

# Dell B.V. - Netherlands Cloud Solutions Agreement

## 1 YOUR RELATIONSHIP WITH DELL

1.1 This Cloud Solutions Agreement (“**CSA**”) is entered into between you and Dell and governs your use of and access to the Solution. The term “**Agreement**” refers collectively to these terms and conditions and, as applicable:

(a) the Solution Description for the applicable Solution;

(b) any Order Form (whether in hard copy format or online) referencing the Solution Description (an “**Order Form**”); and

(c) our Acceptable Use Policy (“**AUP**”), a copy of which is provided with this Agreement as an attachment and which may be amended from time to time. This Agreement is not intended to be a framework agreement and applies to the applicable Solution or Solutions only which Customer purchases in a single order.

1.2 This Agreement is effective upon either: Dell’s acceptance of your executed Solution Description or an Order Form; or you otherwise agree to be bound by this Agreement through your acceptance pursuant to an online order process that references this Agreement; or Dell’s acceptance by starting to perform the relevant services; or your acceptance by accessing or using a Solution. “**You**”, “**your**” or “**Customer**” means the customer entity identified in the applicable Solution Description, Order Form or online order process. “**Dell**”, “**us**”, “**we**” or “**our**” means Dell B.V., on behalf of itself and its suppliers and licensors. A “**Party**” means either you or Dell and “**Parties**” means you and Dell. You agree that Dell may share data with any other supplier to the extent required to deliver the Solution. You agree that your purchases of Solutions pursuant to this Agreement will be solely for your own internal business use and this Agreement does not apply to Solutions purchased for resale.

1.3 If you purchase a Solution from Dell that is performed by a member of Dell’s cloud partner program (a “**Cloud Partner**”), that Solution (a “**Partner Solution**”) may be governed by and subject to additional terms and conditions from that Cloud Partner in respect of that Partner Solution which will be referenced or presented on your Order Form or during the online order process (“**Cloud Partner Terms**”). The Cloud Partner Terms will apply in addition to this Agreement in respect of that Partner Solution only, and in the event of any conflict between the Cloud Partner Terms and this Agreement, the order of precedence in Clause 16.11 below will apply.

1.4 Other than as provided in the paragraph above in relation to Cloud Partner Terms, this Agreement shall apply to the exclusion of, and shall prevail over all other general terms and conditions incorporated in or referred to in any documentation submitted by or to Customer including orders, purchase orders, order acknowledgments, invoices or other communications between the Parties or elsewhere or implied by trade custom, practice or course of dealing.

## 2 DEFINITIONS

“**Activation Date**” means the date:

(a) that the Activation Instructions are transmitted; or

(b) in the event that Activation Instructions are not required, the date that you notify us that you have been able to access the Services.

**“Activation Instructions”** means any instructions, user IDs, software licence keys or passwords that we or the applicable Cloud Partner may provide you in respect of specific Solutions to enable you to activate or access the Solution.

**“Affiliate”** means a Party or any business entity from time to time Controlling, Controlled by, or under common Control with, either Party save that in the case of Dell, an Affiliate shall not include any owners of Denali Holding Inc or their respective companies or investments.

**“Claims”** means claims, demands, actions, losses, expenses, liabilities, judgments, settlements, damages and costs (including all interest, penalties and legal and other professional costs and expenses).

**“Cloud”** means a combination of hardware, services, software and networking elements made available by us under a Solution Description that comprises an information technology system. Depending on the Solution purchased, the Cloud may consist of a dedicated system for your use only, the right to use certain parts of a shared system maintained for multiple customers, or a combination of some dedicated elements and some shared elements.

**“Cloud Partner”** has the meaning in Clause 1 above.

**“Cloud Partner Terms”** has the meaning in Clause 1 above.

**“Confidential Information”** means:

(a) for you, information provided to us on an Order Form, and Customer Content provided to us (save to the extent that use or storage of the same on the Solution renders such Customer Content as part of or within the public domain);

(b) for us, pricing and other Solution terms, Activation Instructions, marketing and sales information, “know-how”, audit and security reports, product development plans, data centre designs (including non-graphic information you may observe on a tour of a data centre), or other proprietary information or technology provided to you (including Software); and

(c) for both you and us, includes all information relating to each Party and its customers, clients and suppliers and includes but is not limited to software, product plans, pricing, marketing and sales information, customer lists, know-how, trade secrets, processes or procedures, whether any such information may be designated as confidential or which, under the circumstances surrounding disclosure, ought to be treated as confidential.

Confidential Information shall not include personal data which shall be governed by Clause 11 below.

**“Contract Year”** means the twelve (12) month period starting on the effective date of this Agreement as set out in Clause 1 above, and then each subsequent twelve (12) month period starting from the same date until the Agreement expires or is terminated.

**“Control”** means in respect of a company, the power of a person to directly or indirectly secure that the affairs of the company are conducted in accordance with the wishes or directions of that person.

**“Controlling”, “Controlled by”** and **“under Common Control”** shall be construed accordingly.

**“Customer Content”** means any information or data provided by you or your End Users in connection with your or your End Users’ use of the Solution, including any text, software, music, sound, photographs, graphics, video, messages, files, attachments or other materials you transmit to us or store or use on the Solution.

**"Dell branded"** means IT hardware, software and related products and services which are marked with the Dell logo or sold under the Dell brand and components thereof, excluding:

(a) Third Party Products; and

(b) any parts or components added after delivery of the products or through Dell's custom factory integration service.

