



## Smlouva o dodání software pro řízení infrastruktury IT4Innovations

### SMLUVNÍ STRANY:

#### Vysoká škola báňská – Technická univerzita Ostrava IT4Innovations národní superpočítačové centrum

se sídlem: 17. listopadu 2172/15, 708 00 Ostrava – Poruba  
jednající: doc. Mgr. Vít Vondrákem, Ph.D., ředitelem IT4Innovations  
IČ: 61989100  
DIČ: CZ61989100  
bankovní spojení: ČSOB, a.s.  
č.ú.: 100954151/0300  
(dále jen „Objednatel“)

a

#### C SYSTEM CZ a.s.

se sídlem: Otakara Ševčíka 840/10, Židenice, 636 00, Brno  
zápis v obchodním rejstříku: vedeném Krajským soudem v Brně, oddíl B, vložka č. 4576  
jednající: [redacted] člen představenstva  
IČ: 27675645  
DIČ: CZ27675645  
bankovní spojení: UnicreditBank  
č.ú.: 1387284101/2700  
(dále jen „Poskytovatel“)

uzavřely níže uvedeného dne, měsíce a roku tuto smlouvu v souladu s ustanovením § 1746 odst. 2 zákona č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů (dále jen „občanský zákoník“)

(dále jen „Smlouva“).

### 1. ÚVODNÍ USTANOVENÍ

- 1.1 Objednatel prohlašuje, že:
  - 1.1.1 je právnickou osobou, veřejnou vysokou školou univerzitního typu založenou podle zákona č. 111/1998 Sb., o vysokých školách a o změně a doplnění dalších zákonů (zákon o vysokých školách), ve znění pozdějších předpisů, a
  - 1.1.2 splňuje veškeré podmínky a požadavky v této Smlouvě stanovené a je oprávněn tuto Smlouvu uzavřít a řádně plnit závazky v ní obsažené.
- 1.2 Poskytovatel prohlašuje, že splňuje veškeré podmínky a požadavky v této Smlouvě stanovené a je oprávněn tuto Smlouvu uzavřít a řádně plnit závazky v ní obsažené.

- 1.3 V návaznosti na výsledek průzkumu trhu provedeného v souladu s interní směrnicí Objednatele č. TUO\_SME\_18\_004 o veřejných zakázkách uzavírá Objednatel s Poskytovatelem tuto Smlouvu, a to za účelem realizace projektu „e-INFRA CZ: Modernizace“, reg. č.: CZ.02.1.01/0.0/0.0/18\_072/0015659, jehož poskytovatelem podpory je Ministerstvo školství, mládeže a tělovýchovy České republiky.

## **2. PŘEDMĚT SMLOUVY**

- 2.1 Poskytovatel se zavazuje Objednateli dodat 16 ks licencí pro Arcserve UDP 8.x Advanced Edition - Socket - Competitive/Prior Version (perpetual license), včetně poskytování podpory pro tento software na dobu jednoho roku ode dne dodání licencí k tomuto software (dále jen „Plnění“). Poskytovatel se zavazuje Plnění Objednateli dodat nejpozději do 5 pracovních dnů ode dne účinnosti Smlouvy.
- 2.2 Plnění bude ze strany Poskytovatele dodáno a zajištěno v rozsahu a kvalitě určené podmínkami výrobce/poskytovatele licence výše uvedeného software, které tvoří Přílohu č. 1 Smlouvy. Dodání Plnění bude mezi smluvními stranami vhodným způsobem potvrzeno (např. výměnou e-mailů mezi oprávněnými osobami).
- 2.3 Objednatel se zavazuje za poskytování Plnění zaplatit Poskytovateli cenu ve výši a za podmínek sjednaných v této Smlouvě.
- 2.4 Smluvní strany se dohodly, že Plnění je oprávněn užívat nejen Objednatel, ale rovněž třetí osoby odlišné od Objednatele užívající výpočetní čas v rámci IT4Innovations národního superpočítačového centra a konsorcia e-INFRA, jehož je Objednatel součástí.

## **3. CENA A PLATEBNÍ PODMÍNKY**

- 3.1 Smluvní strany se dohodly na celkové ceně za provedení Plnění ve výši 260.800,- Kč bez DPH, DPH ve výši 21 % činí částku 54.768,- Kč. Celková cena včetně DPH činí částku 315.568,- Kč.
- 3.2 Celková cena je nepřekročitelná vyjma případů zákonné změny sazby DPH. V celkové ceně jsou zahrnuty veškeré náklady Poskytovatele spojené se splněním jeho závazků z této Smlouvy, tj. zahrnuje veškeré případné daně, cla, poplatky spojené s platebním stykem – bezhotovostním převodem, jiné platby a další související náklady.
- 3.3 Objednatel se zavazuje zaplatit celkovou cenu uvedenou v bodě 3.1 na základě řádného daňového dokladu – faktury vystavené Poskytovatelem. Poskytovatelem vystavená faktura musí obsahovat název projektu („e-INFRA CZ: Modernizace“), jeho reg. č.: (CZ.02.1.01/0.0/0.0/18\_072/0015659), identifikaci této Smlouvy a identifikaci Plnění. Přílohou faktury musí být smluvními stranami potvrzené předání a převzetí Plnění ve smyslu odst. 2.2 Smlouvy. Dále musí faktura splňovat náležitosti daňového a účetního dokladu dle zákona č. 563/1991 Sb., o účetnictví, ve znění pozdějších předpisů, a zákona č. 235/2004 Sb., o dani z přidané hodnoty, ve znění pozdějších předpisů. V případě, že faktura takové náležitosti nebude splňovat, popř. bude chybně vyúčtována cena nebo DPH, bude Objednatelem vrácena do 20 dnů ode dne jejího doručení k opravení bez proplacení. V takovém případě běží u předmětné faktury lhůta splatnosti znovu ode dne doručení opravené či nově vyhotovené faktury Objednateli. Fakturu Poskytovatel doručí Objednateli doporučenou poštou na adresu Objednatele.

