

## TERMS AND CONDITIONS

### 1 INTERPRETATION

1.1 The following words and phrases shall have the following meanings:

<b>“Authorised Users”</b>	those employees and/or individual contractors of the Client and (if applicable) any Permitted Client Affiliates who are authorised by the Client to use the Services and the Documentation and who have rights of access to additional management and administrative features and functionality including the dashboard;
<b>“Business Day”</b>	a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business;
<b>“Client”</b>	means the entity described as such in the Order Form;
<b>“Confidential Information”</b>	means all information disclosed by or on behalf of a Party (in whatever medium, including in written, oral, visual or electronic form and whether before or after the date of this Agreement) including all business, financial, commercial, technical, operational, organisational, legal, management and marketing information;
<b>“Consultancy Rates”</b>	as set out in the Order Form;
<b>“Consultancy Services”</b>	consultancy or other professional IT services as Peakon may provide from time to time;
<b>“Client Data”</b>	(a) any data or information provided by the Client to Peakon in connection with the use of the Services, and (b) any data or information which is uploaded by any Client Employees to Peakon System in the course of use of the Services;
<b>Client Employees</b>	employees or individual contractors within the general workforce of the Client and (if applicable) any Permitted Client Affiliate who are permitted to use and have the benefit of certain features of the Services; the phrase “Client Employees” shall include the Authorised Users;
<b>“Data Protection Legislation”</b>	(a) all applicable law and regulation concerning data protection and/or privacy in or relating to the European Union (as composed from time to time), including Directive 95/46/EC of the European Parliament on the protection of individuals with regard to the processing of personal data (for so long as the relevant provisions of such Directive remains in force), and (with effect from such time as it comes into force) the EU General Data Protection Regulation (2016/679); and (b) all local laws or regulations in force from time to time, in any country which as at the Effective Date is a member state of the European Union, implementing, giving effect to, replacing, consolidating or otherwise supplementing the law and regulation referred to in part (a) of this definition, or which otherwise concern data protection and/or privacy;
<b>“Documentation”</b>	documentation made available to the Client by Peakon online via Peakon System, which sets out a description of the Services and the user instructions for the Services corresponding to the Product Plan to which the Client has subscribed;
<b>“Effective Date”</b>	the date on which this Agreement comes into force, as specified in the Order Form;

<b>“Initial Subscription Term”</b>	the initial term of this Agreement as specified in the Order Form;
<b>“Minimum Notice to Terminate”</b>	the minimum period of notice to be given by a Party in order to terminate for convenience pursuant to clause 14.1.1;
<b>“Order Form”</b>	means the Order Form to which these Terms and Conditions apply;
<b>“Party”</b>	a contracting party of this Agreement which includes any successor in title or permitted assignee;
<b>“Peakon”</b>	Peakon entity as specified in the Order Form;
<b>“Peakon Affiliates”</b>	all direct or indirect holding companies of Peakon from time to time, and all direct and indirect subsidiary companies of Peakon or of any such holding companies from time to time; in which respect “holding company” and “subsidiary” shall mean as set out in section 1159 of the Companies Act 2006;
<b>“Peakon Software”</b>	the online software applications and programs owned by or licensed to Peakon which provide the underlying functionality and features of the Services;
<b>“Peakon System”</b>	the IT environment (including servers, storage and networking equipment, and including Peakon Software) under the possession or control of Peakon, by which means the Services are made available by Peakon to its clients;
<b>“Permitted Client Affiliates”</b>	as specified in the Order Form;
<b>“Product Plan”</b>	the product plan as specified in the Order Form;
<b>“Product Support”</b>	the support services provided by Peakon as specified in the Order Form;
<b>“Renewal Period”</b>	each successive period of this Agreement following the Initial Subscription Term, as specified in the Order Form;
<b>“Security Overview”</b>	Peakon’s published security policy, as made available on the Client’s website from time to time;
<b>“Service Availability”</b>	as set out in the Order Form;
<b>“Services”</b>	the services provided by Peakon to the Client under this Agreement via Peakon System, which are made available via the Services Portal, as more particularly described in the Documentation;
<b>“Services Portal”</b>	the website specified as such in the Order Form, or any other website notified to the Client by Peakon from time to time;
<b>“Special Terms”</b>	means any special terms set out in the Order Form;
<b>“Subscription Fees”</b>	the subscription fees payable by the Client to Peakon for the User Subscriptions, as set out in the Order Form in respect of the Initial Subscription Term and as adjusted thereafter in accordance with this Agreement;
<b>“Subscription Term”</b>	the Initial Subscription Term together with all subsequent Renewal Periods;
<b>“Support Hours”</b>	as defined in the Order Form;
<b>“Support Service Levels”</b>	Peakon’s service levels for Product Support, as specified or referred to in the Order Form;

