Phases				
System test				
Design and deliver Acceptance				
Test data				
Design and Plan Training				
Design and Plan Implementation				
Deliver Equipment and test				
Deliver System ready for				
Acceptance Tests				
Perform Acceptance Tests				
Confirm Acceptance				
Install the Live System				

Agree Maintenance and Support

Service Level Agreement

Correct all errors found

Confirm completion of live

running period

THIS SCHEDULE PROVIDES AN OUTLINE GUIDE OF THE CONTENT THAT MAY BE INCLUDED IN SCHEDULE 1.

The Schedule should include details of the key activities, who is responsible for them, dependencies, dates to start and end the activities and a measure or statement of when the activity will be judged to be completed.

It can be replaced by a software-generated set of plans.

It is critical that key milestones are included even if the detailed plan is not agreed at the time the contract is signed.

SCHEDULE 2 MANAGEMENT AND CHANGE PROCEDURE

1. The work covered by the Agreement shall be managed according to the procedures set out in this Schedule.

2. The Supplier and Customer shall each appoint a Project Manager who shall have the skills, experience and knowledge necessary to manage the delivery of their party's respective responsibilities under the Agreement.

3. The Project Managers shall have the authority to take decisions required under the Agreement.

4. The parties will establish a Steering Group comprising representatives of the Supplier and Customer to meet monthly during the period of the Agreement. The first meeting of the Steering Group will agree terms of reference for future meetings but the purpose of the group shall include:

- Receive and review reports of progress from the Project Manager of the Supplier
- Assist in resolving issues which are referred to them by the Project Manager(s)

- Consider significant change requests and assist the Project Manager(s) to manage the volume of changes
- Establish and monitor a register of risks to the work identifying responsibilities for mitigating such risks
- Support the Project Manager in approving major deliverables
- Assist the Project Manager to deal with people issues

5. The Supplier shall provide reports on progress to the Customer at the end of every week in a format specified by the Customer and agreed by the Supplier.

6. The Supplier shall notify the Customer of any matter which may impact on the performance and delivery of the System or Services as soon as such a matter comes to its attention. Where applicable the Supplier shall also propose to the Customer a plan to resolve any such matter.

7. The Supplier shall maintain detailed records of all decisions and activities that occur during the Agreement and shall make these available to the Customer on request.

8. The Customer and Supplier shall comply with the requirements of the Systems Development Methodology, Standards or Management and Change Procedures specified below (or attached as an Appendix to this Schedule).

9. All changes to the Agreement shall be agreed in accordance with the Change Control Procedure described below. Both parties will endeavour to limit the scale and number of changes they require so as to minimise the risk of changes affecting the success of the work.

10. If at any time before Acceptance the Customer wishes to alter all or part of the Specification the Customer will provide the Supplier with the details of what is required and shall provide additional information that the Supplier may reasonably require. THIS SCHEDULE PROVIDES AN OUTLINE GUIDE OF THE CONTENT THAT MAY BE INCLUDED IN SCHEDULE 2.

The Schedule describes the way the work will be managed and how changes will be agreed. Most IT projects involve significant levels of change so this procedure is an essential part of the Agreement.

Project managers play a critical role in any project. Their skills and experience and their ability to work with their counterpart can make or break a project.

Most projects involve a number of stakeholders who will need to be involved in determining issues relating to the project. It is as well to include them as members of a steering group, which can consider most issues and resolve them at the appropriate management level.

Early warning of a problem by a supplier will demonstrate a degree of control and can allow the Customer to manage the resolution of problems proactively.

No specific methodology is specified here, as there are a number to choose from and many customers and suppliers have adopted a standard approach to their own methods. It is important to agree which standard to apply and stick to it throughout the work.

This change control process is a typical approach to this subject and the elements should be familiar to experienced contract and project managers.

11. A standard form and a joint register will be used to record each change request including:

- the title of the change;
- the originator and date of the request or recommendation for change;
- the reason for the change;
- full details of the change including any specifications
- the price, if any, of the change;
- a timetable for implementation together with proposals for acceptance;
- a schedule of payments if appropriate;
- details of the likely impact, if any, of the change on other aspects of the System, including but not limited to:
 - the prices for the Services and/or the Deliverables
 - the payment profile;
 - the documentation to be provided;
 - the training to be provided;
 - working arrangements;
 - other contractual issues.

- the date of expiry of validity of the change request; and
- provision for signature by the Customer and by The Supplier

12. The Supplier will submit to the Customer as soon as is reasonably practicable a full written quotation for any change specifying what changes (if any) will be required to the Price, the Plan, the Specification, the Documentation and the Training Plan and provide a reasonable justification for the extent of any changes.

13. Upon receipt of such quotation the Customer may elect either to accept the quotation in which case this Agreement shall be amended in accordance with it; or to withdraw the request.

14. The Supplier may recommend changes to the Customer. The Customer shall not be obliged to accept any such change other than as a result of any delay or additional cost caused by the Customer or by any factor outside the reasonable control of the Supplier.

15. Neither the Customer nor the Supplier shall unreasonably withhold agreement to any change.

16. Until such time as a change is made in accordance with the Change Control Procedure, the Supplier shall, unless otherwise agreed in writing, continue to undertake the work as if the request or recommendation has not been made.

17. Any discussions, which may take place between the Customer and the Supplier in connection with a request or recommendation before the authorisation of a resultant change to the work, shall be without prejudice to the rights of either party.

18. If the Supplier considers that the preparation of a quotation for a change requested by the Customer, requires significant resources over and above those (if any) stated for such, purposes in the Agreement, the Supplier will notify the Customer accordingly and, on agreement by the Customer, the Supplier will make proposals for a paid study of the cost and It is useful to allow Suppliers the right to submit change requests but make sure that this is not a means of reducing the scope of the work to ensure that the supplier can meet delivery dates or make additional profit without approval implications of preparing a quotation for the change for agreement with the Customer prior to preparing the quotation.

19. All decisions and commitments required to be made by the Customer or the Supplier shall be made through and in the name of the respective Project Manager(s). The Project Manager(s) shall use the Steering Group and adopt other communication processes within their organisations to support them in making decisions.

20. Key Persons who are to work on the Services are named below:

(List Names and titles)

There is a risk that excellent technical and project management people will be used to win a contract but, because of their skills they will be in demand for other projects and they may be moved. Compile and agree a list of key people (not everyone) who are essential to the success of the project and lock them in to staying with the work for as long as they are needed.

SCHEDULE 3 SPECIFICATION

The Supplier shall deliver the System and the Services in accordance with the requirements set out in this Schedule.

Changes to the Specification shall only be agreed through the Change Control Procedure.

(This Schedule sets out the common headings of the content of a typical Systems specification. In writing the Specification it is important to make a clear distinction between the Customer's mandatory requirements that must be delivered and any optional or desirable requirements that are of less significance.)

Business Objectives

- ☐ A statement of the purpose of the planned Software in the Company's organisation
- ☐ The Systems Environment
- ☐ The existing systems architecture with which the Licensed and Developed Software will operate. Set out here a detailed list of existing systems and interfaces,
- ☐ The System and the Equipment - the existing and planned new equipment and software which may be in place and with which the System is to operate.
- ☐ System and technical standards that are to be complied with.

The user environment and any constraints

- ☐ The Site - the locations and the physical conditions and any special considerations
- ☐ Energy or cooling or other environmental constraints
- ☐ The users, their skills, numbers and locations

The functional requirements

- ☐ The specific business functions to be provided
- ☐ Any legal or statutory regulations that apply
- ☐ Optional requirements in addition to mandatory features The performance requirements
- ☐ Response times of the System for Users for specified transactions
- ☐ Availability (i.e. 24hours, 7 days a week)
- ☐ Error rates, mean time between failures and mean time to fix faults
- ☐ Batch processing times
- ☐ Volumes of transactions within a given period within performance parameters
- ☐ Success in processing the volumes
- ☐ Scalability for future growth in business and System enhancement Development Methodology requirements
- ☐ Any standard or methodology with which the development work is to comply - either the Customer's own standards, those of the Supplier or a recognised published standard.
- ☐ Productivity standards to be achieved
- ☐ Quality standards The technical requirements
- ☐ Avoid technical details which are not essential
- ☐ Interface specifications with other systems and equipment
- ☐ Technical standards with which compliance is required
- ☐ Detailed specifications of any existing or third party software to be used
- ☐ Specific specifications agreed between the Customer and Supplier for other parts of the systems environment with which the Licensed and Developed Software will be required to operate

THIS SCHEDULE PROVIDES AN OUTLINE GUIDE OF THE CONTENT THAT MAY BE INCLUDED

IN SCHEDULE 3

In some cases, a detailed specification is not fully agreed by the time a contract is signed. Customers increasingly rely upon the skills of the supplier to help define requirements and design the system on a progressive basis.

It is important to guard against over-specification and de-scoping to the advantage of the supplier.