**"Dell Parties"** means Dell's Affiliates, contractors, agents (or any employees, directors and officers thereof).

**"End User"** means each individual whom the Customer has authorized to access and use the Solution. End Users may include you and your Affiliates' employees and independent contractors that agree to be bound by terms and conditions no less restrictive than those contained in this Agreement and are acting on behalf of you and not a third party.

**"Intellectual Property"** means any patent, copyright and rights in the nature of copyright, database right, moral right, design right, trade secret, registered design, trade mark, service mark, domain name, metatag, utility model, unregistered design or, where relevant, any application for any such right, or other industrial or intellectual property right, whether or not registered or capable of registration, subsisting anywhere in the world and any intellectual property rights in know-how, documentation, and techniques associated with the Services.

**"Malicious Code"** means any software, virus, Trojan horse, time bomb or other code (which can take the form of but not be limited to Java applets, ActiveX controls, scripting languages, browser plug-ins or pushed content) that is harmful, disabling or which enables unauthorised access to or theft of or damage to Confidential Information, data or other information or otherwise impairs the operation of systems.

**"Partner Solution"** has the meaning in Clause 1 above.

**"Services"** means any and all services performed by us, a Cloud Partner, or a combination thereof, as described in one or more Solution Descriptions, including the provision of access to and use of the Cloud.

**"Software"** means any software, library, utility, tool, or other computer or program code, in object (binary) or source code form, as well as the related documentation, provided by us in connection with a Solution. Software includes software provided by Dell and locally installed on your systems and software accessed through the internet or by other remote means including websites, portals, and "cloud-based" solutions to utilize a Solution in accordance with this Agreement.

**"Solution"** means the combination of the Services performed and Software provided by us or our Cloud Partner (if applicable) to you pursuant to a Solution Description including use of the Cloud in connection with the provision of a Solution.

**"Solution Description"** means:

(a) a statement of work, service description, solution description or other agreement that references this Agreement, or (if applicable) Cloud Partner Terms, or

(b) a specification sheet or online description referenced in an Order Form or an online order process.

**"Term"** means, for any Solution, the period beginning on the Activation Date and extending for the period indicated in the Solution Description or Order Form.

**“Third Party Products”** means any non-Dell branded:

- (a) products;
- (b) Software; or
- (c) Services,

but excluding the Partner Solutions.

**“Works”** has the meaning set out in Clause 10(c).

### 3 **QUOTES, ORDERING AND PAYMENT**

3.1 We will charge amounts for Solutions as set forth in the applicable Solution Description or Order Form or, if not specified, the current list pricing provided on our website. Quoted prices will remain in effect only until the expiration date of the quote. All orders are subject to our acceptance. The number of systems, units (e.g., mailboxes, recipients, minutes, etc.), and End Users for which you have purchased Solution(s) shall be indicated on the Order Form. Usage in excess of these numbers or for a period of time longer than the Term will result in additional costs. The additional costs per billing period will be determined by multiplying the excess usage by the contracted fee per system, unit, or End User in the original Order Form. Payment terms shall be subject to regular credit checking by Dell and Dell may require additional payment and/or credit conditions for Customer. Payment must be made in advance to the account indicated by us, unless we agree in writing to credit terms. Solutions are invoiced monthly in advance beginning on the Activation Date. We will invoice you locally, per the billing address(es) you provide, in the applicable currency. Dell may invoice electronically and the Parties agree to make the necessary arrangements to enable such electronic invoicing to take place. Invoices are due and payable within thirty (30) days from the invoice date. All payments made or to be made by Customer to Dell under this Agreement shall be made free of any restriction or condition and without any deduction or withholding (except to the extent required by law) on account of any other amount, whether by way of set-off or otherwise. We reserve the right to charge the statutory commercial interest rate against overdue amounts, until actual payment is made in full.

3.2 The charges stated in any Order Form or invoice will include all duties, levies or any similar charges and will exclude VAT or equivalent sales or use tax. You are responsible for the payment of all taxes and fees assessed or imposed on the Solution in any geography in which you or an End User are permitted to receive the benefit of the Solution, including any sales, use, excise, value-added, or comparable taxes, but excluding taxes for which you have provided a valid resale or exemption certificate. Should any payments become subject to withholding tax, you will deduct these taxes from the amount owed and pay the taxes to the appropriate tax authority in accordance with applicable tax laws. You will promptly provide us with receipts or documents evidencing these tax payments. We are not liable for any withholding tax, fine or interest due as a result of your failure to withhold any applicable tax.

### 4 **ACTIVATION**

With respect to certain Solutions, after our receipt and acceptance of an order, you will receive Activation Instructions. You are responsible for providing, maintaining and monitoring one dedicated email address for the receipt of notices and other communications related to the Solution.

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## **RENEWALS**

Unless you decline auto-renewal in writing at least thirty (30) days prior to the expiration of the Term or unless auto-renewal is explicitly disclaimed in a Solution Description or an Order Form, we may automatically renew this Agreement and the related Solution(s) for a successive Term at our then current list price. By continuing to use the Solution(s) beyond the expiration of the applicable Term, you renew this Agreement and the related Solutions) for a successive Term at our then-current list price. Timelines for delivery of the Solutions are estimates and time shall not be of the essence in the performance of the Solutions.