**“User Subscriptions”**

the user subscriptions purchased by the Client, up to the amount specified in the Order Form (as may be varied or deemed varied from time to time), by which Client Employees are entitled to access and use the Services and the Documentation in accordance with this Agreement; and

**“Virus”**

any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

- 1.2 In this Agreement, unless otherwise specified or the context otherwise requires:
- 1.2.1 words importing the singular only shall include the plural and vice versa, and words importing the whole shall be treated as including a reference to any part;
  - 1.2.2 reference to this Agreement or to any other document is a reference to this Agreement or to that document as modified, amended, varied, supplemented, assigned, novated or replaced from time to time as permitted by the provisions of this Agreement;
  - 1.2.3 reference to any provision of law is a reference to that provision as modified or re-enacted from time to time, except to the extent that any modification or re-enactment takes effect after the Commencement Date and has the effect of materially increasing or extending any obligation or liability or otherwise materially adversely affects the rights of either Party;
  - 1.2.4 reference to any statutory provision includes a reference to any subordinate legislation made under that provision from time to time; and
  - 1.2.5 reference to any statutory provision or legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept, state of affairs or thing shall in respect of any jurisdiction other than England be deemed to include that which most closely approximates in that jurisdiction to the English statutory provision or legal term.
- 1.3 Any phrase in this Agreement introduced by the term "include", "including", "in particular" or similar expression will be construed as illustrative and will not limit the sense of the words preceding that term.
- 1.4 Headings used in this Agreement are for reference only and shall not affect its construction or interpretation.
- 1.5 In this Agreement a reference to:
- 1.5.1 "person" includes any individual, firm, company, corporation, body corporate, government, state or agency of trust or foundation, or any association, partnership or unincorporated body of two or more of the foregoing (whether or not having separate legal personality and wherever incorporated or established); and
  - 1.5.2 "written" or "in writing" includes emails and faxes, but excludes all other content or messages sent by mobile phone or via any instant messaging or similar platform.

## **2 USER SUBSCRIPTIONS**

- 2.1 Subject to the Client purchasing the User Subscriptions in accordance with clause 3.3 and subject to the restrictions set out in this clause and the other terms and conditions of this Agreement (including any Special Terms), Peakon hereby grants to the Client a non-exclusive, non-transferable right, without the right to grant sublicences, to permit the Client Employees (including the Authorised Users) to use the Services and the Documentation during the Subscription Term solely for the Client's internal business operations.
- 2.2 If the Order Form specifies any Permitted Client Affiliates, then:
- 2.2.1 the Client Employees to whom the Services are made available shall be extended to include employees and/or contractors of such Permitted Client Affiliates, provided always that the total aggregate number of Client Employees shall not in any event exceed the then-applicable total number of User Subscriptions;
  - 2.2.2 the Client shall be responsible and liable to Peakon in respect of all acts, omissions and defaults of such Permitted Client Affiliates; and
  - 2.2.3 no Permitted Client Affiliates shall have any right to rely on or enforce any term of this Agreement, and the Contracts (Rights of Third Parties) Act 1999 is accordingly excluded.
- 2.3 The Client hereby undertakes and agrees that:
- 2.3.1 the maximum number of Client Employees that it authorises to access and use the Services and the Documentation shall not exceed the number of User Subscriptions it has purchased from time to time;
  - 2.3.2 it will not allow or suffer any User Subscription to be used by more than one individual member of the Client Employees unless it has been reassigned in its entirety to another individual, in which case the prior Client Employees shall no longer have any right to access or use the Services and/or Documentation; and

2.3.3 each Authorised User shall keep a secure password for his use of the Services and Documentation, and that each Authorised User shall keep his or her password confidential.

2.4 The Client shall not access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that:

2.4.1 is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;

2.4.2 facilitates illegal activity;

2.4.3 depicts sexually explicit images;

2.4.4 promotes unlawful violence;

2.4.5 is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability;

2.4.6 is otherwise illegal or causes damage or injury to any person or property; or

2.4.7 the use or analysis of which breaches or would breach its obligations under clause 6.5;

and Peakon reserves the right, without liability or prejudice to its other rights to the Client, to disable the Client's access to any material that breaches the provisions of this clause.

2.5 The Client shall not:

2.5.1 except as may be allowed by any applicable law which is incapable of exclusion by agreement between the Parties and except to the extent expressly permitted under this Agreement

(i) attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or

(ii) attempt to de-compile, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or

2.5.2 access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or

2.5.3 use the Services and/or Documentation to provide services to third parties; or

2.5.4 subject to clause 22.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Client Employees, or

2.5.5 attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this clause.