This schedule is a list of headings of typical contents of a specification and can be used as a starting point for developing or reviewing a specification

☐ Equipment, storage, memory and computer network capacity and processing power, which the Supplier proposes to run the given volume of transactions. Notwithstanding, the Supplier shall be responsible for ensuring that the delivered Equipment, storage, memory and computer network capacity and processing power will meet all of the requirements specified in Schedule 3.

Maintainability

- ☐ Specific requirements for maintenance and support
- ☐ Support for the Customer's own maintenance Documentation
- ☐ A description of the manuals, installation and maintenance instructions and any training material and the standards or format in which they are to be supplied. Training
- ☐ A description of the training to be provided by the Supplier

SCHEDULE 4 SERVICES FOR DEVELOPMENT OF SOFTWARE

INTEGRATION AND IMPLEMENTATION

1. Development and other services

1.1 The Supplier shall develop the Software to provide the facilities and functions and performance set out in the Specification and the detailed design to meet the Customer's requirements. The Software shall comply with the best practice of the software and computer services industry and to the structured programming and documentation standards set out in the Management and Change Procedures.

1.2 The Supplier shall verify that the Specification and all documentation and designs provided by the Customer are accurate and complete and shall agree with the Customer any changes that it may consider to be necessary under the Change Control Procedure.

1.3 The Supplier shall keep all work, data and Documentation safe and secure from loss or damage and maintain up to date back up copies in a separate and secure location.

2. Specification and design services

2.1 The Supplier shall be responsible for the Services described in the Agreement and shall deliver all Documentation describing the Deliverables accurately and in detail. Deliverables shall meet the requirements set out in the Agreement.

2.2 The Customer will agree Deliverables within an agreed period or notify the Supplier of changes it requires and which the Supplier shall incorporate into revised Deliverables for agreement of the Customer.

2.3 If not already set out in Schedule 1 the Supplier shall develop a detailed plan for the development, test integration and installation of the System to meet the specified requirements of the Customer including an agreed date for completion of the System and Services taking into account reasonable standards of productivity and an assessment of the likely risks.

2.4 The Supplier shall develop detailed technical and design specifications to comply with the Specification and the stated requirements of the Customer and agree these with Customer. The Supplier shall be responsible for ensuring the completeness and accuracy of the detailed design and shall not be entitled to additional payment for any matter or fact relating to the requirement that could reasonably have been verified before entering into the Agreement or during the detailed design stage.

2.5 If the result of preparing a detailed plan and detailed specification result in changes to Schedules 1 and 3 of this Agreement then they shall be included in this Agreement as Schedules and shall replace or amend the current Schedules describing the requirements for the Plan and Specification. Otherwise additional details to the Plan and Specification shall be included in the Agreement as Appendices to Schedules 1 and 3.

3. The Customer's Responsibilities

3.1 The Customer shall make available personnel with necessary business and technical knowledge and skills to advise the Supplier on the requirements of the Customer.

3.2 The Customer shall disclose all information necessary to enable the Supplier to design, plan, develop, integrate, implement and test the System to meet the Specification.

3.3 The Customer shall perform its responsibilities under the Agreement in accordance with the time scales in the Plan or as may otherwise be agreed with the Supplier.

3.4 The Customer shall provide reasonable and agreed computer facilities necessary for the Supplier to provide the Services.

THIS SCHEDULE PROVIDES AN OUTLINE GUIDE OF THE CONTENT THAT MAY BE INCLUDED IN SCHEDULE 4

This Schedule sets out the terms under which a supplier would design and plan the services and System.

Because this is a highly subjective activity relying on the skills experience and talent of the people involved, the quality of the work depends highly on the quality of the people and their ability to apply best practice in their industry.

Model Form contract for Software Development (MFSD) provides another example of a development agreement on a standalone basis.

The term Deliverable is used here to cover the wide range of system elements and services that may be required.

Even if the Customer has included a Plan for delivery in the Agreement it is desirable for the Supplier to prepare their own plan for achieving these dates at a more detailed level. The Plan should be visible to the Customer to ensure that it is realistic and includes all the right elements and so that the Customer can assess the risks and dependencies involved.

Customers are usually active parties in a systems project and will need to meet their responsibilities - so it is important to set out what these obligations are.

SCHEDULE 5 SOFTWARE LICENCE

1. Licence

1.1 The Supplier grants the Customer a perpetual, non-exclusive Licence to use the Licensed Software on the terms and conditions set out in this Agreement.

1.2 The Customer shall be entitled to use the Licensed Software for the business purposes of the Customer including providing services to its customers subject to the following limitations

- ☐ Up to a maximum of [] Users
- ☐ Up to a maximum of [] concurrent Users at any one time
- ☐ Up to a maximum of [] units of processing power
- ☐ Up to a maximum of [] transactions in a defined period
- ☐ On the System specified in the Specification
- ☐ At the Site(s) specified in the Specification
- ☐ On the Equipment described in the Specification
- ☐ In any part of the Customer's organisation including any subsidiaries in which the Customer has at least 50% ownership, its successors or parent or group company subject to compliance with the terms of this licence

1.3 The Customer may transfer the Licensed Software to other parts of the same Group of Companies or a related subsidiary, Users, Systems, Equipment or Sites and confirm to the Supplier that it has done so provided that the Customer shall not make more use of the Licensed Software than it is entitled to do under the Licence.

1.4 The Customer shall only make other copies of the Licensed Software as are necessary for security or back-up purposes.

1.5 The Customer may use the Licensed Software on any equipment and at any location subject to the limitations on the maximum number of usable copies specified in this Agreement.

1.6 The Customer is entitled to employ a third party to provide computer services to run the Licensed Software for the business purposes of the Customer by giving written notice to the Supplier and provided that the third party complies with the terms of this Agreement on behalf of the Customer.

1.7 The Customer shall not be entitled to decompile the Licensed Software or make amendments to the Licensed Software without the prior agreement of the Supplier except for and to the extent of developing interfaces to the System or in the event that the Supplier is unable to provide maintenance services for the Licensed Software.

1.8 The Customer shall be entitled to allow use of the Licensed Software by third parties contracted to the Customer to provide business or systems related services which require use of the Licensed Software provided that such parties are required in a written agreement with the Customer to comply with the relevant requirements of this Agreement.

1.9 The Customer shall comply with the reasonable instructions of the Supplier to protect the Supplier's rights in the Licensed Software and at the written request of the Supplier, the Customer shall make an annual written report of the number of copies of the Licensed Software that have been made and are in use at a specified time.

1.10 The Supplier warrants that is fully entitled to grant the Customer the licence contained in this Agreement to have full right and licence to quiet possession, use and operation of the Software in accordance with this Agreement without infringing the legal rights of any third party;

1.11 The Supplier agrees to provide the Maintenance and Support services at the request of the Customer for a period of not less than [7] years after installation of the last copy of the Licensed Software permitted under the Licence. This licence covers the use of third party software. It is intended to respect the rights of the owner of the software and protect the customer from exploitation as a result of changes to use or over restrictive controls over use. Model form L (Software Licensing) provides another example of a software licence. There are a large number of options for governing the use of software. Ensure that the option chosen is right for the use to which the customer will make of the software as opposed to simply applying a supplier's standard form of agreement.

Customers need to be able to use the software in different parts of their business as the business changes and avoid paying extra for the same actual usage simply because of a change of location, name or entity.

If a customer outsources operations or support of its systems then the software licence will need to allow for this to avoid a supplier charging the outsourcer again for the use of the software.

Because the software is the property of the Supplier and is their source of future revenue it is reasonable to agree to take some measures to protect the owners' rights.

It is vital to require the supplier to continue to support its software for the time you're likely to want to use it. No support means that problems would not get fixed and developments of new features would stop - threatening use of the software.

1.12 The Customer is entitled to make copies of the Documentation for its own internal purposes and to make the Documentation available on its internal computer networks for use by the Users.

2. Delivery

2.1 The Supplier shall deliver the Licensed Software and Documentation in a form capable of installation by the Customer and provide all necessary support for the Customer to install and use the Licensed

Software by the date in the Plan.

Or

2.1 The Supplier shall deliver the Licensed Software and Documentation and install the Licensed Software on the System by the date in the Plan.

2.2 The Supplier shall deliver all new Versions of the Licensed Software to the Customer within 5 working days of its general availability and provide all necessary support and documentation for its installation and use.

2.3 The Supplier shall deliver the Software in machine readable form and install the Software on the System and provide the Customer with copies of all Documentation before installation is complete.

3. Access to Source Code

The Supplier shall provide copies of all source code and documentation for the Licensed Software which may reasonably be required by the Customer for the purposes of developing interfaces to other systems or for developing modifications required to the Licensed Software.

Either:

The Supplier shall supply the source code for the Licensed Software at the request of the Customer to enable the Customer to enhance, build interfaces to or maintain the Licensed Software in the event that the Supplier is unable or unwilling to do so on reasonable terms. The source code shall only be used to ensure that the Licensed Software can continue to be used on the System.