- 3.4 Cena je splatná do 30 kalendářních dnů ode dne doručení příslušné faktury Objednateli. Smluvní strany se dohodly na tom, že závazek zaplatit cenu je splněn dnem odepsání příslušné částky z účtu Objednatele ve prospěch účtu Poskytovatele uvedeného na titulní straně této Smlouvy.

#### **4. ZÁRUČNÍ PODMÍNKY, TECHNICKÁ PODPORA, REAKČNÍ DOBY**

- 4.1 Záruční podmínky, technická podpora, reakční doby podpory apod. se řídí podle podmínek, které jsou uvedeny v Příloze č. 1 této Smlouvy.

#### **5. OPRÁVNĚNÉ OSOBY**

- 5.1 Každá ze smluvních stran jmenuje oprávněnou osobu, popř. zástupce oprávněné osoby. Oprávněné osoby budou zastupovat smluvní stranu v obchodních a technických záležitostech souvisejících s plněním této Smlouvy.
- 5.2 Oprávněné osoby nejsou zmocněny k jednání, jež by mělo za přímý následek změnu této Smlouvy nebo jejího předmětu.
- 5.3 Smluvní strany se dohodly na těchto oprávněných osobách:
- a) za Objednatele:  
[REDAKCE]
- b) za Dodavatele:  
[REDAKCE]
- 5.4 Smluvní strany jsou oprávněny změnit oprávněné osoby, jsou však povinny na takovou změnu druhou smluvní stranu písemně upozornit.

#### **6. SANKČNÍ UJEDNÁNÍ**

- 6.1 V případě prodlení Poskytovatele s termínem provedení Plnění dle bodu 2.1 této Smlouvy se Poskytovatel zavazuje uhradit Objednateli smluvní pokutu ve výši 0,1 % z celkové ceny bez DPH, a to za každý i započatý den prodlení.
- 6.2 Pro případ prodlení Objednatele se zaplacením faktury je Poskytovatel oprávněn požadovat zaplacení zákonného úroku z prodlení.
- 6.3 Splatnost vyúčtovaných smluvních pokut a úroků z prodlení je 30 dnů od data doručení písemného vyúčtování příslušné smluvní straně a za den zaplacení bude považován den odepsání částky smluvní pokuty nebo úroku z prodlení z účtu příslušné smluvní strany ve prospěch účtu, který bude uveden ve vyúčtování smluvní pokuty nebo úroku z prodlení.
- 6.4 Smluvní pokuta dle této Smlouvy se nezapočítává na úhradu škody, která vznikla v souvislosti s porušením povinností stanovených touto Smlouvou a tyto nároky lze uplatňovat nezávisle na sobě v plné výši.
- 6.5 Smluvní pokuty je Objednatel oprávněn započíst proti pohledávce Poskytovatele na úhradu celkové ceny.

#### **7. OSTATNÍ**

- 7.1 Poskytovatel se dále za podmínek stanovených touto Smlouvou a v souladu s pokyny Objednatele a při vynaložení veškeré potřebné odborné péče, zavazuje umožnit uveřejnění této Smlouvy na profilu Objednatele, a to v souladu se zákonem č. 134/2016 Sb. o zadávání veřejných zakázek, ve znění pozdějších předpisů, popřípadě v registru smluv, a to v souladu s příslušnými ustanovením zákona č. 340/2015 Sb., o zvláštních podmínkách účinnosti některých smluv, uveřejňování těchto smluv a o registru smluv (zákon o registru smluv), ve znění pozdějších předpisů (dále jen „zákon o registru smluv“).