2.6 The Client shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify Peakon.

2.7 Save in respect of the Permitted Client Affiliates, the rights provided under this clause are granted to the Client only, and shall not be considered granted to any subsidiary or holding company of the Client or to any other person or entity.

### **3 ADDITIONAL USER SUBSCRIPTIONS**

3.1 The Client may, from time to time during any Subscription Term and in accordance with this clause 3, purchase additional User Subscriptions in excess of the number specified in the Order Form (as such number may be deemed varied from time to time under this clause), and Peakon shall grant access to the Services and the Documentation to such additional Client Employees in accordance with the provisions of this Agreement.

- 3.2 Unless otherwise agreed (as specified in the Order Form), the Client shall at the end of each quarterly period (the first quarterly period commencing on the Effective Date) submit details of the actual User Subscriptions above the specified number set out in the Order Form, with details of the date of the relevant increase(s). Peakon shall submit its invoice to the Client for the corresponding additional Subscription Fees at Peakon's then-current rates. If such additional User Subscriptions are purchased by the Client part way through the Initial Subscription Term or any Renewal Period (as applicable), such Subscription Fees shall be pro-rated from the date of activation by Peakon for the remainder of the Initial Subscription Term or then current Renewal Period (as applicable).
- 3.3 The Client shall pay to Peakon the relevant additional Subscription Fees as invoiced by Peakon, in accordance with the payment terms specified in the Order Form (or if none are specified, within 30 days of the date of Peakon's invoice). Peakon shall activate the additional User Subscriptions within 5 Business Days of payment by the Client of the corresponding invoice. Upon payment of the corresponding invoice, the number of User Subscriptions shall be deemed varied accordingly.

#### **4 SERVICES**

- 4.1 Peakon shall, during the Subscription Term, provide the Services and make available the Documentation to the Client on and subject to the terms of this Agreement.
- 4.2 Peakon shall use commercially reasonable endeavours to ensure that the Services are made available for the Client for at least the Service Availability (measured on a monthly basis as a percentage of total time in that month, in minutes). In calculating Service Availability in every month the following shall be disregarded:
- 4.2.1 scheduled maintenance performed in that month outside Business Hours; in which respect scheduled maintenance shall be as posted from time to time on Peakon's status page available at <https://status.peakon.com/> (or at such address as Peakon may otherwise notify from time to time), and the Client hereby agrees to sign up to such status page for these purposes and shall be deemed to have been notified accordingly;
- 4.2.2 unscheduled maintenance performed outside Business Hours, provided that Peakon has given the Client not less than 4 Business Hours' notice in advance;
- 4.2.3 unscheduled maintenance in the case of emergency (including any steps or measures which are in Peakon's reasonable consideration necessary or desirable in connection with any anticipated emergency); and
- 4.2.4 any unavailability due to an event of force majeure (as specified in clause 15).

If Service Availability is not met in any month, Peakon shall be liable to pay to the Client compensation of 10% of the total applicable monthly fee (excluding VAT) for that month, for each 1% (of total time in that month, measured in minutes) below the Service Availability in which Services were unavailable (disregarding the factors referred to in clauses 4.2.1 to 4.2.4 above).

- 4.3 Peakon will, as part of the Services and at no additional cost to the Client, provide the Client with Product Support during the Support Hours in accordance with Support Service Levels.
- 4.4 Peakon shall provide any Consultancy Services if (and to the extent) stated in the Order Form, or as otherwise may be agreed between the Parties from time to time. Peakon shall charge, and the Client shall pay, fees in respect of any such Consultancy Services calculated at then-applicable Consultancy Rates, in accordance with the payment terms set out in the Order Form. Peakon shall be entitled to adjust the Consultancy Rates once in every year.
- 4.5 Unless otherwise stated in the Special Terms, Peakon shall be entitled to use the name and logo of the Client for promotional and marketing purposes.

#### **5 CLIENT DATA AND DATA PROTECTION**

- 5.1 The Client shall own all right, title and interest in and to all of the Client Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Client Data.

- 5.2 Peakon shall follow its archiving procedures for Client Data as set out in its Security Overview. In the event of any loss or damage to Client Data, the Client's sole and exclusive remedy shall be for Peakon to use reasonable commercial endeavours to restore the lost or damaged Client Data from the latest back-up of such Client Data maintained by Peakon in accordance with the archiving procedure described in its Security Overview. Peakon shall not be responsible for any loss, destruction, alteration or disclosure of Client Data caused by any third party (except those third parties sub-contracted by Peakon to perform services related to Client Data maintenance and back-up).
- 5.3 Peakon shall, in providing the Services, follow and comply with the data privacy and security measures set out in its Security Overview in connection with the Client Data.