Or

The Supplier shall enter into a source code escrow agreement (an available form of Escrow Agreement will be referred to here) in relation to the Licensed Software with the Customer and such other party as may be necessary in a form to be agreed. The Supplier shall deposit copies of the source code with the escrow agent pursuant to the escrow agreement and shall keep such copies up to date.

The Supplier shall execute the Escrow Agreement within 30 days of the date of Acceptance.

4. Effect of ending this Agreement

4.1 Upon termination of this Agreement or an individual Licence, the Customer shall, at the request of the Supplier, return or destroy all applicable copies of the Licensed Software and documentation within 30 days.

4.2 On termination of this Agreement by the Customer as a result of an unremedied default by the Supplier the Customer shall be entitled to continue to use the Licensed Software under the terms of the Licence with no further liability to the Supplier.

Source code is the version of the software that can be used to maintain, modify and develop it, including building interfaces. It is not necessarily supplied with the software as the software could then be copied or amended and this is not in the interests of the original owner.

If source code is not supplied then make sure that access to it will be possible by putting a copy into the safe hands of a third party under an escrow agreement with a body which contains provisions for the release of it to the customer in certain circumstances - such as the supplier going into liquidation or ceasing to support the Software.

SCHEDULE 6 EQUIPMENT

1. Delivery

1.1 The Supplier shall deliver the Equipment and all operating system software and documentation required to operate it in accordance with the Specification by the date in the Plan.

1.2 The Supplier shall supply the Customer with consumable materials required to operate or maintain the Equipment at prices, which shall be the Supplier's current price for similar consumables or the price set out in Schedule 11, whichever shall be the lowest.

1.3 The Supplier shall provide all Equipment and support required to deliver and install the Equipment on the Site. The Supplier shall carry out all necessary surveys and checks to ensure that the Equipment can be delivered and installed.

1.4 The Supplier shall take all practicable steps to avoid disruption to the operations of the Customer during delivery and installation and shall leave the Site in the condition it was prior to delivery and shall remove all materials and equipment supplied by the Supplier during delivery and installation.

1.5 The Customer shall provide safe access to the Site, any necessary lifting Equipment reasonably required by the Supplier and specified in this Agreement for the Supplier to deliver and install the Equipment at the date agreed in the Plan.

1.6 The Customer shall provide all power, security, safety, cooling and telecommunications or network services required to operate the Equipment and shall operate the Equipment in accordance with the supplier's written instructions.

2. Upgrades

2.1 The Supplier shall ensure that the Equipment is capable of running under the latest Version of the operating system software that it is required to execute or the Customer is entitled to use in accordance with the Specification.

2.2 The Supplier shall make available to the Customer all fixes, modifications, software changes and revised documentation that it makes available for the Equipment and shall provide assistance in installation as necessary.

2.3 The Supplier shall supply upgrades to the Equipment which are available and required by the Customer under these terms and conditions and at a price which shall be the price set out in the Price Schedule or the Supplier's then current list price less the discount set out in the Price Schedule, whichever shall be the lower.

2.4 The Supplier shall supply on the written request of the Customer such supplies of parts, any documentation and diagnostics or other support software that may be necessary for the Customer or a third party contracted to the Customer to maintain and support the Equipment. The terms of such supply shall be reasonable and on no worse terms than those made available to other customers.

3. Lease Arrangements

The Supplier shall at the written request of the Customer agree to the Customer assigning this Agreement to supply the System to a Leasing Company appointed by the Customer for the purposes of financing the System.

4. Replacement

4.1 If the Customer wishes to replace the Equipment with new Equipment from the Supplier then the Supplier shall purchase the Equipment at the higher of the prevailing fair

market price for the Equipment or the residual value of the Equipment in the Customer's accounts.

Computer equipment no longer carries the risks it once did. Most manufacturers are able to meet high technical and reliability standards and tend to use standard components to reduce the number of surprises awaiting a customer.

Standalone Model Form P is another example of an agreement for sale of computer or telecommunications equipment. Because technology continues to develop quickly it is essential that the supplier is committed to deliver new versions and upgrades to keep pace with the development of the chosen operating system software. If this does not happen the customer will find it difficult to maintain the system and the other software will be developed to work with the new versions so the customer will lose out on new features and performance improvements.

Customers may want to have the equipment maintained by a third party to reduce costs or to keep all maintenance in the hands of one party responsible for the complete system.

Leasing is very common for expensive IT equipment and this clause allows a third party leasing company to become involved.

Many equipment purchases are part of a long-term commitment to a technology or a supplier and if this is the case then the supplier should be prepared to assist in the

4.2 The Supplier shall ensure that existing equipment to be replaced by the Equipment is de-installed and removed from the Site at the request of the Customer with the least possible disruption to the operations of the Customer. economics of replacing old equipment with new ones. Tying the credit for the old equipment to its residual value places at least one guarantee on the cost involved

SCHEDULE 7 ACCEPTANCE

1. The Supplier and Customer shall carry out Acceptance Tests to confirm that each part of the System is in accordance with the Specification.

2. The details of the tests and the responsibilities of both parties are set out as an Appendix to this Schedule. In the event that Acceptance Tests have not been agreed by the date set out in the Agreement then either (a) the Customer or (b) the Supplier shall prepare Acceptance Test specifications and plans for agreement with the other party within [.....] weeks of the date set out in the Plan. In the event of any dispute The Customer's

requirements shall prevail. Any changes to the Acceptance Test plan shall be subject to Change Control.

3. All plans, data and results produced for the purposes of the Acceptance Tests shall be made available for scrutiny by both parties and either party shall be entitled to be present at any tests and be given reasonable notice of the intention to carry out tests.
4. By the date in the Plan the Customer or Supplier (as defined in the Acceptance Test plans) shall prepare the data for use in Acceptance Tests and a statement of the results with which the System is expected to comply. Either party may request changes to the data and the expected results provided that no change may be agreed without the approval of the Customer.
5. The Supplier shall carry out its own unit and system tests on each part of the System as they are completed. Any faults identified shall be rectified prior to delivery of the System to the Customer.
6. The Supplier shall carry out system and unit tests on the System at specified stages prior to delivery to verify that the System is in accordance with the Specification. Any faults identified shall be rectified prior to delivery of the System to the Customer.
7. The Supplier shall confirm in writing to the Customer prior to or at the time the System is delivered and installed that it has carried out tests and that in its opinion the System is in accordance with the Specification.
8. The Supplier shall carry out all Acceptance Tests on Equipment prior to delivery and after installation to ensure that it is working properly in accordance with the Specification.
9. The Customer shall carry out the Acceptance Tests to the dates or time scales set out in the Plan after delivery of the System. The Supplier shall provide all necessary assistance to the Customer to perform the tests.
10. If the System or any part of it fails the Acceptance Tests then repeat Acceptance Tests shall be carried out in accordance with the provisions of clause 12 of Schedule 12.
11. The Supplier shall re-test all or parts of the System before delivering the corrected System to the Customer for repeat Acceptance Tests.

Acceptance test clauses usually contain the same elements and this version is drawn from a number of sources and attempts to be reasonable to both parties.

Acceptance testing should not be left to the very end of the development process. Testing each part of the system as it is delivered in conjunction with the other elements, which may have been delivered, can reduce risk of failure.

It is necessary to include the options available to the customer should the system not be capable of acceptance or only part of it turns out to be satisfactory.

SCHEDULE 8 MAINTENANCE AND SUPPORT.

The Maintenance and Support Services available from the Supplier shall commence from Acceptance of the System and continue for at least 7 years and until terminated by the Customer giving not less than 3 months' notice to the Supplier.

Charges for the Maintenance and Support services shall commence at the time that all defects identified during Acceptance and which were not corrected at the time of Acceptance are corrected and are in accordance with the Specification.

The maintenance and Support Services shall be provided as set out below:

1. The Supplier shall provide maintenance and support services to ensure that the Customer can continue to use the System as set out in the Specification.
2. The Customer shall provide an internal point of contact, which shall be responsible for the co-ordination and reporting of faults or for making requests for support to the Supplier.
3. The Supplier shall make available to the Customer any information, tools or software necessary to carry out first line fault diagnosis and resolution.
4. The Supplier shall provide a specified number of people skilled and experienced in the design and use of the System and the Customer's use of the System to provide the maintenance services. These people will be made available to the Customer, at agreed charge rates to provide expert Consultancy and advice, enhancement development services or training and onsite support as reasonably required by the Customer.
5. The parties shall agree the implementation and operation of any remote diagnostic tools, which the Supplier may make available from time to time.
6. The Supplier shall provide a telephone help desk or online service to receive and log calls for assistance and provide an initial fault diagnosis and resolution service. The service shall be provided by sufficient competent people for [24 hours per day 7 days per week] or [during working days between 0800 and 1800].
7. As soon as a defect which has a significant effect on the use of the System by the Customer is reported by the Customer or the supplier becomes aware of the defect, the Supplier shall promptly commence work on diagnosing and fixing the fault and shall continue to work diligently until a fix can be successfully implemented on the System.
8. Service levels for fixing faults are attached as Appendix 1 to this Schedule.
9. All changes and corrections made by the Supplier shall be documented and revised Documentation shall be supplied to the Customer.
10. The Supplier shall be responsible for delivering corrected programs or instructions to correct the defect so that the System can be restored to operational use with least possible delay. The Supplier may be required by the Customer to provide onsite or other support for reinstallation and recovery of the System.