## 8. PLATNOST A ÚČINNOST SMLOUVY

- 8.1 Tato Smlouva nabývá platnosti dnem jejího podpisu oběma smluvními stranami a účinnosti dnem uveřejnění Smlouvy v registru smluv v souladu s příslušnými ustanovením zákona o registru smluv v případě, že tato Smlouva vyžaduje uveřejnění v registru smluv ve smyslu tohoto zákona. Pokud ne, nabývá Smlouva účinnosti v den podpisu oběma smluvními stranami.
- 8.2 Každá smluvní strana je oprávněna odstoupit od této Smlouvy pouze z důvodů stanovených touto Smlouvou.
- 8.3 Objednatel je oprávněn odstoupit od této Smlouvy v případě
  - 8.3.1 prodlení Poskytovatele s provedením Plnění po dobu delší než 10 dnů oproti termínu plnění stanovenému v této Smlouvě,
  - 8.3.2 pokud je tak uvedeno v podmínkách v Příloze č. 1 této Smlouvy,
  - 8.3.3 pokud Poskytovatel v průběhu trvání Smlouvy ztratil způsobilost řádně plnit závazky vyplývající ze Smlouvy, tzn. pozbyl oprávnění uvedené v bodě 1.2 Smlouvy.
- 8.4 Poskytovatel je oprávněn odstoupit od této Smlouvy v případě prodlení Objednatele se zaplacením ceny dle této Smlouvy po dobu delší než 60 dnů.
- 8.5 Účinky odstoupení od Smlouvy nastávají dnem doručení písemného oznámení o odstoupení druhé smluvní straně, popř. pozdějším dnem uvedeným v písemném oznámení o odstoupení.
- 8.6 Ukončením účinnosti této Smlouvy nejsou dotčena ustanovení Smlouvy, z jejichž povahy vyplývá, že mají trvat i po zániku účinnosti této Smlouvy, např. nároky ze smluvních pokut, pokud vznikly před ukončením této Smlouvy.

## 9. ZÁVĚREČNÁ USTANOVENÍ

- 9.1 Práva a závazky touto Smlouvou neupravené se řídí právním řádem České republiky, zejména občanským zákoníkem, s vyloučením kolizních norem. Smluvní strany se rovněž zavazují dodržovat pravidla Operačního programu Výzkum, vývoj a vzdělávání.
- 9.2 V případě zániku Poskytovatele bez právního nástupce je Objednatel i nadále oprávněn využívat Software dle této Smlouvy.
- 9.3 Změnit nebo doplnit tuto Smlouvu mohou smluvní strany pouze formou písemných dodatků, které budou vzestupně číslovány a podepsány oprávněnými zástupci smluvních stran.
- 9.4 Smluvní strany se dohodly, že v případě rozporu mezi ustanoveními přílohy a ustanoveními této Smlouvy jsou rozhodná ustanovení přílohy této Smlouvy.
- 9.5 Pokud by se kterékoliv ustanovení této Smlouvy ukázalo být neplatným nebo nevynutitelným nebo se jím stalo po uzavření této Smlouvy, pak tato skutečnost nepůsobí neplatnost ani nevynutitelnost ostatních ustanovení této Smlouvy, nevyplývá-li z donucujících ustanovení právních předpisů jinak. Smluvní strany se zavazují takové neplatné či nevynutitelné ustanovení nahradit platným a vynutitelným ustanovením, které je svým obsahem nejbližší účelu neplatného či nevynutitelného ustanovení.
- 9.6 Veškeré spory mezi smluvními stranami vyplývající nebo související s ustanoveními této Smlouvy budou řešeny vždy nejprve smírně vzájemnou dohodou. Nebude-li smírného řešení dosaženo v přiměřené době, bude mít kterákoliv ze smluvních stran právo předložit spornou záležitost k rozhodnutí místně příslušnému soudu. V souladu s § 89a zák. č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, se za místně příslušný soud k projednávání sporů z této Smlouvy prohlašuje obecný soud Objednatele.
- 9.7 Nedílnou součástí této Smlouvy tvoří Příloha č. 1 – podmínky poskytování Plnění.
- 9.8 Smluvní strany prohlašují, že Smlouva včetně přílohy Smlouvy neobsahuje obchodní tajemství ve smyslu § 504 občanského zákoníku a Smlouva včetně

přílohy Smlouvy tak může být v plném rozsahu uveřejněna v registru smluv ve smyslu zákona o registru smluv.

- 9.9 Tato Smlouva se uzavírá jako elektronický originál, po jehož podpisu každá smluvní strana obdrží vyhotovení Smlouvy.
- 9.10 Smluvní strany shodně prohlašují, že jsou si vědomy všech právních důsledků touto Smlouvou vyvolaných, souhlasí se všemi jejími ustanoveními, s nimiž se podrobně seznámily.

Podepsáno dne

Podepsáno dne (datum v elektronickém podpisu)

.....  
Vysoká škola báňská – Technická univerzita  
Ostrava

doc. Mgr. Vít Vondrák, Ph.D.  
ředitel IT4Innovations

.....  
C SYSTEM CZ a.s.

  
člen představenstva

## ARCSERVE (USA) LLC END USER LICENSE AGREEMENT

This End User License Agreement (the "Agreement") is a legal and enforceable contract between You, as the organization or person using the Software Product or purchasing a Hardware Product and Arcserve (USA) LLC or StorageCraft Technology, LLC an Arcserve company (collectively "Arcserve"). If Your purchase includes Cloud Services, You agree to be bound by the Cloud Terms of Service available at <https://www.arcserve.com/cloud-services/> or a successor site published by Arcserve in addition to the terms set forth herein.

Carefully read the following terms and conditions regarding Your use of the Product before installing and using the Product. Throughout this Agreement, you will be referred to as "You" or "Licensee."