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## **TERMINATION**

6.1

Either Party may terminate this Agreement if the other Party commits a material breach and fails to remedy such breach within ninety (90) days of receipt of written notice describing the nature of the breach. If you purchased multiple Solutions, termination of an individual Solution will not terminate this Agreement unless the circumstances giving rise to termination generally affect all purchased Solutions. Notwithstanding the foregoing, we may terminate this Agreement or the affected Solutions upon written notice to you if:

(a) you are delinquent on your payment obligations for thirty (30) days or more and payment is not in dispute;

(b) you breach the terms of the AUP or the Cloud Partners AUP;

(c) a change in our relationship with a third party Software or technology provider or Cloud Partner has had a material adverse effect on our ability to provide the Solution; or

(d) you cease or threaten to cease to trade;

(e) you become insolvent;

(f) you are unable to pay your debts as they fall due;

(g) you have a receiver, administrative receiver, administrator or manager appointed over the whole or any part of your assets or business;

(h) you make any composition or arrangement with your creditors;

(i) an order or resolution is made for your dissolution or liquidation (other than for the purpose of solvent amalgamation or reconstruction); or

(j) if the equivalent of any of the events described in this Clause 6.1(d) to Clause (i) occurs in relation to you under the laws of any jurisdiction.

6.2

Upon expiration of the Term for all Solutions purchased pursuant to this Agreement, either Party may terminate this Agreement by providing thirty (30) days written notice. Upon termination of this Agreement, all rights and obligations under this Agreement will automatically terminate except for rights of action accruing prior to termination, payment obligations, and any obligations that expressly or by implication are intended to survive termination.

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## **TRANSFER TO THIRD PARTY**

You may not transfer this Agreement or any rights or obligations under this Agreement to a third party without our prior written consent. We may novate, sell or otherwise transfer our rights to a business,

product line or substantially all of our assets, to a third party or any Affiliate provided the transferee agrees to perform the obligations under this Agreement. We may subcontract or delegate in whole or in part this Agreement, provided that we remain responsible for the performance of the Solution. For the purposes of this Agreement, any change of Control will be deemed a transfer.

## 8 **PROPRIETARY RIGHTS**

Except for information created or otherwise owned by you or licensed by you from third parties, including all information provided by you to us through the Solution or for use in connection with the Solution, all right, title, and interest in the Intellectual Property embodied in the Solution, including the know-how and methods by which the Solution is provided and the processes that make up the Solution, will belong solely and exclusively to us, our licensors and/or suppliers, and you will have no rights in any of the above, except as expressly granted in this Agreement. The Services and the Software used to provide the Solution embody valuable trade secrets and proprietary rights of Dell and/or our suppliers and/or our licensors and are protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. Any Intellectual Property developed during the performance of the Solution will belong solely and exclusively to Dell, on behalf of itself and its licensors and suppliers.

## 9 **SUSPENSION, DELETION, AND MODIFICATION**

9.1 We may suspend all or part of the Solution or your access to or use of data stored in the Cloud or refuse to provide additional Solutions to you:

- (a) if you are delinquent on your payment obligations for thirty (30) days or more;
- (b) upon receipt of a valid summons or law enforcement request; or
- (c) when we have a commercially reasonable belief that you have materially breached this Agreement or that your use of the Solution poses an imminent security risk or may subject Dell to liability.

Unless it's not possible:

- (i) due to applicable laws and regulations; or
- (ii) because in our commercially reasonable judgment a suspension on shorter or contemporaneous notice is necessary to protect us, our Cloud Partner (if applicable) or our customers,

we will use commercially reasonable efforts to give you at least twelve (12) hours' notice of a suspension

9.2 It is the Customer's responsibility to manage its data including deletion of data at the end of this Agreement. We may delete your data stored in the Cloud:

- (a) sixty (60) days following any termination by us pursuant to Clause 6 of this Agreement; or
- (b) if you fail to renew an applicable Solution Description within sixty (60) days of expiration of the applicable Solution.

For Customers purchasing a Partner Solution the retention and deletion of Customer data will also be governed by the applicable Cloud Partner Terms.

- 9.3 We or the Cloud Partner (if applicable) may modify the functionality or features of the Solution at any time provided that the modification does not materially denigrate the functionality of the Solution during the Term. We and/or the Cloud Partner will not be liable to you or any third party for any such modification.
- 9.4 Certain Solutions may contain features designed to interoperate with Third Party Products or Cloud Partner services. If the Third Party Product or Cloud Partner services are no longer made available by the applicable provider, we may stop providing the related Solution feature and you will not be entitled to any refund, credit or other compensation.
- 9.5 It may be necessary for us or the Cloud Partner to perform scheduled or unscheduled repairs or maintenance, or remotely patch or upgrade the Software, which may temporarily degrade the quality of the Solution or result in a partial or complete outage of the Solution. Although we cannot guarantee that you will receive advance notice of repairs or maintenance, we will endeavour to provide at least seven (7) days' notice of scheduled updates and patches or such notice as is set forth in the Cloud Partner Terms, if applicable.

## 10 ACCESS AND USE

To the extent Software is provided as a part of the Solution, such Software is provided subject to the following terms:

### (a) Licence

For the applicable Term, we grant you a non-exclusive, non-transferable, non-sublicensable, limited, revocable licence to access and use the applicable Software solely in the country or countries in which Dell delivers the Service or where you are authorised to receive the Services and solely for the benefit of receiving the Solution for your internal use as permitted by this Agreement. A portion of the Software may come bundled or otherwise distributed with open source software.