11. If a defect has no material impact on the use of the System by the Customer, the Supplier and the Customer shall agree a reasonable period within which the fault will be fixed and incorporated into a generally available version or release.

12. All corrections made by the Supplier shall be free from defects and shall execute or operate without further defect or impact on other parts of the System.

THIS SCHEDULE PROVIDES AN OUTLINE GUIDE OF THE CONTENT THAT MAY BE INCLUDED IN SCHEDULE 8

The customer needs assurance of long-term support from the software and equipment supplier but may need to be able to terminate it for other reasons. The supplier is not given an option to terminate except if the customer is in breach of the Agreement – see the General Terms and Conditions. **Model Form M and S(M)** provide further examples of an equipment and a bespoke software maintenance contract respectively, to which reference can be made.

Software can never be entirely free from errors and this provision allows for minor problems to be corrected with a lower priority than business stopping ones.

13. Intellectual property rights in any correction, enhancement or modification, made to the System or any new tool or technique or know how developed as a consequence of correcting a defect shall be the property of the Customer except where the intellectual property is an inherent part of the Licensed Software and is to be made available to other Licensees of the Licensed Software by the Supplier.

14. The Supplier shall be responsible at its own cost for the maintenance and support of any part of the System which is supplied prior to Acceptance and is required for use by the Customer or Supplier as part of the Services.

16. The Supplier shall correct any fault which may be caused by the act or omission of the Customer in not using the System in accordance with the Documentation and shall be entitled to charge the Customer a reasonable charge at the rates set out in the Price and Payment Schedule for such work.

17. If the service is terminated due to the un-remedied default of the Supplier or at the request of the Supplier then the Supplier shall provide all documentation, tools and instructions including source code of the System and internal maintenance instructions to allow the Customer to maintain the System itself or to allow the Customer to employ a third party to carry out the maintenance.

For Licensed Software specifically:

19. The Supplier shall accept a request from the Customer to recommence previously terminated maintenance and support services at a later date provided that the Customer pays reasonable additional charges for the installation of current versions or releases of Licensed Software which shall be compatible with the System.

20. The Customer shall not be required to install any new version , upgrade or release or Licensed Software for which additional payment is required but shall not unreasonably refuse to do so provided that it is fully compatible with the System and meets the functional and performance requirements of the Customer and the charge proposed by the Supplier can be demonstrated to reasonably reflect the increased value of the new version, upgrade or release.

21. The Supplier shall promptly make available under the terms of this Agreement all new versions (including upgrades and releases) of the Licensed Software provided under the maintenance and support service. The Customer shall not unreasonably refuse to install such new versions of the Licensed Software within a reasonable time where it is fully compatible with the System and meets the functional and performance requirements of the Customer.

22. The Supplier shall continue to provide support on request for any version of the Licensed Software in use by the Customer.

23. The Supplier shall keep up to date and, on request, provide an accurate plan for the release of new versions of the Licensed Software.

New versions of licensed software may contain excellent improvements to the old one but may affect the operational performance of the system, be incompatible with other elements of the system and may require extensive and expensive redevelopment of interfaces and modifications to be implemented. The customer may need to decide not to upgrade and will continue to need support for the version in use. But the Supplier will find it increasingly difficult to support old versions (nobody wants to work on old technology!) and the Customer should be obliged to upgrade when there is no reason not to do so.

APPENDIX 1 TO THE MAINTENANCE AND SUPPORT SCHEDULE

Service rating	Priority	Description	Definition	Time to provide initial response		
Time to provide workload solutions			Maximum Fix Time	Total	lapsed	
1	Critical	A major impact on the business and/or affecting a large number of customers				
		30 minutes	1 hour	4 hours	4 hours	30 mins
2	Urgent	An impact on business and/or affecting several customers		1 hour	4 hours	
		8 hours	9 hours			
3	Important	Impact on one or a small number of customers		4 hours	1	
		1-5 working day	5.5 working days			
4	Non-urgent	Inconvenient, but business not severely affected.		1 day	5 days	
		5-10 working days	11 working days			
5	Minor	Requires attention but with no urgency.		5 working days	as soon	
		practical as agreed	as agreed			

SCHEDULE 9 EQUIPMENT MAINTENANCE

If so requested by the Customer the Supplier shall enter into a Maintenance and Support Agreement with the Customer in accordance with the terms of this Schedule and such of the terms and conditions contained in Schedule 12 as shall be applicable to a maintenance and support agreement as listed below:

- ☐ Expert Determination
- ☐ Waiver
- ☐ Force Majeure
- ☐ Statutory Regulations
- ☐ Payment
- ☐ Interference
- ☐ Limitation and Exclusion of liability
- ☐ Supplier to fully inform himself
- ☐ Access to the Premises and Supplier's Personnel
- ☐ Dispute Resolution
- ☐ Law
- ☐ Insolvency and Bankruptcy
- ☐ Assignment and Sub-Contracting
- ☐ Termination for Default

The period of this Agreement shall commence when all defects in the Equipment identified in the Acceptance Tests or which may occur during the period of the Defects Liability for the Equipment have been rectified and shall continue for a period of **[7 years]** During the period of this Agreement the Supplier shall be responsible for:

Carrying out a Programme of preventative maintenance to ensure so far as practicable that the Equipment is at all times during the period of this Agreement in an operable condition and capable of reliable operation in accordance with the relevant Equipment specifications.

The Programme shall be carried out so as to minimise disruption to the operational use of the System Responding to a request for service by the Customer at any time between the hours of x and x within x minutes of such request being received. The Supplier shall forthwith upon receipt of any such request commence to diagnose the cause of the problem and shall repair the Equipment and restore it to full operational use within x hours of receipt of a request for service. Requests for service shall be made by the Customer in the form agreed { } or if made verbally shall be confirmed immediately by the issue of such form. The Supplier shall keep the Customer fully informed of the progress on the repair action.

Making available sufficient supplies of spares and sufficient skilled personnel throughout the period of this Agreement to be able to carry out any repairs required to the Equipment.

The charges for the Maintenance and Support services shall be those set out in Schedule 11. If the number of items of Equipment to be maintained under this Agreement is increased or reduced then the appropriate addition or reduction to the charges shall be agreed between the Customer and the Supplier by reference to the unit prices in the Price Schedule or, in default of agreement, determined by Expert Determination. The addition or reduction so agreed or determined shall take effect from the date that the addition or reduction to the items of Equipment took place. The Supplier shall only be entitled annually on the anniversary of the commencement of the Maintenance and Support Agreement to require such charges to be adjusted by an amount not in excess of the increase in the Retail Price Index over the year concerned. The Supplier shall submit a written request to the Customer for such adjustment and the Customer shall advise the Supplier in writing of the adjustment to which he agrees. Other than this the Agreement shall be on a fixed price basis.

Model Form M and S(M) provide further examples of an equipment and a bespoke software maintenance contract- respectively, to which reference can be made.

SCHEDULE 10 TRAINING AND IMPLEMENTATION

The Supplier shall investigate and develop a specification for the training requirements of the Customer and develop a plan for delivery of the training.

The Training Plan shall be subject to the agreement of the Customer.

All documentation and training materials developed for the customer shall be the property of the Customer.

SCHEDULE 11 PRICE AND PAYMENT TERMS

This Schedule sets out the prices to be paid under the Agreement and when payment becomes due.

Services and Development Charges

The Services may be charged on the basis of either a fixed price or time and materials and both mechanisms may be applied to different deliverables or periods.

Time and Materials

For time and materials work the Customer shall pay the Supplier for the time properly spent by its staff and the materials and computer time properly used in providing the Services at the rates specified below.

These rates shall be fixed for the duration of the Agreement.

Person	Grade	Daily rate
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The daily rate covers a normal 7.5-hour day and includes any additional effort required to maintain progress in accordance with the Plan.

In the event that it is agreed that the number of days or the cost of the Services shall exceed [] the daily rates shall be reduced by [x%] from [date agreed].

The Supplier shall keep complete accurate and detailed records of all work carried out and will provide detailed reports in a format agreed by the Customer within 5 days of the end of each month and at any other time upon request, to enable the Customer to verify the Supplier's charges and progress.

The Customer shall pay reasonable travel and accommodation expenses which are agreed in advance with the Customer and which are necessarily incurred by the Supplier's staff for work carried out away from the location at which it is agreed the work will normally be performed.