## **6 DATA PROTECTION**

- 6.1 Each Party shall comply with its respective obligations under the Data Protection Legislation. The terms "Process", "Data Controller", "Data Processor", "Personal Data" and "Data Subject" shall mean as defined in the applicable Data Protection Legislation.
- 6.2 If and to the extent that Peakon is required to Process any Personal Data on the Client's behalf when performing its obligations under this Agreement, the Parties hereby agree that the Client shall remain the Data Controller and Peakon shall be a Data Processor in respect of such Personal Data, and accordingly (and in any case):
- 6.2.1 Peakon shall Process such Personal Data only in accordance with the lawful instructions given by the Client from time to time; provided that:
- (i) where such lawful instructions necessarily prevent, delay or restrict Peakon from providing the Services hereunder or require modification of the nature or extent of the Services hereunder, then Peakon shall not be liable in respect of such prevention, delays or restrictions and shall be entitled to make any such modifications without incurring any additional liability to the Client;
  - (ii) where such lawful instructions would require or result in any non-compliance by Peakon of any Data Protection Legislation or any other applicable law, Peakon shall promptly notify the Client and the Client shall retract and restate such instructions;
  - (ii) where such lawful instructions require performance in addition to or in excess of what is reasonably required in accordance with good industry practice in order to comply with Data Protection Legislation, and such additional or excess performance requires Peakon to incur additional cost or expense (including re-allocation of internal resources), then Peakon shall be entitled to adjust its Subscription Fees in order to recharge such additional cost or expense to the Client;
- 6.2.2 Peakon shall implement and maintain appropriate technical and organisational measures, to ensure an appropriate level of security in respect such Personal Data, against accidental, unauthorised or unlawful loss, destruction, alteration, disclosure of or access to such Personal Data; such measures shall be implemented with regard to: (a) encryption of Personal Data; (b) back-up and disaster recovery arrangements; (c) the ability to ensure ongoing confidentiality, integrity, availability and resilience of the IT infrastructure and environment; and (d) the regular testing and evaluation of the effectiveness of such measures ;
- 6.2.3 Peakon shall limit access to such Personal Data to those of its authorised personnel who need access to it in order to meet Peakon's obligations under this Agreement, and shall ensure that all such personnel are bound by appropriate obligations of confidentiality;
- 6.2.4 without prejudice to the Processing by Peakon of such Personal Data in aggregated and anonymised form pursuant to clause 6.4 for statistical or benchmarking purposes or otherwise in a manner not incompatible with the provision of the Services, Peakon shall only Process such Personal Data as strictly necessary in the provision of the Services and not for any other purpose;
- 6.2.5 Peakon shall ensure that all such Personal Data is kept separate from any Personal Data of Peakon or of any other client of Peakon;
- 6.2.6 delete all such Personal Data in accordance with Peakon's obligations as set out in clause 14.3.3, but without prejudice to Peakon's rights in respect of aggregated and anonymised data as set out in clause 6.4;