### (b) Restrictions

Unless otherwise expressly permitted in this Agreement, without our prior written consent, you will not (other than as permitted by law):

- (i) permit any third party to use or copy the Software or to obtain access to the Solution, unless such third party is an authorized End User;
- (ii) use the Software in excess of the authorised number of licensed seats for concurrent users, sites, or other criteria specified in the applicable Solution;
- (iii) modify, translate, alter, adapt, publish, transmit, remove reverse engineer, decompile, disassemble, reproduce, distribute, display, create derivative works, compilations or collective works based on, or otherwise exploit any of the Software (including in respect of any part of the Software or any copy, adaption, transcription or merged portion of it);
- (iv) merge the Software with any other software;
- (v) sell, sublicense, rent, loan, lease, assign, grant a security interest in, create a trust over, or otherwise transfer rights to the Software;
- (vi) benchmark the performance of the Software or Solution without our prior written consent; or

(vii) use the Software to operate in or as a time-sharing, outsourcing, or service bureau environment or in any way allow third party access to the Solution.

You acknowledge and agree that you are liable for any breach of this Agreement by any End User.

**(c) Rights Reserved**

THE SOFTWARE IS LICENSED, NOT SOLD.

Except for the licence expressly granted herein, Dell, on behalf of itself and its licensors and suppliers, retains all right, title, and interest in and to the Software and in all related Intellectual Property and its derivative works, including registrations, applications, renewals, and extensions of such rights (the "**Works**"). The rights in these Works are valid and protected in all forms, media and technologies existing now or hereinafter developed and any use other than as contemplated herein, including the reproduction, modification, distribution, transmission, adaptations, translation, display, re-publication or performance of the Works, except as specifically permitted herein or by law, is strictly prohibited. Dell, on behalf of itself and its licensors and suppliers, retains all rights not expressly granted herein.

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**DATA PROTECTION**

In this Clause 11, the terms "data controller", "data processor", "personal data" and "processing" shall be as defined in the European Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("**Directive**") as amended or superseded from time to time.

(a) Customer shall comply with the provisions and obligations imposed by the Directive (as implemented into applicable national laws) in respect of the processing of the personal data.

(b) Customer warrants and represents on behalf of itself and its Affiliates that it has obtained all necessary consents and permissions for lawful processing, prior to passing personal data to Dell.

(c) Dell shall process the personal data only in accordance with Customer's instructions and this Agreement. This Agreement contains Customer's complete and final instructions to Dell for the processing of personal data. Any additional or alternate instructions must be agreed between the parties in writing. To the extent Dell processes personal data as a data processor for Customer under or in connection with the Agreement, Dell shall ensure appropriate protection is in place to safeguard such personal data.

(d) Dell shall use its reasonable efforts to assist Customer to respond to requests for access to personal data which may be made by individuals to whom the personal data relates and where the personal data are held by Dell, subject to the payment by Customer of Dell's reasonable professional charges for the time engaged by Dell staff in so doing.

(e) Customer instructs and authorises Dell to collect, use, store and transfer the personal data Customer provides to Dell for the purpose of performing Dell's obligations under the Agreement and for any additional purposes described, pursuant to the Agreement.

(f) Dell may, in the normal course of business, make worldwide transfers of personal data on its corporate systems, to other entities, agents or subcontractors in the same group of companies, or to other relevant business partners who may have incidental access to personal data. When making such transfers, Dell shall ensure appropriate protection is in place to safeguard personal data transferred under or in connection with the Agreement.



(g) Dell shall not be liable for any claim brought by Customer or a data subject arising from any action or omission by Dell to the extent that such action or omission resulted from compliance by Dell with Customer's instructions.

(h) If you purchase a Partner Solution, the privacy policy set forth in the applicable Cloud Partner Terms will also apply.

## 12 **ACCEPTABLE USE POLICY**

You shall take all measures in accordance with good IT industry practice to prevent unauthorised use or disclosure of the Solution. For the purposes of this clause, "good IT industry practice" means:

(a) using standards, practices, methods and procedures; and

(b) exercising that degree of skill and care, diligence, prudence and foresight, which would in each case reasonably and ordinarily be expected from a skilled and experienced person in the IT industry in the same or similar circumstances.

You must use reasonable security precautions in connection with your use of the Solution and comply with the AUP and laws and regulations applicable to your use of the Solution. You must cooperate with our reasonable investigation of Service outages, security issues, and any suspected breach of this Agreement. We may revise the AUP to add or modify restrictions on use of the Solutions, provided that the changes are commercially reasonable, consistent with industry norms and apply to all customers.

## 13 **CUSTOMER OBLIGATIONS**

- 13.1 You are responsible for keeping your account permissions, billing, and other account information up to date.
- 13.2 You will ensure that End Users comply with your obligations under this Agreement and that the terms of your agreement with each End User are consistent with this Agreement and are legally enforceable. If you become aware of any violation of your obligations under this Agreement by an End User, you will immediately terminate such End User's access to any Solution.
- 13.3 You will ensure that End Users only use the Solutions in a territory in which the Solutions are sold and permitted for use by Dell.
- 13.4 You will be deemed to have taken any action that you permit, enable or facilitate any person or entity to take related to this Agreement or use of any Solution. You are responsible for the use of the Solutions by any End User and any person who gains access to your or any End User's data or the Solution as a result of your failure to use reasonable security precautions, even if the use was not authorized by you.
- 13.5 You are responsible for selecting, obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Solution and for ensuring that the equipment is compatible with the Solution.
- 13.6 You are responsible for the data and software you use or store in the Cloud, including its maintenance, operation and compatibility in and with the Cloud, and any third party claims regarding the same. You understand and agree that neither Dell nor the Cloud Partners have control over the content of the data processed by us and that we or the Cloud Partner, as applicable, perform the Services on your behalf.
- 13.7 If you or an End User transmits data to a third party website or other provider that is linked to or made accessible by the Solution, you and the End User consent to our or the Cloud Partners, as applicable,

enabling such transmission, but such transmission and any related interaction is solely between you and the third party website or provider and may be subject to additional terms and conditions provided by the third party website or provider. Neither Dell nor the Cloud Partners will be responsible for any disclosures, modifications or deletions of your data resulting from any such transmission. Neither Dell nor the Cloud Partners make any warranties about, or will have any liability for, such third party websites or providers.