All additional work and additional Deliverables or use of Licensed Software under this Agreement shall be charged at rates or fees which do not exceed those set out in the Price.

Optional

The time and materials cost of the Service shall not exceed the sum of [] for each specified Deliverable.

Software Licence Fees

The Customer shall pay the Supplier the Fees for the right to use the Licensed Software as set out below.

The Supplier may invoice the Customer for the Price upon delivery of a copy of the Licensed Software to the Customer and installation and Acceptance of the Licensed Software by the Customer for the first installation and then for each copy that is installed by the Supplier for a [named user] [user] [Customer computer] [concurrent user] up to a maximum of [number] of such users. ; or

The Supplier may invoice the Customer for the Price to use the Licensed Software on any machine or by any user without limitation other than that set out in this Agreement upon installation of the first copy for which a licence has not previously been paid or by date specified in the Agreement.

This schedule is a checklist of the types of pricing and payment terms that are commonly found in IT contracts. Each deal will be different so this is not a prescription to be used unchanged in every situation.

Some basic principles though are to:

- make payments in return for deliveries,
- reduce costs by paying in line with the supplier's expenditure profile - subject to getting value and progress
- put a cap on time and materials rates
- use time and materials only when the services are ill-defined, and fix prices for clear deliverables
- stop recurring charges from increasing in future
- ensure that daily rates are properly defined and are reasonable
- obtain unit costs for equipment, staff and software to assist in managing the cost of changes.

The Licence Fees:

- ☐ Total fees
- ☐ Per User or per concurrent user
- ☐ Per machine
- ☐ Per unit of processing power
- ☐ Per site/location
- ☐ Any volume discount structure

- ☐ Annual or recurring fees
- ☐ Fees for access to Source Code
- ☐ Escrow Agreement costs

Recurring charges shall not be increased without the prior written agreement of the Customer.

Equipment Charges

Include here a table of the charges for Equipment including:

- ☐ Unit costs for each item of Equipment and associated software.
- ☐ List prices and discounts
- ☐ Delivery and installation charges
- ☐ Upgrade prices

Maintenance and Support

Include here a list of all Software and Equipment to be maintained and the unit cost per annum/per quarter for providing maintenance and if applicable a maximum charge for the Service.

Recurring charges shall not be increased without the prior written agreement of the Customer.

Payment terms

Specify the intended date and percentage or amount of the Price to be paid against specified events including:

- ☐ upon agreement by the Customer of the Specification and/or Plan
- ☐ upon delivery and acceptance of specified third party components or software
- ☐ upon completion of each phase of the work
- ☐ upon successful completion of system test
- ☐ upon successful completion of Acceptance Tests
- ☐ upon full installation and live implementation
- ☐ upon 3 months operational running with no significant defects.
- ☐ frequency and timing and amounts of recurring charges

SCHEDULE 12 GENERAL CONDITIONS OF AGREEMENT

1. Assignment and Subcontracting

1. Neither party shall assign the Agreement or any of its rights or obligations thereunder without first having received the written approval of the other party provided that the Customer may assign the benefit of the Agreement to any of its associated or subsidiary companies or to any leasing or financing company or to any outsourced service provider of its choice

2. The Supplier shall not sub-contract the Agreement or any part thereof without first having obtained the written permission of the Customer, provided that this restriction shall not apply to sub-contracts for materials or minor details or any parts of the work to be performed or for materials or equipment to be supplied for which the sub-contractor is named in the Agreement. The Supplier shall be responsible for the acts, defaults and omissions of its sub-contractors whether approval has been given to their appointment under this clause or not or whether they are named in the Agreement or not as if they were his own and any consent given under this clause shall not relieve the Supplier of any of their obligations under the Agreement.

2. Access to the Premises and the Suppliers' Personnel

1. The Customer shall provide to the Supplier access to the Site to carry out the Agreement at such times as may be specified in the Agreement or if not so specified at such times as may reasonably be required by the Supplier for the purpose of carrying out the Agreement in accordance with the Plan and if included within the Agreement its obligations for providing Software Maintenance and Support

2. Whilst on the Site the Supplier shall comply strictly with all applicable statutory enactment's and regulations, by-laws or other regulations of local authorities, the Customer's rules on health, safety and security (a copy of which is available to the Supplier on request) and any instructions from any of the Customer's safety or security Officers

3. The Customer shall have the right to require the supplier to remove immediately from the Site any employee or Sub-Contractor's employee who has: -

3.1. Failed to comply with any of the above enactments, regulations, rules or instructions, or

3.2. In the sole opinion of the Customer misconduct's himself or herself or has been negligent or incompetent Without thereby incurring any responsibility to the Supplier for any additional costs or extension of time. The Customer shall confirm to the Supplier in writing

any such action and the Supplier shall forthwith replace to the satisfaction of the Customer's Project Manager any person so removed.

4. At all times when the Supplier or any of its Sub-Contractors is present on the Site it shall have present a competent supervisor and any instructions given by the Customer to that supervisor shall be considered as having been given to the Supplier

3. Supplier fully to inform himself The Supplier shall be deemed to have satisfied itself as to:

1. The sufficiency and correctness of the Contract Price. Unless otherwise expressly stated in the Agreement the Contract Price shall cover all its obligations under the Agreement and everything necessary for the proper design, execution, testing and completion of the Hardware, Software and all other services to be provided by the Supplier under the Agreement.

It is intended that these conditions apply to all the various appended contracts such as software licence, maintenance, development as conditions dealing with such issues as liability, confidentiality, choice of law will be necessary for all agreements contracted under this model form.

1.1. The suitability of the Site for the installation, commissioning, testing and maintenance of the Equipment and Software.

1.2. Unless otherwise expressly stated in the Agreement no claim by the Supplier will be allowed for any addition to the Contract Price or any extension of the Time for Completion on the grounds of any matter relating to:

1.2.1. The Site

1.2.2. Any document forming part of the Agreement or any ambiguity or discrepancy therein On which an experienced supplier could have satisfied himself by a visit to the Site, reference to the Customer or any other appropriate means

4. Confidentiality and Data Protection

1. Each party shall treat the Agreement and any information it may have obtained or received in relation thereto or arising out of or in connection with the Agreement or its negotiation or relating to the business or affairs of the other as private and confidential and neither party shall publish or disclose the same or any particulars thereof without the prior written consent of the other or as may be permitted under the latter provisions of this clause

2. The obligations expressed in sub clause 1 above shall not apply to any information which:

2.1. Is or subsequently becomes in the public domain otherwise than by breach of this clause

2.2. Is already in the possession of the receiving party with Without any accompanying obligation of confidentiality

2.3. Is obtained from a third party who is free to divulge the same

2.4. Is independently and lawfully developed by the recipient or its sub-contractor outside the scope of the Agreement.

2.5. So far as it may be necessary for the performance of the Agreement or for the operation and maintenance of the Equipment and Software supplied or licensed under the Agreement each party may divulge any information to be kept confidential under sub-clause 1 above to their employees, agents and sub-contractors on a need to know basis but undertake that they will take all steps necessary to ensure compliance by such employees, agents and sub- contractors with the obligations as to confidentiality expressed in this clause and will be responsible to the other party for any failure by any employee, agent or sub-contractor to comply with such obligations whether such employee, agent or sub-contractor was aware of them or not

3. Both parties shall ensure that they, their employees, agents and sub-contractors shall observe the requirements of the Data Protection Act 1998 and any amendments or revisions thereto in the provision and use of the Software and Equipment to be provided or licensed under the Agreement and shall comply with any request made or direction given to the other which is directly due to the requirements of such Act

4. On the conclusion or termination of the Agreement both parties shall destroy all copies of confidential information obtained from the other and shall ensure that their employees, agents or sub-contractors do likewise and the obligations as to confidentiality shall continue without limit as to time.

5. Statutory Regulations

1. Both parties shall in all matters relating to the performance of the Agreement comply with all Acts of Parliament and with all orders regulations and bylaws made with statutory authority by Government Departments or by local and other authorities. Subject to sub-clause 2 below the cost to each party of meeting that requirement shall be borne by that party

2. If the cost to the Supplier of the performance of the Agreement shall be increased or decreased by reason of the making after the date of the Contract of any new law, order or regulation having the force of law as referred to in sub-clause 1 above or of the making of any change to any such law, order or regulation in force at the date of the Agreement that shall be applicable to the Agreement (other than any tax on profits) the amount of such increase or reduction shall be paid to or repaid by the Supplier as appropriate.

6. Payment

1. The Supplier shall be entitled to invoice the Customer on the satisfactory completion of each of the stages of the work identified in the Agreement the proportion of the Contract Price payable under the Agreement in respect of each such stage. For work to be performed

under the Maintenance and Support Agreements for Software and Hardware the Supplier shall be entitled to invoice the Customer at the intervals and for the amounts specified in such Agreements.