You are accepting this Agreement if You indicate Your assent to its terms by clicking the "accept" button; install the Software Product, including through a manual, silent, unattended or push installation; use the Software Product, including by installing, loading, running, executing, displaying, deploying or retaining the Software Product; open or break the seal on a package containing the Software Product; and/or otherwise indicate Your assent to the terms of this Agreement. When You accept this Agreement, You are:

- (i) Agreeing that Your acceptance hereof also constitutes Your acceptance of this Agreement for all Software Products that You install using the Product or use in conjunction with that Software Product;
- (ii) Agreeing that, in the event Your Order Form includes a Hardware Product, Your acceptance hereof also includes your acceptance of Arcserve's Hardware Product Schedule available at <https://www.arcserve.com/hardware-product-schedule> regarding your rights, obligations and acceptance of such Hardware Product;
- (iii) Representing that You are not a minor, and have full legal capacity and have the authority to bind Yourself and Your employer, as applicable, to the terms of this Agreement;
- (iv) Consenting on behalf of Yourself and/or as an authorized representative of Your employer, as applicable, to be bound by this Agreement;
- (v) Agreeing that You have not based Your purchasing decision on the future availability of any new products and/or additional features, components, or versions of the Product, nor on any oral or written comments made by Arcserve regarding future functionality or features and that Arcserve, in its sole discretion, will determine if and when updates, upgrades and additional features of the Products will be released;
- (vi) Agreeing that You have read and understood the terms set forth in Arcserve's Privacy Notice, including but not limited to Arcserve's use of cookies, available at <https://www.arcserve.com/privacy-notice/> and agree to be bound thereby and agree that the use of the Product(s), the Portal (defined below) and Arcserve's website are subject thereto; and
- (vii) Acknowledging that Arcserve may, in its sole discretion, modify the terms and conditions of this Agreement and/or any policies referenced herein at any time by notice to You, including without limitation by posting the revised terms and conditions on its website at <https://www.arcserve.com/EULA>. Such modified terms and conditions become effective on posting. Your continued use of the Product after the effective date of the modifications will be deemed acceptance of the modified terms. For the avoidance of doubt, such modified terms and conditions shall supersede any prior version of this Agreement that may have been imbedded in or packaged with the Product itself.

By selecting the "decline" button, the installation process will cease and You will not be able to install, access

or use the Product.

NOW IT IS AGREED as follows:

## 1. DEFINITIONS.

- A. "Arbitral Dispute" shall have the meaning as set forth in Section 20.K.
- B. "Authorized Use" means the specific usage entitlements and restrictions designated on an Order Form and/or in the applicable Documentation.
- C. "Authorized User" means the employees or agents of Licensee, that Licensee permits or has engaged to operate and use the Product or Documentation on Licensee's sole behalf.
- D. "Cloud Services" means any of the following Arcserve cloud services: Arcserve UDP Cloud Hybrid (including BaaS and DRaaS), Arcserve Email Archiving Cloud (formerly Arcserve UDP Cloud Archiving), Arcserve Cloud Direct (including BaaS and DRaaS; formerly Arcserve UDP Cloud Direct) and/or any other cloud services that may be offered by Arcserve and not listed herein.
- E. "Community Edition" shall have the meaning as set forth in Section 15.E.
- F. "Designated Technician" means the employee, agent, or representative designated by the Licensee as its sole user and who maintains exclusive custody of the Software Product among Licensee's agents, employees, or representatives.
- G. "Documentation" means the current user guide and readmes relating to the Product.
- H. "End User" means a person, organization, or entity that accepts this Agreement. In the case of a subscription based Software Product used by a managed service provider ("MSP") or an organizational End User, the End User is the MSP or the organizational End User.
- I. "Events of Default" shall have the meaning as set forth in Section 18.A.
- J. "Fees" means fees for the Hardware Product, Software Product license(s) and Product Support as set forth on the Order Form.
- K. "Government End User" means an agency or instrumentality of the U.S. Federal Government.
- L. "Hardware Product" means an appliance or other piece of hardware to be provided by Arcserve.
- M. "Intellectual Property Rights" means any and all registered and unregistered rights granted, applied for, or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection, or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.
- N. "IT Edition" means a license to ShadowProtect IT Edition and/or ShadowProtect IT Edition Professional.
- O. "Minimum Customer Terms" shall have the meaning as set forth in Section 4.B.
- P. "Open Source Components" shall have the meaning as set forth in Section 14.
- Q. "Order Form" means an Arcserve ordering document or registration form which has been signed by Licensee and Arcserve or a License Program Certificate which is provided by Arcserve to Licensee, as applicable.
- R. "Portal" means a password-protected area on Arcserve's Internet website that permits End Users of some Products to access certain functionality and information concerning their account with Arcserve.

- S. “Product” means collectively Hardware Product and Software Product.
- T. “Product Support” means maintenance and support provided by Arcserve for its Products in accordance with the guidelines located at <https://support.arcserve.com>, which are hereby incorporated into this Agreement by this reference.
- U. “Sanctions and Export Control Laws” means any law, regulation, statute, prohibition, executive order or similar measure applicable to the Products and/or to either party relating to the adoption, application, implementation and enforcement of economic sanctions, export controls, trade embargoes or any other restrictive measures, including, but not limited to, the Export Administration Act, the Arms Export Control Act, the International Economic Emergency Powers Act, and regulations issued pursuant to these and those administered and enforced by the European Union, the United Kingdom, and the United States, each of which shall be considered applicable to the Products.
- V. “Software Product” means collectively the Arcserve software product that is being installed and the associated Documentation, any Arcserve software product embedded in a Hardware Product and any SDK/API included within the software product.
- W. “Term” means the period of time specified on the Order Form.
- X. “Three-Day ISO” means the three (3) day period that Licensee’s temporary IT Edition ISO image containing the Windows Recovery Environment can be used in the restore operation without connecting to a licensing server.
- Y. “Third Party Software” shall have the meaning as set forth in Section 14.
- Z. “Third Party Terms” shall have the meaning as set forth in Section 14.
- AA. “Trial Period” shall have the meaning as set forth in Section 15.D.
- BB. “U.S Government Contract” means a United States General Services Administration Schedule Contract or other applicable United States Government contract.