- 13.8 You are responsible for properly configuring and using the Solution and taking your own steps to maintain appropriate security, protection and back-up of your data and software including the use of appropriate encryption, back-up and archiving. You remain responsible for properly handling and processing notices claiming that your data or software violates a person's rights.
- 13.9 You are responsible for keeping Activation Instructions confidential and controlling your own and your representatives' use of them and you shall be responsible for payment of all Software and/or Services accessed using the Activation Instructions.
- 13.10 If for any reason you do not accept delivery of any of the Solutions or do not activate a Solution when it is ready to be provided, or Dell is unable to deliver a Solution on time because you have not provided appropriate instructions, documents, licences, authorisations or have not activated the Solution, then the relevant Solution will be deemed to have been delivered and completed, and Dell may invoice Customer for such Solution.
- 13.11 You acknowledge that the Solutions are not intended to replace and do not replace the need for you to maintain regular data back-ups or redundant data archives. You are responsible for maintaining back-up copies of your data that may be accessed, stored or processed by us in the course of our provision of Solutions. You understand and agree that we are not responsible for any loss or corruption of your data or software. We will have no liability for loss or recovery of data or programs or loss of use of system(s) arising out of the Solutions.
- 13.12 With respect to Customer's use of Software, Customer is responsible for the costs of all necessary servicing, repairs or correction of problems caused by Malicious Code unless such problems or Malicious Code are caused as a direct result of Dell's wilful misconduct.
- 13.13 In our performance of the Solution, we may obtain information (which does not include "personal data" as defined in Clause 11) related to your use of the Solution. You agree that we may use such information in an aggregated, anonymized form to assist in improving and optimizing various aspects of the Solution or in support of generic marketing activities related to the Solution.
- 13.14 In connection with certain Solutions, we may provide you with hardware, software, equipment or other property ("**Equipment**"). The Equipment is our sole property and we may immediately take possession of the Equipment following the termination or expiration of this Agreement. You will:
- (a) keep the Equipment free and clear of any lien and not pledge as security or otherwise encumber the Equipment;
  - (b) use the Equipment only to access the Solution and comply with our reasonable Equipment use instructions;
  - (c) not remove, relocate or move the Equipment from the specific location where it was first installed without our prior written approval;
  - (d) provide adequate, secure and proper space at your facility to install Equipment, it being agreed that we are not obligated to install Equipment in poorly ventilated, air conditioned or inadequately maintained room(s);

(e) be responsible for risk of loss and damage to the Equipment equal to the present value of the Equipment's fair market value;

(f) not remove, cover or alter plates, labels or other markings on the Equipment; and

(g) provide a secure link such as a static IP address for the Equipment.

## **14 CUSTOMER LICENCE GRANT**

14.1 Customer grants to Dell and its suppliers the necessary rights to operate any Customer provided software, including a non-exclusive, royalty-free licence (which shall terminate upon termination of the applicable Solution) to install, deploy, use, execute, reproduce, display, perform and run such software (including, without limitation, guest operating systems and application programs), as are reasonable or necessary for Dell and its suppliers to perform or provide the Solution. As between you and Dell, or you and the Cloud Partner, you are responsible for providing, updating, uploading and maintaining any Customer provided software and paying all fees associated therewith, including any software licence and maintenance fees. If, in order to provide the Solution, we or our suppliers are required to install, patch, manage or otherwise use or access software that you licence from a third party software vendor, then you represent and warrant that you have obtained a written licence agreement with the vendor that permits us to perform these activities.

14.2 Customer grants to Dell and its suppliers a non-exclusive, royalty-free licence to access, use, reproduce, modify, perform, display and distribute Customer and End User data as is reasonable or necessary for Dell or its suppliers to perform or provide the Solution. It is Customer's responsibility to obtain, at its own expense, all licences, consents and approvals required to grant to Dell and its suppliers the rights and licences in this Agreement.

## **15 HIGH RISK DISCLAIMER**

The Solutions are not fault tolerant and are not designed or intended for use and may not be used in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, weapons systems, life-support machines, or any other potentially life critical uses (collectively, "**High-Risk Activities**"). Dell shall not be liable for any claims by the Customer in respect of or which relate directly or indirectly to High Risk Activities.

## **16 GENERAL**

### **16.1 Warranty**

16.1.1 Dell warrants that the Services provided as part of the Solution shall be provided in accordance with the Solution Description and in the absence of the Solution Description, with reasonable skill and care.

16.1.2 Except as set out in this Clause 16.1, Dell makes no express or implied warranty (whether under statute or common law):

(a) relating to the performance of the Software;

(b) that the Software is or will be secure, accurate, complete, without error or free of Malicious Code or that any errors in software will be corrected;

(c) that the Services will be uninterrupted, timely or without error; or

(d) as to the security of the Solution.