- 6.2.7 at the cost and expense of the Client, assist the Client in respect of (a) any requirement of the Client to notify any Personal Data breach to any supervisory authority, and/or (b) any data protection impact assessment which the Client may from time to time be required to undertake in accordance with applicable law, and/or (c) (where appropriate, taking into account the nature of the Processing) in respect of the Client's obligation to respond to requests of any Client Employee, being a Data Subject with respect to the Personal Data in question, exercising his or her rights as such;
- 6.2.8 save as otherwise stated in the Special Terms to this Agreement, Peakon shall be entitled to transfer and/or Processed such Personal Data outside the European Economic Area in connection with the provision of certain modules and features of the Services, as set out in the Security Overview, to the third parties and at the physical server locations as specified in the Security Overview, in connection with the functioning and support of such modules and features in the course of the provision of the Services; and the Client hereby consents to such transfer and Processing. Peakon and the Client shall document any relevant contractual requirements of the Client as required under applicable Data Protection Legislation to ensure compliant transfer and Processing of such Personal Data outside the European Economic Area. In this respect the Parties hereby agree that, unless the relevant transfer is to a third party based in a country confirmed as having adequate data protection safeguards by the European Commission, or unless the relevant transfer is to a US-based third party which is validly certified under the Privacy Shield as set out at <https://www.privacyshield.gov/> from time to time, they will adopt the standard contractual clauses for data export as stipulated from time to time by the European Commission, insofar as and for so long as such contractual clauses remain legally valid and enforceable; and
- 6.2.9 Peakon shall not share or disclose any such Personal Data with or to any sub-contractor of Peakon (as such sub-contractors are specified in Peakon's Security Overview, as amended from time to time) unless the Client has provided its written consent in advance to the same; and provided also that there is a written contract in place between Peakon and such sub-contractor under which such sub-contractor is required to comply with the same or equivalent terms as Peakon is required to comply with under this clause 6.2. The Client hereby consents to the disclosure of Personal Data to those sub-contractors of Peakon existing as at the Effective Date, who require to have disclosure of such Personal Data, as set out in the then-current Security Overview. Peakon hereby confirms that such sub-contractors are bound by equivalent contractual terms as those set out in this clause. In the event that Peakon appoints any new sub-contractor to whom Personal Data might need to be disclosed, Peakon shall: (i) notify the Client by email or via an update posted on its status page available at <https://status.peakon.com/> (or at such address as Peakon may otherwise notify from time to time), providing all requisite information concerning such sub-contractor and the processing to be undertaken by it; (ii) update its Security Overview to reflect such new sub-contractor, and (iii) at the time of such email or update, in circumstances in which such consent is needed, Peakon shall request the further consent of the Client to the disclosure of Personal Data by Peakon to such new sub-contractor, on and subject to the terms of this sub-clause.
- 6.3 The Client shall ensure, and shall procure that all Permitted Client Affiliates shall ensure that:
- 6.3.1 it is entitled to transfer any relevant Personal Data to Peakon, such that Peakon may lawfully use, process and transfer such Personal Data in accordance with this Agreement on the Client's behalf; and
- 6.3.2 all relevant Data Subjects have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable Data Protection Legislation.
- 6.4 Peakon shall be entitled, in accordance with the policies and timescales specified in its Security Overview from time to time, to anonymise Personal Data of the Client following termination of this Agreement, whereby such data shall be aggregated within certain non-identifying criteria, and all references to individual Data Subjects shall be deleted, and such data shall no longer constitute Personal Data, and in such circumstances Peakon shall retain such data in aggregated form for statistical, research and/or benchmarking purposes only.
- 6.5 The Client shall not (and shall not permit its Authorised Users to) configure the Services dashboard or other interface by reference to, or devise or undertake any surveys or analysis using the Services by reference to, any special category of Personal Data (within the meaning of the EU General Data Protection Regulation), namely: racial or ethnic origin; political opinions; religious or philosophical beliefs; trade union membership; genetic or biometric data; health data; sex life or sexual orientation.

## **7 PEAKON'S OBLIGATIONS**



- 7.1 Peakon undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.
- 7.2 The undertaking in clause 7.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Peakon's instructions, or modification or alteration of the Services by any party other than Peakon or Peakon's duly authorised contractors or agents. If the Services do not conform with the foregoing undertaking, Peakon will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Client with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Client's sole and exclusive remedy for any breach of the undertaking set out in clause 7.1. Notwithstanding the foregoing, Peakon:
- 7.2.1 does not warrant that the Client's use of the Services will be uninterrupted or error-free; or that the Services, Documentation and/or the information obtained by the Client through the Services will meet the Client's requirements; and
- 7.2.2 is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Client acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 7.3 This Agreement shall not prevent Peakon from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this Agreement.

## **8 CLIENT'S OBLIGATIONS**

- 8.1 The Client shall:
- 8.1.1 provide Peakon with:
- (i) all necessary co-operation in relation to this Agreement; and
  - (ii) all necessary access to such information as may be required by Peakon;
- in order to provide the Services, including but not limited to Client Data, security access information and configuration services;
- 8.1.2 comply with all applicable laws and regulations with respect to its activities under this Agreement;
- 8.1.3 carry out all other Client responsibilities set out in this Agreement in a timely and efficient manner. In the event of any delays in the Client's provision of such assistance as agreed by the Parties, Peakon may adjust any agreed timetable or delivery schedule as reasonably necessary;
- 8.1.4 ensure that the Client Employees use the Services and the Documentation in accordance with the terms and conditions of this Agreement and shall be responsible for any Client Employee's breach of this Agreement;
- 8.1.5 obtain and shall maintain all necessary licences, consents, and permissions necessary for Peakon, its contractors and agents to perform their obligations under this Agreement, including without limitation the Services;
- 8.1.6 ensure that its network and systems comply with the relevant specifications provided by Peakon from time to time; and
- 8.1.7 be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to Peakon's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Client's network connections or telecommunications links or caused by the internet.