2. Provided that the invoice was one which under the Agreement the Supplier was entitled to submit, the Customer shall pay the Supplier within the period of days specified in the Agreement from the date of receipt of the invoice subject to any right of deduction which the Customer may have by way of set-off or abatement. If the Customer does make any such deduction then he shall notify the Supplier accordingly in writing with reasons

7. Force Majeure

1. For the purposes of the Agreement the term Force Majeure shall mean

1.1. War and other hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition or embargo

1.2. Rebellion, revolution, insurrection. Military or usurped power or civil War

1.3. Earthquake, flood, fire or other natural disaster except to the extent that any such disaster is caused by or its effects contributed to by the party claiming Force Majeure

1.4. Riot, commotion or disorder except where solely restricted to the employees either of the Supplier or its sub-contractors or sub-suppliers

1.5. A general industrial dispute not limited to the employees of the Supplier or the employees of any of its sub-contractors or sub-suppliers

2. If either party considers that any circumstances of Force Majeure have occurred which may affect materially the performance of its obligations under the Agreement then it shall notify the other in writing to that effect giving full details of the circumstances giving rise to the Force Majeure event.

3. Neither party shall be considered to be in default of its obligations to the extent that it can establish that the performance of such obligations is prevented by any circumstances of Force Majeure which arise after the date of the Agreement and which were not foreseeable at the date of the Agreement

No right to charge interest on overdue sums is included as few Buyers want such a provision. However, the Contractor may in any event be able to charge statutory interest and collection charges under the Late Payment of Commercial Debt (Interest) Act 1998 and subsequent legislation.

This Force Majeure Clause is longer than the previous CIPS versions. However, it is essential to define Force Majeure, to state what is to happen if an event of Force Majeure occurs and how the rights and obligations of the parties are to be affected. Force Majeure is defined restrictively and it is for the Contractor to establish that the event prevents him from performing the Contract. If necessary other events could be included but it is strongly suggested that "beyond the Contractor's control" should never be used it is too broad a

term. Some Contractors like to include strikes and industrial disputes as Force Majeure but most Customers would dispute such categorisation.

4. If the performance of the obligations of either party is so prevented by an event of Force Majeure and shall continue to be so prevented for a period less than 30 days then during that period the Agreement shall be considered as suspended. Upon the ending of the Force Majeure event the contractual obligations of the parties shall be reinstated together with such reasonable modifications to take account of the effects of the Force Majeure event as may be agreed between the parties or in default of agreement as may be determined by an Expert appointed in accordance with the Agreement

5. If the performance of the obligations of either party is so prevented by an event of Force Majeure and shall be so prevented for a period in excess of 30 days then the Agreement shall be terminated by mutual consent and neither party shall be liable to the other as a result of such termination.

8. Insolvency and Bankruptcy

1. If either party shall:

1.1. Become insolvent or bankrupt, or

1.2. Have a receiving order or administration order made against it or compound with its creditors, or

1.3. Being a corporation commences to be wound up (not being a member's voluntary winding up for the purposes of reconstruction or amalgamation, or

1.4. Carries on its business under an administrator or administrative receiver for the benefit of its creditors or any of them then the other party shall have the right forthwith by notice in writing to that party or to the administrator, administrative receiver or liquidator or to any person in whom the Agreement shall have become vested to terminate the Agreement

2. Alternatively the party giving notice may at their sole option give such administrator, administrative receiver, liquidator or other person the option of carrying out the Agreement subject to their providing a guarantee for the due and faithful performance of the Agreement in such form and up to such amount as the party giving notice may in its sole discretion decide.

3. In the event of the Agreement being terminated under this clause the party giving notice shall have right by prior notice to the other to enter that other's premises for the sole purpose of removing any item, equipment or materials which are its property and which are clearly identified as such.

9. Patents Designs and Copyright

1. The Supplier shall fully indemnify and hold the Customer harmless against all actions, demands, claims, proceedings, costs, charges and expenses (including legal fees on an indemnity basis) arising from or incurred by reason of any infringement or alleged

infringement of any letters patent, designs registered or unregistered, copyright or any other intellectual property right including any wrongful use of confidential information by the use or possession of the Works or any part thereof provided by the Supplier or licensed by the Supplier to the Customer under the Agreement subject to:

1.1. The Customer promptly notifying the Supplier of any alleged infringement and, subject to sub-clause 3 below, allowing the Supplier at their own expense to conduct all negotiations for settlement or litigation

1.2. The Customer shall make no admission without the Supplier's written consent unless and until the Supplier shall have failed to take over the conduct of the negotiations or litigation period could be lengthened if considered appropriate. If the force majeure event is then past the parties' rights are adjusted. It should not be left to agreement of the parties without a third party reference as otherwise the obligation is unenforceable. If the event continues then the Contract is terminated by mutual consent; the supplier is then paid for the work he has done provided that the purchaser is given the benefit of this.

1.3. The conduct by the Supplier of such negotiations or litigation shall be conditional upon the Supplier having given the Customer such reasonable security as the Customer may require for the compensation, damages costs and expenses for which the Customer may become liable. The Customer at the Supplier's expense shall give the Supplier all available assistance.

2. If the System or any part thereof becomes or in the Supplier's reasonable opinion is likely to become subject to any such action for infringement then, in addition to the indemnity under sub-clause 1 above, the Supplier shall at their own expense negotiate to obtain the right for the Customer to continue to use the infringing items, if necessary by replacing or modifying them, but without reducing their quality or ability to meet the Customer's requirements as specified in the Agreement. The Supplier shall indemnify the Customer against all losses, costs, damages and expenses whatsoever, including the Customer's loss of profits, during the period that the Customer is deprived of the use of the Works by reason of such negotiations, replacements or modifications the outcome of which will be confirmed by the issues of a Variation Order which shall not entitle the Supplier to any addition to the Contract Price or any extension of the Time for Completion.

3. The Supplier shall not be liable under sub-clauses 1 and 2 above for any such infringement or alleged infringement which arises as a result of the inclusion in the System of any items supplied by the Customer or any use of the System for a purpose or in a manner different to that specified in, or reasonably to be inferred from, the Agreement.

10. Indemnity and Insurance

1. The System

1.1. The Supplier shall be responsible for the care of the System until the issue of the Acceptance Certificate when responsibility passes to the Customer

1.2. The Supplier shall also be responsible for loss or damage to the System caused by any operations of the Supplier after the issue of the Acceptance Certificate

1.3. If any loss or damage happens to the System arising from any cause, other than the Customer's risks defined in sub-clause 4 below while the Supplier is responsible, the

Supplier shall forthwith at its own expense rectify such loss or damage including the reconstituting or recompiling of any Software so that the System conform to the Agreement

1.4. The Customer's risks are:

1.4.1 Any act of Force Majeure as defined in the Agreement

1.4.2 Ionising radiation or contamination by radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear components of such assembly 1

1.4.3 Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

2. Third Party Liability

2.1. Each party shall indemnify the other against all damages, losses, costs, compensation or expenses arising from the death or injury of any person and against all loss or damage to any physical property, other than the System, to the extent that the same are due to any act, default or negligence of that party their sub-contractors, servants or agents and against all actions, claims demands or proceedings in respect thereof or in relation thereto.

3. Insurance

3.1. The Supplier shall effect professional indemnity insurance, which shall insure the Supplier's liability by reason of professional negligence in the design of the System. The Supplier shall maintain such insurance in full force and effect throughout the period of their liability under the Agreement and at law. Such insurance shall be at least for the amount stated in the Agreement

3.2. The Supplier shall insure the System in the joint names of the Supplier and the Customer against all or damage from any cause other than the Customer's risks as defined in sub-clause 1.4 above. Such insurance shall be for not less than the full replacement cost including profit and the cost of reconstituting or recompiling the Software until the date of the issue of the Acceptance Certificate. The Supplier shall extend such insurance to cover their liability for loss or damage after the issue of the Acceptance Certificate

3.3. Both parties shall insure against their respective liability for injury to persons or damage to property under sub-clause 2.1 above for at least the sums stated in the Agreement

3.4. All insurance shall be effected with first class British companies and if required the parties shall provide documentary proof of their insurance's and the payment of premiums

3.5. The obligations of the parties to effect insurances shall be without prejudice to their liabilities under or arising out of the Agreement, in tort or otherwise.

11. Time for Completion and Liquidated Damages

1. The Supplier shall complete the work to be performed under the Agreement and have passed the Tests on Acceptance by the date specified in the Agreement. For the

purposes of this clause the work to be performed under the Agreement shall exclude the Supplier's obligations under

1.1 the clause relating to Defects Liability and

1.2. the provisions relating to Software Maintenance and Support

2. If the Supplier shall be prevented from carrying out the work to be performed under the Agreement or the carrying out of the Tests on Acceptance by any act or default of the Customer, any industrial dispute, otherwise than one limited to the employees of the Supplier, or any act of Force Majeure as defined in the Agreement then subject to the provisions of sub-clause 3 below the Customer shall grant to the Supplier such extension of the date for completion of the work to be performed under the Agreement and or the passing of the Test on Acceptance as may be reasonable.