## 2. LICENSE.

- A. Arcserve or its applicable affiliate provides Licensee with the number of copy(ies) of the Software Product set forth on the Order Form, for use by Licensee’s Authorized Users in accordance with the Authorized Use. Subject to and conditioned upon Licensee’s payment of all Fees, and Licensee’s strict compliance with all terms set forth in this Agreement, Arcserve licenses the Software Product to Licensee on a personal, revocable, non-exclusive, non-transferable, non-sublicensable, and limited basis, to install and use the Software Product pursuant to the terms of this Agreement and the applicable Order Form.
- B. This license grants Licensee the right, exercisable solely by and through Licensee’s Authorized Users, to:
  - (i) Install and use the Software Product during the Term as set forth on the Order Form and in accordance with all Authorized Use;
  - (ii) Download and install in accordance with the Documentation the authorized number of copy(ies) of the Software Product as set forth on the Order Form accessible only on computers owned or leased and controlled by Licensee. In addition to the foregoing, Licensee may make one copy of the Software Product solely for archival/backup purposes, provided that (1) production use of the Software Product is restricted to the Authorized Use, (2) use of the Software Product for disaster recovery testing shall be



limited to one week in any three month period, and (3) Licensee shall not, and shall not allow any person to, install or use any such copy other than if and for so long as the copy installed in accordance with the preceding sentence is inoperable and, provided, further, that Licensee uninstalls and otherwise deletes such inoperable copy(ies). Such copy of the Software Product made by the Licensee will be the exclusive property of Arcserve; will be subject to the terms and conditions of this Agreement; and must include all trademark, copyright, patent, and other Intellectual Property Rights notices contained in the original;

- (iii) Use and run the Software Product, as properly installed, in accordance with this Agreement, the applicable Order Form and the Documentation and solely for Licensee's internal business purposes;
- (iv) Use the Software Product as provided herein solely to process its own data and the data of its majority-owned subsidiaries as restricted by location, computer equipment, and Authorized Use. If Licensee desires to use the Software Product beyond such restrictions, it shall notify Arcserve, and Licensee will be invoiced for and shall pay the applicable fees for such expanded use. If the Software Product purchased is included on a Hardware Product, then Licensee is restricted from installing any additional instances of the "Recovery Point Server" or "Service Node" functionality as applicable, other than the instance running on the Hardware Product; and
- (v) To the extent permitted herein or in the Order Form, transfer any copy of the Software Product from one computer to another, provided that: (1) the number of computers on which the Software Product is installed at any one time does not exceed the number licensed by Licensee; and (2) Licensee notifies Arcserve in writing of each such transfer, including in such notice the information required under this Agreement for each computer on which the Software Product is installed.

### **3. USE RESTRICTIONS.**

- A. Unless expressly authorized by this Agreement, required by applicable law or with Arcserve's prior written consent, Licensee shall not, and shall require its Authorized Users not to, directly or indirectly, do any of the following:
  - (i) use the Product or Documentation in violation of the terms of this Agreement, including using them beyond the scope of the license granted under Section 2 or in a manner that exceeds the Authorized Use;
  - (ii) infringe Arcserve's Intellectual Property Rights in or related to the Product or the Documentation;
  - (iii) provide access to, allow use of, or otherwise make available the Product, or any features or functionality of the Product, to any third party, including any subcontractor, independent contractor, affiliate, or service provider of Licensee, except for an Authorized User, for any reason, whether or not over a network or on a hosted basis, including in connection with the internet or any web hosting, wide area network (WAN), virtual private network (VPN), virtualization, software as a service, cloud, or other technology or service, or modify the Product, in whole or in part, or permit others to do any of the foregoing with regard to the Product;
  - (iv) modify, translate, adapt, or create derivative works or improvements, whether or not patentable, of the Product or Documentation or any part thereof;