## **9 CHARGES AND PAYMENT**

- 9.1 The Client shall pay the Subscription Fees to Peakon for the User Subscriptions in accordance with this clause.
- 9.2 The Client shall on the Effective Date provide to Peakon valid, up-to-date and complete purchase order information acceptable to Peakon and any other relevant valid, up-to-date and complete contact and billing details, and Peakon shall invoice the Client:

- 9.2.1 on or around the Effective Date, for the Subscription Fees payable in respect of the Initial Subscription Term; and
  - 9.2.2 on or around each anniversary of the Effective Date, for the Subscription Fees payable in respect of the next Renewal Period,
- and the Client shall pay each invoice within 30 days after the date of such invoice.
- 9.3 If Peakon has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of Peakon:
- 9.3.1 Peakon may, without liability to the Client, disable the Client's password, account and access to all or part of the Services and Peakon shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
  - 9.3.2 interest shall accrue on a daily basis on such due amounts at an annual rate equal to 3% over the then current base lending rate of Peakon's bankers in the UK from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.
- 9.4 All amounts and fees stated or referred to in this Agreement:
- 9.4.1 are non-cancellable and non-refundable;
  - 9.4.2 are exclusive of value added tax, which shall be added to Peakon's invoice(s) at the appropriate rate.
- 9.5 Peakon shall be entitled to increase the Subscription Fees, including the fees payable in respect of the additional User Subscriptions) at the start of each Renewal Period, upon giving 30 days' prior written notice to the Client.

## **10 PROPRIETARY RIGHTS**

- 10.1 The Client acknowledges and agrees that Peakon and/or its licensors own all intellectual property rights in the Services, the Documentation and the Peakon Software. Except as expressly stated herein, this Agreement does not grant the Client any rights to, under or in, any patents, copyright, database right, design right, trade secrets, trade names, trade marks (whether registered or unregistered), or any other intellectual property rights or licences in, to or in respect of the Services, the Documentation or the Peakon Software.
- 10.2 Peakon confirms that it has all the rights in relation to the Services and the Documentation that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this Agreement.

## **11 CONFIDENTIALITY**

- 11.1 Each Party shall, and in the case of the Client shall procure that all Permitted Client Affiliates shall:
- 11.1.1 keep all Confidential Information of the other Party confidential, and not without the prior written consent of the other Party disclose or permit the disclosure of the same to any third party other than its or their respective personnel on a strictly need to know basis; and
  - 11.1.2 use the Confidential Information of the other Party only for the proper performance of its duties or exercise of its rights under this Agreement.
- 11.2 Each Party shall, and in the case of the Client shall procure that all Permitted Client Affiliates shall, keep the contents of this Agreement and all negotiations in relation to it confidential, and not disclose the same to any third party.
- 11.3 The provisions of clause 11.1 shall not apply to any Confidential Information that:
- 11.3.1 the receiving Party can reasonably demonstrate was known to the receiving Party or in its possession before that information was acquired from the disclosing Party;
  - 11.3.2 is in or enters the public domain through no default of the receiving Party or any person on its behalf, with effect from the date that the relevant Confidential Information enters the public domain; or
  - 11.3.3 the receiving Party receives from a third party without similar obligations of confidence in circumstances where the third party did not obtain that information as a result of a breach of an obligation of confidence.

- 11.4 The provisions of clauses 11.1 and 11.2 shall not apply to any information which is required to be disclosed by any applicable law or by order of any court of competent jurisdiction or any government body, agency or regulatory body, to the extent of the required disclosure, provided that the receiving Party shall use all reasonable endeavours:
- 11.4.1 to give the other Party as much written notice of the disclosure as it reasonably can to enable the other Party to seek a protective order or other action protecting such information from disclosure;
  - 11.4.2 to furnish only that portion of the information that it is legally obliged to disclose; and
  - 11.4.3 to consult with the other Party with a view to agreeing the timing and content of any such disclosure.
- 11.5 The receiving Party shall notify the disclosing Party promptly if it becomes aware that any of the Confidential Information falls within the provisions of clauses 11.3 and 11.4.
- 11.6 Upon expiry or termination of this Agreement (howsoever arising) the receiving Party shall promptly return, or (if so requested by the disclosing Party) destroy, all Confidential Information of the disclosing Party.
- 11.7 No Party shall make, or suffer or permit any person to make, any public announcement concerning this Agreement without the prior written consent of the other Party (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.