3.

3.1. The Supplier shall give notice to the Customer forthwith on the happening of any event, which may entitle it to an extension of the date of completion and or the carrying out of the Acceptance Tests. The Supplier shall further give notice to the Customer within 7 days of the cessation of any such event with particulars of the delay and the extension of time to which the Supplier considers itself to be entitled.

3.2. The Supplier shall only be entitled to an extension of time if the event or events delayed are on the critical path for the completion of the work to be performed under the Agreement and or the carrying out of the Acceptance Tests

3.3. Notwithstanding the granting of any extension of time the Supplier shall continue to take all reasonable steps to complete the work to be performed under the Agreement and or the carrying out of the Acceptance Tests by the dates specified in the Agreement.

4. If the Supplier shall fail to complete the work to be performed under the Agreement and have passed the Tests on Acceptance by the date specified in the Agreement, or any extension of such date granted by the Customer under sub-clause 2 above, then the Supplier shall pay to the Customer liquidated damages at the rate specified in the Agreement for each day of delay up to the maximum specified in the Agreement. The parties agree such sum is a genuine pre-estimate of the Customer's loss arising from such delay.

5. If the Supplier shall still not have completed the work to be Performed under the Agreement and or passed the Tests on Acceptance by the time when the Supplier shall have become liable to pay the Customer the maximum liquidated damages for delay then the Customer shall have the right to give the Supplier notice of termination of the Agreement for Default and the provisions of clause 13 shall apply.

12. Acceptance

1. When the System has been completed in accordance with the Agreement and has passed the Tests on Acceptance the Supplier shall be entitled to apply to the Customer for the issue of the Acceptance Certificate and the Customer shall issue such Certificate within 7 days of an application which the Supplier was entitled to make. Minor cosmetic errors or errors for which fixes can be delivered prior to operational use will not prevent the issue of

the Acceptance Certificate but all such errors shall be identified on the Acceptance Certificate and corrected within the time periods specified in the Certificate

2. If the System shall fail to pass the Acceptance Tests and any repeat Acceptance Tests as provided for in Schedule 7 then the Customer shall be entitled by written notice to the Supplier to exercise at his sole option any of the following rights:

2.1 To require the Supplier to carry out all or any of the Acceptance Tests at such rate as the Customer shall fix at the sole cost of the Supplier and otherwise on the same terms and conditions as the repeat tests. If the System shall pass such Tests then the Supplier may then apply for the issue of the Acceptance Certificate. If the System fails all or any of such Tests then the Customer shall have the further rights set out in this clause.

2.2 accept the System subject to a reasonable abatement of the Price to take account of the loss to the Customer caused by the failure of the System or any part thereof to conform to the requirements specified in the Acceptance Tests.

The amount of such loss shall be agreed between the parties or, in default of agreement within 14 days of the notice issued by the Customer under this Clause, as shall be determined by the Expert appointed under the Agreement.

2.3. accept that part of the System, which has passed the Acceptance Tests, and reject that part of the System, which shall have failed the Acceptance Tests. The Supplier shall then be entitled to a partial Acceptance Certificate in respect of that part which has been accepted. Such partial rejection shall not constitute termination of the Agreement but the Supplier shall pay to the Customer such compensation for the part of the System rejected as may be agreed by the parties within 14 days of the notice issued by the Customer under this clause, or in default of agreement, as shall be determined by the Expert appointed under the Agreement.

2.4. reject the System as not being in conformity with the Agreement and terminate the Agreement for default by the Supplier under the provisions of clause 11 of these Conditions which shall then apply

13. Termination for Default

1. Either party may terminate this Agreement forthwith by notice to the other effective from the date of service of such notice if: -

1.1. There is a breach by the other party of any provisions of the Agreement which expressly entitle the party not in breach to terminate the Agreement, or

1.2. There is a material or persistent breach by the other of any other term of the Agreement, which is not remedied, or if it is remedied not been remedied within 30 days of the service of notice to the defaulting party specifying the breach and

requiring it to be remedied

2. On termination, other than for the default of the Supplier, the Customer shall pay to the Supplier the proportion of the Contract Price payable in respect of the Hardware or Software supplied or licensed or services performed by the Supplier up to the date of termination, together with the costs of cancellation of the

Commitments already reasonably entered into by the supplier at the date of termination less the amount of any payments already made to the Supplier up to the date of termination. If the amount of the payments already made to the Supplier to the date of termination exceeds the sum due to the Supplier under this clause then the supplier shall repay the balance due to the Customer. Any such payments shall be in full satisfaction of the Supplier's rights to payment, compensation or damages in respect of the termination of the Agreement or the breach of contract giving rise to termination, other than any interest charges for delay in payment.

3. On payment of the amount due under sub-clause 2 above the Supplier shall transfer to the Customer the benefit of all work done and the property in all Hardware manufactured and Software developed by the Supplier in the performance of the Agreement up to the date of termination. To the extent that the Software is to be supplied under licence then the Customer shall have the right to use such Software in accordance with the terms of such licence.

4. If the Agreement is terminated for the default of the Supplier then:

4.1. The Customer shall have the like rights and benefits forthwith upon such termination as are given under sub-clause 3 above other than in respect of any Hardware or Software rejected under the Agreement. The Customer shall further be entitled to have the work to be performed under the Agreement completed by itself or by others and for this purpose shall be entitled to use the Hardware or Software not rejected.

The sum specified in the Agreement for such liquidated damages must represent a genuine estimate of the Customer's losses arising from delay otherwise this clause will be held to be void by the courts as a penalty clause.

4.2. The Customer shall pay to the Supplier the proportion of the Contract Price payable for the work done and services performed by the Supplier up to the date of termination in respect of the Hardware and Software which the Customer elects to retain

4.3. The Customer shall pay the sum due to the Supplier when the work to be performed under the Agreement up to and including the passing of the Acceptance Tests has been completed but only after the deduction of:

4.3.1. All payments already made to the Supplier, and

4.3.2. The costs reasonable incurred by the Customer in obtaining the completion of all work to be performed by the Supplier under the terms of the Agreement either by itself or by others, and

4.3.3. All damages payable by the supplier in respect of the termination of the Agreement or the breach of the Agreement giving rise to the right to terminate.

4.3.4. If the amount due to the Supplier is less than the amount due to the Customer then the Supplier shall pay the

4.4. If the Customer elects not to have the work under the Agreement completed than any payments due to either party under sub-clause

4.3 above shall become due 56 days after the termination of the Agreement.

4.5. Following the termination of the Agreement neither party shall have any further rights or obligations in relation to the other except for those stated in this clause and in the clauses listed below which shall continue in full force and effect. Subject to sub-clause 2 above termination shall not affect the rights of action and remedies of the parts which shall have accrued at the date of termination or shall thereafter accrue

4.6. List of clauses:

Confidentiality

Publicity

Waiver

Infringement Indemnity

Governing Law and Jurisdiction

Intellectual Property Rights

Conditions and warranties relating to the Hardware and Equipment and services supplied or licensed under the Agreement

14. Warranty

1. The Supplier warrants that:

1.1. The Equipment and Software supplied and licensed under the Agreement shall be fit for the purposes as specified in Part A of the Specification. This is a continuing warranty for the period of the operational life of the Equipment and Software as defined in the Specification.

1.2. Subject to compliance with sub-clause 1.1 above the Equipment and Software shall comply with the description, technical details and standards contained in Part B of the Specification

1.3. It has the right to grant the Customer a licence to use the Software on the terms set out in this Agreement

1.4. The Software supplied or licensed when installed and tested shall meet the requirements of the Acceptance Test specifications.

1.5. The Software shall be fully compatible with and operate on the System

1.6. The Software shall provide all the facilities and functions described in the Specification provided that the System operates in accordance with the relevant manufacturers specifications.

1.7. The Equipment shall be delivered and installed free from defects and when tested shall meet the requirements specified in the Acceptance Test specifications.

1.8. If any defect shall occur in the Equipment during the period of {12} months from the Acceptance Date the Supplier shall forthwith remedy such defect at its own expense by repair or replacement. Any replacement or repaired part shall carry a similar warranty for [12] months from the date of the repair or replacement. If the Supplier shall fail to take

action to remedy a defect within 24 hours of being notified by the Customer of the same then the Customer shall have the right to remedy the defect himself or by others at the Supplier's risk and expense.

1.9. If any defect shall occur in the Software which materially affects the use or performance of the Software within [12] months of the Acceptance of the first copy or any new version or release then as soon as it is reported to him by the Customer, the Supplier at his own cost shall promptly commence work on diagnosing and fixing the defect and shall continue to work diligently until a fix can be successfully implemented on the Software which corrects such defect. The Supplier shall further at his own cost provide all necessary corrections and replacement copies assistance and documentation at no additional cost. Minor defects, which do not affect the use of the Software, may be corrected in the next appropriate version or release.