- (v) combine the Software Product or any part thereof with, or incorporate the Software Product or any part thereof in, any other programs;
  - (vi) disclose, de-compile, decode, disassemble nor otherwise reverse engineer the Software Product or otherwise attempt to derive or gain access to the source code or trade secrets of the Software Product or any part thereof;
  - (vii) work around any technical or security limitations of the Software Product;
  - (viii) use the Software Product to provide facilities management or in connection with a service bureau, time sharing arrangement or like activity whereby Licensee, without purchasing a license from Arcserve for such purpose, operates or uses the Software Product for the benefit of a third party who has not purchased a copy of the Software Product;
  - (ix) exchange the Authorized Use respecting the Software Product for any other Arcserve product. The Software Product is licensed as a single product. Its component parts may not be separated for use;
  - (x) remove, delete, alter, or obscure any proprietary markings, trademarks or any copyright, patent, or other intellectual property or proprietary rights notices of Arcserve or its licensors provided on or with the Product or Documentation, including any copy thereof;
  - (xi) except as expressly permitted herein, copy the Software Product or Documentation, in whole or in part;
  - (xii) grant a security interest in, transfer, assign, rent, lease, lend, sell, sublicense, distribute, publish or otherwise dispose of the Product or Documentation;
  - (xiii) use the Product or Documentation in violation of any law, regulation, or rule;
  - (xiv) release the results of any benchmark testing of the Product to any third party;
  - (xv) use the Product or Documentation for purposes of competitive analysis of the Product, the development of a competing software product or service, or any other purpose that is to Arcserve's commercial disadvantage; and
  - (xvi) use Products for which Licensee has not paid and Arcserve has not received the applicable fees.
- B. If the Software Product being licensed and/or the Hardware Product being installed hereunder will be used in providing managed services directly or indirectly to customers, Licensee shall not, and shall require its Authorized Users not to, directly or indirectly scheme with third parties for the aggregation of Authorized Use entitlements of the Product in an attempt to achieve lower pricing.
- C. If the Software Product being licensed and/or the Hardware Product being installed includes StorageCraft's VirtualBoot or OneSystem service, the following use restrictions apply and Licensee shall not, and shall require its Authorized Users not to, directly or indirectly, do any of the following:
- (i) use VirtualBoot in conjunction with image files created by software other than the specific Software Product with which VirtualBoot was provided to Licensee;
  - (ii) copy, frame or mirror any part or content of the OneSystem services, other than copying or framing on an intranet or otherwise for internal business purposes; and
  - (iii) interfere with or disrupt the integrity or performance of the OneSystem services or third-party data contained therein.

- D. The Product may be used only within the boundaries of the country where the Product was purchased (except as otherwise provided on the Order Form) unless Arcserve consents otherwise in writing.
- E. Licensee's right to use the Software Product will terminate and the Software Product may cease to function if the Licensee violates the terms of this Agreement or the applicable Term of the Software Product lapses or expires. A Software Product may require a reliable Internet connection permitting the Software Product to periodically connect with Arcserve systems. The Software Product may lose functionality, cease to function, or deactivate if necessary system requirements are not satisfied. Certain Software Products are licensed only for use and installation on a particular operating system or type of machine.

#### **4. CONDITIONS AND RESTRICTIONS ASSOCIATED WITH CERTAIN PRODUCTS.**

- A. **Perpetual License.** Licensee may not use the functionality of any Software Product licensed to Licensee on a perpetual basis to provide managed or professional services to third parties.
- B. **Subscription Based License.** If Licensee is an MSP or in the business of providing managed or professional services to third parties, Licensee may license the Software Product on a subscription basis in order to install and use the Software Product on computers owned by its customer, provided that such installation and use does not otherwise violate this Agreement. If Licensee licenses the Software Product on a subscription basis through a distributor, reseller, or master MSP (collectively referred to as "Distributor"), Licensee understands and acknowledges that, in the event that such Distributor fails to pay fees associated with use or distribution of the Software Product, or otherwise breaches its agreement with Arcserve (or its subsidiary or corporate affiliate), Licensee's use of the Software Product, access to the Portal, if any, and/or Product Support may be suspended or terminated. Licensee further understands, acknowledges, and consents that Licensee's agreement with such Distributor may be assigned to Arcserve or its designee to permit continued delivery of the Software Product. If Licensee licenses the Software Product on a subscription basis as an MSP or as part of a business engaged in protecting, managing, and/or storing customer data, the following shall apply: (i) Licensee will advise the customer in writing of all terms in this Agreement that may adversely affect the customer if this Agreement is terminated; (ii) Licensee is responsible for delivering any managed and professional services in compliance with this Agreement and ensuring Licensee's customers compliance with the requirements of this Agreement; (iii) Licensee shall enter into a written agreement with its customers, the terms of which shall include the following: (1) Arcserve is the owner of the Software Product; (2) the Software Product is licensed to Licensee, not the customer; (3) the Software Product is licensed "as is", with all faults, and there are no warranties, representations, or conditions, express or implied, written or oral, arising by statute, operation of law, or otherwise relating to the Software Product; and (4) Arcserve is not liable for any damages, whether direct, incidental, indirect, special, punitive, or consequential (subsections (iii)(1) through (iii)(4) collectively, the "Minimum Customer Terms"); and (iv) if Licensee fails to advise customers of the Minimum Customer Terms, Licensee shall indemnify and hold Arcserve and its parent, affiliate and subsidiaries harmless from any and all claims, damages, and liabilities arising from such failure.
- C. **IT Edition License.** An IT Edition license requires Licensee to identify a Designated Technician. Licensee may appoint a successor Designated Technician once per calendar quarter. Arcserve shall have the right to audit Licensee's use of IT Edition to determine compliance with this Agreement. IT Edition must be used directly from the USB flash media, or in unusual circumstances, from the Three-Day ISO, which shall not be downloaded more than once in any ten (10) day period and shall be used only in situations in which the USB flash media version of the Software Product is not capable of running on the target computer or the use of the license server is not a suitable solution. Arcserve, in its sole discretion, may condition, suspend, or terminate Licensee's ability to access or

create the Three-Day ISO. Licensee shall not copy, install, redistribute, or share a license of IT Edition among its agents, employees, representatives, or third parties and shall not automate or script all or any portion of the functionality of IT Edition.