## 12 INDEMNITY

- 12.1 The Client shall (a) defend and indemnify Peakon and all Peakon Affiliates, and its and their respective officers, directors and employees, on demand, from and against all claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the use of the Services and/or Documentation by the Client and/or by any person under the auspices or control of the Client or any Permitted Client Affiliate whether or not Client Employees and whether or not acting in the course of their employment or engagement (in this clause, referred to as an “**Services Usage Claim**”), and (b) defend and indemnify Peakon and all Peakon Affiliates, its officers, directors and employees, on demand, from and against all third party or regulatory claims, actions, proceedings, or fines, and for any related losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees), arising out of or in connection with any breach by the Client of its obligations under clause 6 (in this clause, referred to as a “**Data Protection Claim**”), provided that:
- 12.1.1 the Client is given prompt notice of any matter for which Peakon wishes to be indemnified under this sub-clause;
  - 12.1.2 Peakon provides reasonable co-operation to the Client in the defence and settlement of the relevant Services Usage Claim or Data Protection Claim (as the case may be), at the Client's expense; and
  - 12.1.3 the Client is given sole authority to defend or settle the relevant Services Usage Claim or Data Protection Claim (as the case may be), provided that no settlement shall be made which prejudices Peakon's rights or places Peakon under any obligations (in addition to those in this Agreement) without the prior written approval of Peakon (such approval not to be unreasonably withheld or delayed).
- 12.2 Peakon shall (a) defend the Client, its officers, directors and employees against any claim brought by a third party that the Services, Documentation or Peakon Software infringes any patent effective as of the Effective Date, copyright, trade mark, database right or right of confidentiality (in this clause, referred to as an “**Infringement Claim**”), and shall indemnify the Client for any amounts awarded against the Client in judgment or settlement of any such Infringement Claims, and (b) defend and indemnify the Client, its officers, directors and employees against any third party or regulatory claims, actions, proceedings, or fines, and for any related losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees), arising out of or in connection with any breach by Peakon of its obligations under clause 6 (in this clause, referred to as a “**Data Protection Claim**”), provided that:
- 12.2.1 Peakon is given prompt notice of any matter for which the Client wishes to be indemnified under this sub-clause;
  - 12.2.2 the Client provides reasonable co-operation to Peakon in the defence and settlement of the relevant Infringement Claim or Data Protection Claim (as the case may be), at Peakon's expense; and

- 12.2.3 Peakon is given sole authority to defend or settle the relevant Infringement Claim or Data Protection Claim (as the case may be), provided that no settlement shall be made which prejudices the Client's rights or places the Client under any obligations (in addition to those in this Agreement) without the prior written approval of the Client (such approval not to be unreasonably withheld or delayed).
- 12.3 In the defence or settlement of any Infringement Claim, Peakon may procure the right for the Client to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this Agreement on 2 Business Days' notice to the Client without any additional liability or obligation to pay liquidated damages or other additional costs to the Client.
- 12.4 In no event shall Peakon, its employees, agents and sub-contractors be liable to the Client to the extent that the alleged infringement (whether or not the subject of an Infringement Claim) is based on:
- 12.4.1 a modification of the Services or Documentation by anyone other than Peakon; or
- 12.4.2 the Client's use of the Services or Documentation in a manner contrary to the instructions given to the Client by Peakon; or
- 12.4.3 the Client's use of the Services or Documentation after notice of the alleged or actual infringement from Peakon or any appropriate authority.
- 12.5 The foregoing states the Client's sole and exclusive rights and remedies, and Peakon's (including Peakon's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

### **13 LIMITATION OF LIABILITY**

- 13.1 Except as expressly and specifically provided in this Agreement:
- 13.1.1 the Client assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Client, and for conclusions drawn from such use. Peakon shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Peakon by the Client in connection with the Services, or any actions taken by Peakon at the Client's direction;
- 13.1.2 all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this Agreement; and
- 13.1.3 the Services and the Documentation are provided to the Client on an "as is" basis.
- 13.2 Nothing in this Agreement excludes or restricts the liability of Peakon or any Peakon Affiliate for death or personal injury caused by Peakon's negligence, or for fraud or fraudulent misrepresentation.
- 13.3 Subject to clauses 13.1 and 13.2:
- 13.3.1 neither Peakon nor any Peakon Affiliate shall be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under or in connection with this Agreement; and
- 13.3.2 the total and aggregate liability of, collectively, Peakon and all Peakon Affiliates to, collectively, the Client and all Permitted Client Affiliates, in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising under or in connection with the performance or non-performance or contemplated performance of this Agreement shall be limited to the total Subscription Fees paid for the User Subscriptions during the 12 months immediately preceding the date on which the claim arose.