1.10. If the Supplier shall have entered into Software Maintenance and Support agreements with the Customer on the terms set out in Schedules....to the Agreement then in the remedying of defects the Supplier shall comply with the provisions of such Software Maintenance and Support Agreements at no charge to the Customer

1.11. The provisions of this clause shall not apply to any defect in either the Equipment or the Software which is due to:

1.11.1 Any failure by the Customer to operate the Equipment or Software otherwise than in accordance with the relevant instructions supplied by the Supplier

1.11.2. Any unauthorised use by the Customer of the Software

15. Interference

The Supplier shall ensure that in the performance of any of his work under the Agreement it does not unnecessarily interfere with the operations of the Customer, its employees or any other supplier employed by the Customer or with the Customer' systems for entry, security or data

16. Passing of Property and Risk

1. The Property in all Equipment and in the physical medium in which any of the Software is inscribed shall pass to the Customer on delivery to the Site or if payment is to be made in part prior to delivery then upon such payment subject to subclause 2 below

2. If payment is to be made prior to delivery then the Supplier shall mark the Equipment or physical medium or the relevant part as being the property of the Customer and so far as is practicable and shall set the same aside. Such marking and setting aside shall be a condition precedent to the right of the Supplier to payment.

Notwithstanding the passing of property in such Equipment or physical media the same shall remain at the sole risk of the Supplier until the Acceptance Date.

17. Limitation and Exclusion of Liability

1. All conditions warranties and other terms as to quality or fitness for purpose implied by statute, common law or otherwise are hereby excluded, and the Supplier's liability to the Customer for the quality or fitness for purpose of the Equipment and Software shall be limited to the express obligations as to quality and fitness for purpose set out in this Agreement.

2. The Supplier shall not be liable to the Customer for any consequential damages which arise out of or are due to any breach by the Supplier of his obligations under the Agreement and whether the same be due to the negligence of the Supplier or otherwise other than for any breach of the indemnity contained in clause 9. The Supplier shall however be liable to the Customer for any direct damages caused to or suffered by the Customer by any breach by the Supplier of his obligations under the Agreement

3. Without prejudice to Clause.... (Indemnity and Insurance) and to clause..... (Patents, Design and Copyright) and to subclause 2 above the Supplier's liability arising out of or in connection with this Agreement and whether in contract tort or otherwise shall be limited as follows:

3.1. Death or personal injury to any person - no limit

3.2. Physical damage to the property of third parties – the sum stated in the Agreement

3.3. Physical damage to the property of the Customer- the sum stated in the Agreement

3.4 Any other direct damages caused to or suffered by the Customer- the sum stated in the Agreement

3.5. Consequential damages caused to or suffered by the Customer - no liability of the Supplier other than for a breach of the indemnity under clause

18. Notices

Any notice which either party is required to give to the other shall be given in or confirmed by writing and shall be sufficiently served if sent to the other party at its address specified in the Agreement either by (a) hand, (b) first class post or recorded delivery or, (c) facsimile, or (d) electronic mail transmission confirmed by registered, first class post or recorded delivery within 24 hours of transmission.

19. Expert Determination

1. Where under the Agreement any issue is to be determined by an Expert then either party may give the other 7 days' notice in writing requiring expert determination by an Expert to be agreed between the parties or nominated as referred to below

2. Within 14 days of the receipt of such notice the parties shall have agreed upon the choice of an Expert or in default of agreement either party may require an Expert to be nominated forthwith by the President for the time being of the Institute named in the Appendix to these conditions

3. The Expert shall act in accordance with such procedure as the Expert may in his sole discretion decide provided only that he shall act impartially between the parties

4. The Expert shall reach a decision within 35 days of his appointment which decision shall except in the case of fraud be final and binding upon the parties
5. The Expert shall not be liable for anything done or omitted in the discharge of his duties as an expert unless the act or omission was done in bad faith.

Exclusion of liability for consequential loss is common although few buyers in their own standard terms for purchase would offer the Supplier such an exclusion automatically, therefore the Customer may wish to modify this provision.

A limit of liability for direct loss to a sum specified in the contract is common although buyers do not have to offer a Supplier the benefit of such a limit.

Notice may be provided by email and indeed fax under this clause as long as it is confirmed on paper as provided in this provision. Expert Determination: This Clause is a suggestion to overcome the problem that there are Clauses under the CIPS Contract forms where the parties are required to agree on some issue e.g. Force Majeure, Training, Maintenance.

Unless there is provision for a third party to decide should the parties not agree, then such a Clause is not enforceable under

English law. The name of a suitable nominating body should be included e.g. the British Academy of Experts or the British Computer Society in the case of an IT Contract (as here).

For telecommunications contracts an expert from the Institution of Electrical Engineers might be included in the clause instead of the British Computer Society.

The period of 56 days is a maximum and the parties may want to see a shorter period included.

20. Dispute Resolution

If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to Expert Determination, either party may give the other 7 days' notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be litigated, without prejudice to either party's right at any time to obtain immediate interim court relief.

The parties submit to the exclusive jurisdiction of the English courts in connection with any dispute hereunder.

21. Waiver

Any failure by the Customer to insist at any time upon the Performance of any of the terms, provisions or undertakings of the Supplier under the Agreement or to exercise any of its rights under the Agreement shall not constitute or be construed as a waiver or relinquishment of the Customer's rights to require the future performance of any such term provision or undertaking but the obligations of the Supplier with regard to the same shall continue in full force and effect.

22. Law

English law shall in all respects govern the construction, performance

23. No Third Party Rights

Nothing in this Contract shall confer, nor is it intended to confer, any enforceable right on any third party under the Contracts (Rights of Third Parties) Act 1999 except as otherwise expressly so stated.

The Agreement provides for preliminary non-binding mediation, failing which disputes go to court. Most Indian companies and their advisers agree that court litigation is cheaper than formal arbitration under the Arbitration Act. However, arbitration is confidential so a considered judgment must be made in each case.

If the contract does not specify arbitration then disputes go to court and it is best in any event to specify which country's courts have jurisdiction (here English courts are chosen) and in clause 20 which country's laws apply to the contract (whether arbitration or litigation are chosen).

If arbitration is preferred then the following should be substituted: -

DISPUTE RESOLUTION ALTERNATIVE

1. If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to

Expert Determination, either party may give the other 7 days' notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the

party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be referred to Arbitration in accordance with sub-Clause 2.

2. Subject to sub-Clause 3 below if any dispute or difference which may arise between the parties in connection with or arising out of the Contract is referred to ADR mediation, but is not so settled as specified in sub-Clause 1, then either party shall give notice to the other and such dispute or difference shall be referred to Arbitration. The parties shall agree on the appointment of a single arbitrator within 14 days after the date of such notice or in default of agreement the arbitrator shall be nominated on the application of either party by the President for the time being of the Chartered Institute of Arbitrators. The Arbitration shall be conducted in accordance with the then current Arbitration Rules as published by the Chartered Institute of Arbitrators and in accordance with the Arbitration Act 1986.

3. There are excluded from Arbitration any proceedings brought by one party against the other which arise out of the failure by that other party to comply with the provisions of any binding agreement setting out the terms upon which the dispute or difference was settled as a result of or following from the ADR mediation procedure referred to in sub-Clause 1 above."

This alternative Clause provides for a two-stage process of dispute resolution. The first stage is ADR mediation under the auspices of the CEDR. If in a defined time this is not successful then the dispute is referred to arbitration under the rules of the Institute of Arbitrators.

The only exception to the initial stage of ADR is if the Contract specifically provides for Expert Determination to resolve a specific issue. This is also the case with the started litigation clause in the Model Form. Sub-paragraph 3 is included to deal with the problem that if the Contract contains an arbitration Clause then all disputes must go to arbitration which would prevent one party from going to court, unless the other party agreed or did not object. Immediate reference to either the courts or arbitration is contrary to modern purchasing practice and indeed the Civil Procedure Rules 1998, so the first step should be to ADR.

One view is that arbitration under the 1996 Act is more flexible and retains the advantage of privacy as opposed to the courts. It is to be preferred generally therefore to the courts.

ENTIRE AGREEMENT

No Clause has been included because usually an entire agreement Clause is to the benefit only of the Supplier. The purpose of such a Clause is to prevent either party from relying on statements made or documents issued pre-Contract which are not included in the Contract but which in some circumstances would be regarded in law as misrepresentations and to ensure no documents such as precontract

letters, assurances, tenders, specifications etc are part of the Agreement. It is more likely in practice that such statements will be made or documents issued by the Customer in the course of trying to conclude the sale. It therefore has the effect of preventing the Customer

from relying on these in any action for misrepresentation. If the Customer however wants important documents such as its statements of requirements to be part of the contract rather than relying on the absence of the entire agreement the Customer must incorporate such documents by express reference in the contract. In addition, pre-contract warranties should ideally also be expressly stated in the Contract.