16.1.3 Dell warrants that the Software will be:

- (a) free from any material defects; and
- (b) checked for Malicious Code from time to time using commercially available virus protection software.

Customer's sole remedy shall be the correction of any material defects of the Software so that it functions in material respects in accordance with the Solution Description. Dell does not warrant or guarantee that it will be able to rectify all defects, nor that any defect which does not materially affect Customer's operations will be corrected.

16.1.4 Dell shall not be liable under the express warranties granted in this Clause 16.1 in respect of:

- (a) use of the Services, Software or Solution otherwise than in accordance with the Agreement;
- (b) in the event of any use of the Service, Software or Solution by any party other than the Customer or Dell or any party permitted under and subject to the terms of this Agreement;
- (c) in the event that any attempts to rectify any Software defect other than normal recovery or diagnostic procedures have been made by Customer's personnel or third parties without the permission of Dell;
- (d) any modification of the Services, Software or Solution not carried out or authorised in writing by Dell;
- (e) failure of electric power or environmental control systems; or
- (f) failure of hardware, software or other products or services not supplied by Dell or any other matter beyond the reasonable control of Dell.

16.1.5 Dell's liability under the warranties given in this Agreement shall not apply to Third Party Products or open source software and Customer shall only be entitled to the benefit of any warranty or guarantee as is given by the manufacturer or supplier to Dell to the extent that they are assignable by Dell to Customer provided this is at no additional cost to Dell.

16.1.6 All other warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Agreement.

16.1.7 Customer agrees that the operation and availability of the systems used for accessing and interacting with the Solutions (including telephone, computer networks and the internet) or to transmit information can be unpredictable and may from time to time interfere with or prevent access to, use or operation of the Solutions. Dell shall not be liable for any such interference with or prevention of Customer's access to, use or lack of operation of the Solutions.

## 16.2 **Limitation of Liability**

16.2.1 The exclusions and limitation of liability set out in this Agreement do not apply to:

- (a) liability arising from any indemnity under Clause 16.4 of the Agreement;
- (b) liability arising from death or personal injury resulting from negligence;
- (c) either party's liability arising as a result of fraud;

- (d) Customer's obligation to pay for the Solutions, Software and Services;
- (e) anything else that cannot be excluded by law.

16.2.2 Neither Party shall be liable for:

- (a) loss of profit, income or revenue;
- (b) loss of anticipated savings;
- (c) loss of interest;
- (d) any fines, penalties or other regulatory changes;
- (e) loss of use of Customer's system(s) or networks;
- (f) loss of goodwill or reputation;
- (g) loss of, corruption of, or damage to data or software;
- (h) recovery of data or programs; or
- (i) special, indirect or consequential loss or damages.

16.2.3 Dell's total liability to Customer for all claims in any Contract Year, howsoever arising out of or in connection with this Agreement (whether for negligence or breach of contract or otherwise) shall not exceed the total amount of the charges paid, or invoiced and due but not yet received, under this Agreement in that Contract Year.

16.2.4 Customer agrees that it has accepted the terms and conditions of the Agreement in the knowledge that Dell's liability is limited and that the charges payable in respect of the Software, Services and Solutions have been calculated so as to reflect such limitations and therefore represent a reasonable and commercial allocation of risk between the Parties.

### 16.3 **Confidentiality**

Confidential Information may not be disclosed except to Affiliates, employees, agents and subcontractors on a "need to know" basis and who have agreed in writing to treat the Confidential Information under terms at least as restrictive as those in this Agreement. Each Party agrees to take the necessary precautions to maintain the confidentiality of the other Party's Confidential Information by using at least the same degree of care as such Party employs with respect to its own Confidential Information of a similar nature, but in no case less than a commercially reasonable standard of care to maintain confidentiality. The restrictions set out in this Clause 16.3 shall not apply to information that:

- (a) was known by the recipient Party receiving Confidential Information from the disclosing Party in accordance with the Agreement prior to its receipt from the disclosing Party;
- (b) is or becomes public knowledge through no fault of the recipient;

(c) is rightfully received by the recipient from a third party without a duty of confidentiality; or

(d) a recipient is required or requested to divulge by any court, tribunal or government agency with competent jurisdiction to which either Party is subject, wherever situated.

If a recipient is required by a court, tribunal or government agency with competent jurisdiction to which either Party is subject, wherever situated, to disclose Confidential Information, the recipient shall, where possible, provide written notice to the disclosing Party prior to such a disclosure. The obligations in this Clause 16.3 shall continue for a period of six (6) years from the termination of this Agreement.

## 16.4 **Indemnification**

16.4.1 We will indemnify you on demand from and against any Claims incurred by you arising out of or relating to any third party claim or third party action that the Solution (excluding Third Party Products and open source software) delivered pursuant to the Agreement infringes that third party's Intellectual Property rights enforceable in the country in which the Solution is sold to you and in which you are authorised to receive such Solution and provided you comply with the provisions of Clause 16.4 and Clause 16.5 as the indemnified Party. If we receive prompt notice of a claim that, in our reasonable opinion, is likely to result in an adverse ruling, then we will, at our option:

(a) obtain a right for you to continue using the Software or a right that allows us to continue performing the Services;

(b) modify the Software or Services to make them non-infringing;

(c) replace the Software or Services with a non-infringing equivalent; or

(d) refund any pre-paid fees for the allegedly infringing Services that have not been performed or provide a reasonably depreciated or pro rata refund for the allegedly infringing Software. Notwithstanding the foregoing, we will have no obligation under this Clause for any claim resulting or arising from:

(i) modifications of the Software or Services that were not performed by or on behalf of us;

(ii) the combination, operation, or use of the Software or Services in connection with a Third Party Product (the combination of which causes the claimed infringement);

(iii) any misuse of the Solution or any use of the Software and/or Services not in accordance with general office use or if used by you in connection with High Risk Activities; or

(iv) our compliance with your written specifications or directions, including the incorporation of any software or other materials or processes provided by or requested by you.