### **14 TERM AND TERMINATION**

- 14.1 This Agreement shall, unless otherwise terminated as provided in this clause, commence on the Effective Date and shall continue for the Initial Subscription Term and, thereafter, this Agreement shall be automatically renewed for successive Renewal Periods, unless:

- 14.1.1 either Party at any time notifies the other Party in writing of its intention to terminate, giving at least the Minimum Notice to Terminate; such notice to take effect at the expiry of the Initial Subscription Term or Renewal Period (as applicable) in which the notice is given; or
  - 14.1.2 otherwise terminated in accordance with the provisions of this Agreement.
- 14.2 Without affecting any other right or remedy available to it, either Party may terminate this Agreement with immediate effect by giving written notice to the other Party if:
- 14.2.1 the other Party fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than 30 days after being notified in writing to make such payment;
  - 14.2.2 the other Party commits a material breach of any other term of this Agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;
  - 14.2.3 the other Party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 ;
  - 14.2.4 the other Party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;
  - 14.2.5 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other Party other than for the sole purpose of a scheme for a solvent amalgamation of that other Party with one or more other companies or the solvent reconstruction of that other Party;
  - 14.2.6 an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other Party;
  - 14.2.7 the holder of a qualifying floating charge over the assets of that other Party has become entitled to appoint or has appointed an administrative receiver;
  - 14.2.8 a person becomes entitled to appoint a receiver over the assets of the other Party or a receiver is appointed over the assets of the other Party;
  - 14.2.9 a creditor or encumbrancer of the other Party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other Party's assets and such attachment or process is not discharged within 14 days;
  - 14.2.10 any event occurs, or proceeding is taken, with respect to the other Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clauses 14.2.3 to 14.2.9 (inclusive); or
  - 14.2.11 the other Party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.
- 14.3 On termination of this Agreement for any reason:
- 14.3.1 all licences granted under this Agreement shall immediately terminate and the Client shall immediately cease all use of the Services and/or the Documentation;
  - 14.3.2 each Party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other Party;
  - 14.3.3 without prejudice to Peakon's rights in respect of anonymised data as set out in clause 6.4, Peakon shall delete any and all Client Data (including any Personal Data contained therein) within 30 days of the termination of this Agreement, provided that Client Data contained on backup copies of Peakon's databases shall not be deleted for up to 90 days from the date of termination, upon expiry of the then-current backup; and the Client hereby agrees that it shall be entitled to receive copies of any such Client Data solely by use by the Client of the data export functionality within the Services made available at any time up to the date of such termination; and

14.3.4 any rights, remedies, obligations or liabilities of the Parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of this Agreement which existed at or before the date of termination shall not be affected or prejudiced.

## **15 FORCE MAJEURE**

Neither Peakon nor any Peakon Affiliate shall have any liability to the Client under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of Peakon or any other party), failure of a utility service or transport or telecommunications network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of Peakon's sub-contractors or any Peakon Affiliate's sub-contractors, provided that the Client is notified of such an event and its expected duration.

## **16 CONFLICT**

If there is an inconsistency between (a) the express and unambiguous provisions in the Special Terms set out in the Order Form and these Terms and Conditions, the provisions of the Special Terms shall prevail; or (b) any other terms of the Order Form and these Terms and Conditions, these Terms and Conditions shall prevail.

## **17 VARIATION**

No variation of this Agreement shall be effective unless it is in writing and signed by the Parties (or their authorised representatives).

## **18 WAIVER**

No failure or delay by a Party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

## **19 RIGHTS AND REMEDIES**

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

## **20 SEVERANCE**

If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force. If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the Parties.

## **21 ENTIRE AGREEMENT**

21.1 This Agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

21.2 Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Agreement.

21.3 Nothing in this Agreement shall however limit or exclude any liability for fraud.

## **22 ASSIGNMENT**

22.1 The Client shall not, without the prior written consent of Peakon, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

22.2 Peakon may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

## **23 NO PARTNERSHIP OR AGENCY**

Nothing in this Agreement is intended to or shall operate to create a partnership between the Parties, or authorise either party to act as agent for the other, and neither Party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

## **24 THIRD PARTY RIGHTS**

This Agreement does not confer any rights on any person or party pursuant to the Contracts (Rights of Third Parties) Act 1999.

## **25 NOTICES**

25.1 Any notice required to be given under this Agreement shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other Party at its address set out in this Agreement, or such other address as may have been notified by that Party for such purposes, or sent by fax to the other Party's fax number as set out in this Agreement.

25.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in Business Hours, at 9 am on the first Business Day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. A notice sent by fax shall be deemed to have been received at the time of transmission (as shown by the timed printout obtained by the sender).

## **26 GOVERNING LAW AND JURISDICTION**

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