- D. OneSystem Service License. A license to the OneSystem Service is solely a right to remotely access the functionality of the OneSystem off-premises console management services Software. Licensee shall use commercially reasonable security precautions in its use of the OneSystem Service.

## **5. INTELLECTUAL PROPERTY RIGHTS AND OWNERSHIP.**

- A. Licensee acknowledges that the Software Product is provided under license, and not sold or given, to Licensee. Licensee does not acquire any ownership interest in the Software Product or Documentation provided under this Agreement, or any other rights to the Software Product or Documentation other than to use and access the Software Product in accordance with the license granted under this Agreement, subject to all terms, conditions, restrictions and Authorized Use. Arcserve and its licensors and service providers reserve and shall retain their entire right, title, and interest in and to the Documentation, the Software Product, including without limitation all copies, updates, upgrades, releases, revisions, enhancements, modifications, translations, localizations, components, and features and all Intellectual Property Rights arising out of or relating to the Documentation or the Software Product, subject to the license expressly granted to the Licensee in this Agreement. Licensee shall use commercially reasonable efforts to safeguard the Software Product (including all copies thereof) from infringement, misappropriation, theft, misuse, or unauthorized access. Licensee's right to use and access the Software Product and Documentation are limited to those rights expressly identified in this Agreement.
- B. The Software Product, including any source or object code that may be provided to Licensee hereunder, as well as Documentation, appearance, structure and organization, is the proprietary property of Arcserve and/or its licensors, if any, and may be protected by copyright, patent, trademark, trade secret and/or other laws. Title to the Software Product, or any copy, modification, translation, partial copy, compilation, derivative work or merged portion of any applicable SDK (as defined below), shall at all times remain with Arcserve and/or its licensors.
- C. This Agreement, including this Section 5 applies to and governs any update, upgrade, fix, revision or enhancement to the Software Product.
- D. Licensee acknowledges that certain Software Products include features and functionality that back up, replicate, and/or transfer electronic data and that these processes require the copying of such data, which may include digital files, software programs, and other data that may be protected by third-party intellectual property rights, such as copyrights. Licensee understands and agrees that Arcserve has no knowledge concerning the data contained in the backup images Licensee creates, replicates, or transfers through use of Software Products, including no knowledge of the third-party intellectual property rights applicable to that data. Licensee acknowledges and agrees that it is solely its obligation to understand and comply with laws associated with the contents of these backup images. Licensee represents and warrants that its use of Software Products does not violate applicable international, national, state, regional or local laws or regulations governing the backup, copying, or transfer of the data contained in the backup images.

## **6. PORTAL; PASSWORDS**

- A. If Licensee is permitted use of the Portal, it is solely responsible for: (i) all transactions conducted through use of its Portal access credentials, (ii) all changes made to its data or account through use of such credentials, (iii) ensuring that only persons Licensee has authorized to use the credentials

have access to them, and (iv) timely payment of fees and charges due and owing for all Products and Product Support deployed, issued, or provisioned through the Portal using Licensee's credentials. If Licensee becomes aware of unauthorized access to its account or credentials, Licensee will notify Arcserve immediately at security@arcserve.com. If Arcserve determines that a security breach has occurred or is likely to occur, it may suspend Licensee's Portal account and require Licensee to change its passwords and other credentials.

- B. Licensee understands that loss of its password or other credential to any Product, the Portal or other systems will result in the loss of access to Licensee's data and potential inability to use the Product, system, or Portal. Arcserve shall not have any (i) obligation to keep, maintain, or monitor any password Licensee creates; (ii) liability associated with loss of any password; or (iii) obligation to assist in its recovery. BY CREATING A PASSWORD OR ENCRYPTING DATA, LICENSEE ASSUMES ALL RISK ASSOCIATED WITH LOSS OF THAT PASSWORD AND THE ASSOCIATED DATA.

## 7. PRODUCT SUPPORT.

- A. Arcserve offers Product Support for its Products. Arcserve reserves the right to update its Product Support guidelines from time to time and such updates will be effective on the date that they are posted to Arcserve's website.
- B. Product Support will only be provided by Arcserve as follows:
  - (i) For Hardware Products and perpetual or term based Software Products, Arcserve shall provide Product Support for the time period set forth on the Order Form, provided Licensee has purchased and properly paid for Product Support. Once the initial term expires, Licensee is required to renew Product Support as specified in the Order Form in order to continue to receive Product Support from Arcserve.
  - (ii) For subscription based Products, Arcserve shall provide Product Support as part of the subscription license. Once the subscription period expires, Licensee is required to renew the subscription as specified in the Order Form in order to continue to use the Product and receive Product Support from Arcserve.
  - (iii) For subscription based Products billed based on Licensee's consumption, Arcserve shall provide Product Support so long as the Licensee's account with Arcserve and/or the applicable Distributor is in good standing and Licensee is not otherwise in breach of the terms of this Agreement or any other agreement with Arcserve or Distributor.
- C. If Licensee fails to renew and pay the applicable Product Support fee, Arcserve's obligation to provide Product Support shall cease. Licensee may reinstate Product Support thereafter by paying to Arcserve a fee equal to 150% of Arcserve's then prevailing Product Support fee for each year for which the fee has not been paid.
- D. Except as set forth herein or as otherwise agreed upon in writing by Arcserve, Product Support is not provided for plugins, SDKs, APIs, integration tools, Alpha/Beta Licenses, No Charge Editions, Internal Use/Not-For-Sale Licenses, Trial/Evaluation Licenses, Community Edition versions or generally any Product, utility, or tool for which a fee or monetary consideration was not paid to Arcserve.
- E. Licensee acknowledges and agrees that Arcserve may vary, update, and discontinue Products, Software Product versions, Software Product features, Product Support, and support for third party products (including without limitation operating systems and platforms) from time to time for reasons including but not limited to changes in demand or enhancing security and technology.