This Clause states Customer's sole and exclusive remedies for any third party Intellectual Property Claim and nothing in this Agreement or elsewhere will obligate us to provide any greater indemnity to Customer.

16.4.2 You will indemnify on demand the Dell parties from and against any Claims incurred by the Dell parties arising out of or relating to any third party claim or third party action relating to:

(a) your failure to obtain or maintain any appropriate licence, sub-licence or consent, Intellectual Property rights, or other permissions, regulatory certifications or approvals associated with technology, software or components or data provided by you necessary for Dell or its suppliers under or in connection with the Agreement;

- (b) Third Party Products or other components directed or requested by you to be installed or integrated as part of the Services;
- (c) any unauthorised use or modifications or additions to the Software or Services;
- (d) your breach of Dell's proprietary rights as stated in this Agreement;
- (e) any inaccurate representation made by you or your representatives regarding the existence of an export licence;
- (f) any allegation made against Dell parties due to your breach or alleged breach of any applicable laws, regulations or orders;
- (g) tax liabilities that are your responsibility pursuant to Clause 3; and
- (h) the failure of any End Users to comply with your obligations under this Agreement.

#### 16.5 **Indemnification Procedure**

In respect of any claim under the Indemnities set out in Clause 16.4, the relevant indemnified party shall:

- (a) promptly notify the indemnifying party in writing of any claim;
- (b) grant the indemnifying party sole control of the defence and resolution of the claim;
- (c) provide reasonable cooperation to the indemnifying party, at the indemnifying party's expense, in defending and resolving the claim; and
- (d) not settle or compromise any indemnity claim or make any admission of liability without the other's written consent.

Failure to provide prompt notice, however, will not affect the indemnifying party's obligations to the extent the failure does not materially prejudice the indemnifying party's ability to defend the claim.

#### 16.6 **Independent Contractor Relationship; No Third Party Beneficiaries**

The Parties are independent contractors. Neither Party will have any rights, power, or authority to act or create an obligation, express or implied, on behalf of another party except as specified in this Agreement nor have any authority to act in the name or on behalf of or otherwise to bind or to create a liability against the other party in any way.

#### 16.7 **Force Majeure**

Neither Party shall be liable to the other for any delay or failure to perform any of its obligations (except Customer's payment obligations) under this Agreement during any period in which the performance is delayed or missed by any circumstances beyond a Party's reasonable control including, without limitation, fire, flood, storm, natural disasters, severe weather, unforeseeable transport or production problems affecting supplies to Dell, shortages in materials, failure of a utility service or transport network, omissions of internet traffic carriers, embargo, strike, lock out or other industrial dispute (whether involving Dell's workforce or any other party), act of God, war, riot, terrorism (including cyber terrorism), civil commotion, terrorist acts, malicious damage, governmental or regulatory actions, accident, breakdown of plant or machinery, local or national emergency, explosions or other catastrophes or default of suppliers or subcontractors (a "**Force Majeure**") provided that the affected Party shall promptly provide the other

Party with written notice of the Force Majeure. The affected Party's time for performance will be excused for the duration of the Force Majeure, but if the Force Majeure lasts longer than thirty (30) days, then the other Party may immediately terminate this Agreement or, if possible, terminate the applicable Solution under the Agreement, in each case, which is affected by the Force Majeure, by giving written notice to the delayed Party. In the case of a Force Majeure, Customer acknowledges and agrees that its' data may not be recoverable and accepts responsibility for re-entry of such data.

## 16.8 **Export Compliance**

16.8.1 Customer acknowledges that the Solution provided under this Agreement, (which may include technology and encryption):

(a) are subject to U.S. and European customs and export control laws;

(b) may be rendered or performed in countries outside the U.S. or Europe, or outside of the borders of the country in which Customer or Customer's products are located; and

(c) may also be subject to the customs and export laws and regulations of the country in which the products, deliverables, Software, or Services are rendered or received.

16.8.2 Under these laws and regulations, products, deliverables, Software, and Services purchased under the Agreement may not be sold, leased or otherwise transferred to restricted end users or to restricted countries. In addition the products, deliverables, Software and Services may not be sold, leased or otherwise transferred to, or utilised by, an end user engaged in activities related to weapons of mass destruction, including but not necessarily limited to, activities related to the design, development, production or use of nuclear materials, nuclear facilities, or nuclear weapons, missiles or support of missile projects, or chemical or biological weapons. Customer agrees to abide by those laws and regulations. Customer represents that any software provided by it and used as part of the products, deliverables, Software and Services contains no encryption or, to the extent that it contains encryption, such software is approved for export without a licence.

## 16.9 **Control laws**

You will comply with all applicable import, re-import, export, and re-export control laws and regulations ("**Control Laws**") and country-specific economic sanctions programs. For clarity, you are solely responsible for compliance related to the manner in which you choose to use the Solution, including your transfer and processing of data or software, the provision of data or software to End Users, and any Control Laws of the country in which the products, deliverables, Services or Software are rendered or received.

## 16.10 **Regulatory Requirements**

We are not responsible for determining whether any Third Party Product used in the performance of the Solution or the Partner Solution satisfies the local regulatory requirements of the country in which the Third Party Product or Partner Solution is delivered. Where we become aware that the Software or Services do not satisfy the local regulatory requirements:

(a) we are not obligated to provide such Software or perform such Services; and

(b) we may immediately terminate the affected Solution under the Agreement by giving written notice to you.



#### 16.11 **Order of Precedence**

If there is a conflict between the terms of any of the documents that comprise this Agreement, the documents will govern in the following order: the CSA, the Solution Description or Order Form (unless terms are specific to a Solution Description or Order Form, in which case, such terms will take precedence over all other terms), the AUP. In the event Customer purchases a Partner Solution, then in relation to that Partner Solution, the Cloud Partner Terms will also apply and to the extent of any conflict with this Agreement, the Cloud Partner Terms will prevail over the terms of this Agreement solely in respect of that Partner Solution. Prevailing terms will be construed as narrowly as possible to resolve the conflict whilst preserving as much of the non-conflicting terms as possible, including preserving non-conflicting provisions within the same paragraph, clause or sub-clause.

#### 16.12 **Revisions to Online Terms**

Any revisions to this Agreement (other than the AUP) ("**Revisions**") are not effective as between the Parties until the underlying Solution Description or Order Form is renewed or extended following the date we publish the Revisions on our website.

#### 16.13 **Entire Agreement; Severability**

The Agreement constitutes the entire agreement between the Parties and supersedes any previous arrangement, understanding or agreement relating to the subject matter it covers. The Parties agree that no representations, warranties, undertakings or promises have been given (express or implied) in respect of the subject matter of the Agreement, other than those which are expressly stated in the Agreement. Neither Party shall have any remedy in respect of any statement not set out in the Agreement upon which it relied in entering into the Agreement, unless the statement was made fraudulently. Neither Party shall be entitled to rescind or terminate the Agreement except as otherwise expressly provided in the Agreement. If any provision of the Agreement should be found by any court or administrative body of competent jurisdiction to be invalid, unenforceable, void or illegal, such provision shall be struck out or modified to the extent necessary to give effect to the commercial intention of the Parties and to comply with the law, and the remainder of the Agreement shall remain in full force and effect.

#### 16.14 **Governing Law; Vienna Convention**

The Agreement and any disputes or claims arising out of or in connection with its subject matter (including non-contractual disputes or claims) are governed by and construed in accordance with Dutch law. The Parties irrevocably agree that the Dutch courts have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Agreement including disputes relating to non-contractual obligations. The Parties agree that the United Nations Convention on Contracts for the International Sale of Goods 1980 (Vienna Convention) shall not apply to the Agreement.

#### 16.15 **Waiver**

A waiver by either Party of a breach of the Agreement or delay or failure to enforce a right under the Agreement shall not constitute a waiver of any subsequent breach of the Agreement.

#### 16.16 **Notices**

16.16.1 Any notice required to be given under the Agreement shall be in writing (including email) and shall be delivered by:

(a) Email;

(b) by hand; or

(c) sent by pre-paid first class post or recorded delivery post to the other Party at its address set out in the Agreement, or such other address as may have been notified by that Party for such purposes.

16.16.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9am on the first working 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 email shall be deemed delivered at the earlier of:

(a) the time a return receipt is generated automatically by the recipient's email server;

(b) the time the recipient acknowledges receipt; and

(c) twenty four (24) hours after transmission;

unless the sender receives notification that the email has not been successfully delivered. Address for notices: FAO: Legal Department, Dell B.V., Transformatorweg 38-72, 1014 AK Amsterdam.

## **Attachment 1**

### **DELL | ACCEPTABLE USE POLICY**

This Acceptable Use Policy (the "**AUP**") sets forth certain limitations and restrictions required in connection with your use of the Services. We may revise the AUP from time to time to add or modify restrictions on your use of the Services. If you violate the AUP, we may suspend or terminate your use of the Services.

Terms used in the AUP that are capitalized and not otherwise defined have the meanings set forth in the Cloud Solutions Agreement.

You are prohibited from:

1 attempting to use or gain unauthorized access to our or to any third party's networks or equipment;

2 permitting other individuals or entities to copy the Services;

3 providing unauthorized access to or use of Activation Instructions;

4 attempting to probe, scan, or test the vulnerability of the Services or of a system, account, or network of Dell or any of our customers or suppliers;

5 interfering or attempting to interfere with service to any user, host, or network;

6 engaging in fraudulent, offensive or illegal activity of any nature or any activity that infringes the intellectual property rights or privacy rights of any individual or third party;

7 transmitting unsolicited bulk or commercial messages;

8 intentionally distributing worms, Trojan horses, viruses, corrupted files or any similar items;

9 restricting, inhibiting, or otherwise interfering with the ability of any other person, regardless of intent, purpose, or knowledge, to use or enjoy the Services (except for tools with safety and security functions); or

10 restricting, inhibiting, interfering with, or otherwise disrupting or causing a performance degradation to any Dell (or Dell Service supplier) facilities used to deliver the Services.

Dell may in its sole discretion determine whether your use of the Services is a violation of this AUP.

We may investigate suspected violations of the AUP. We may report suspected violations of the AUP to applicable law-enforcement authorities or third-parties and may cooperate with any investigation of illegal activities associated with your use of the Services, the system or network, or any violation of this AUP.