- F. From time to time, Arcserve may collect and process technical and related information about Licensee's use of the Products and Cloud Services and use such information to support and troubleshoot issues, invoice, analyze trends and improve the Products and Cloud Services

## 8. WARRANTY.

- A. Arcserve warrants that it can enter into this Agreement and that it has the right to grant the Software Product licenses as set forth herein. Arcserve also warrants that the Software Product will operate substantially in accordance with the specifications set forth in the Documentation, under ordinary operating circumstances, for a period of thirty (30) days from Licensee's acquisition of the license for the Software Product. If Licensee notifies Arcserve in writing of a breach of this warranty during the warranty period set forth above, Arcserve's entire liability and Licensee's sole remedy shall be for Arcserve, at Arcserve's sole option (i) to correct, repair or replace the Software Product within a reasonable time, or (ii) if within a reasonable time after receiving Licensee's written notice of breach of the above warranty, Arcserve is unable to cause the Software Product to operate in accordance with Arcserve's written Documentation, then either party may terminate this Agreement on written notice to the other party and Arcserve or the authorized reseller will refund the relevant license Fees Licensee paid for such non-compliant Software Product. Arcserve's obligation to refund shall only occur after the Licensee returns the Software Product to Arcserve or its authorized reseller from whom it obtained the Software Product, with the purchase receipt included. The warranties set forth in this Section do not apply to Community Edition versions, as defined in Section 15.E below, alpha/beta versions of the Software Product, Software Products licensed on a trial or evaluation basis, any other product licenses covered by or referenced in Section 15 below or to SDKs/APIs.
- B. The warranty in subsection (A) above, shall not apply if (i) the Software Product has not been used in accordance with the terms and conditions of this Agreement, the Documentation or applicable laws, (ii) the Software Product has been used for a purpose or application for which it was not intended, (iii) the defect is a result of alteration, abuse or damage, (iv) the issue has been caused by the failure of Licensee to apply updates, upgrades or any other action or instruction recommended by Arcserve, (v) the issue has been caused by the act or omission of, or by any materials supplied by, the Licensee or any third party, or (vi) the issue results from any cause outside of Arcserve's reasonable control.
- C. After the end of the warranty period as set forth in subsection (A) above, if Licensee obtains Product Support from Arcserve for the Software Product and Arcserve is unable to cause the Software Product to operate in accordance with Arcserve's Documentation within a reasonable period of time, Licensee may terminate this Agreement on written notice to Arcserve, and Arcserve or the authorized reseller will refund the pre-paid and unearned Product Support Fees relating to the period of time of such termination until the end of the then current Product Support term. If the defective Software Product was purchased on a subscription basis, such refund will be provided only when Licensee returns the Software Product to Arcserve or its authorized reseller from whom it obtained the Software Product, with the purchase receipt included.
- D. EXCEPT FOR THE EXPRESS WARRANTIES AS SET FORTH ABOVE IN SECTION 8.A, THE SOFTWARE PRODUCT IS PROVIDED AND LICENSED "AS-IS", WITH ALL FAULTS, AND THERE ARE NO WARRANTIES, REPRESENTATIONS, OR CONDITIONS, EXPRESS OR IMPLIED, WRITTEN OR ORAL, ARISING BY STATUTE, OPERATION OF LAW, OR OTHERWISE, REGARDING THE SOFTWARE PRODUCT OR ANY OTHER ARCSERVE SOFTWARE PRODUCT OR SERVICE PROVIDED UNDER OR IN CONNECTION WITH THIS AGREEMENT. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ARCSERVE AND ITS THIRD-PARTY LICENSORS AND SUPPLIERS AND THE CONTRIBUTORS OF CERTAIN INCLUDED SOFTWARE DISCLAIM ALL WARRANTIES

AND CONDITIONS, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, UNINTERRUPTED USE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. ADDITIONALLY, ARCSERVE DOES NOT WARRANT THAT THE SOFTWARE PRODUCT WILL MEET LICENSEE'S REQUIREMENTS OR THAT USE OF THE SOFTWARE PRODUCT WILL BE UNINTERRUPTED OR ERROR FREE.

- E. THE PRODUCTS CONTAIN TECHNOLOGY THAT IS NOT FAULT TOLERANT AND IS NOT DESIGNED, MANUFACTURED, OR INTENDED FOR USE IN ENVIRONMENTS OR APPLICATIONS IN WHICH THE FAILURE OF THE PRODUCT COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL, PROPERTY, OR ENVIRONMENTAL DAMAGE.
- F. NO THIRD PARTY, INCLUDING AGENTS, DISTRIBUTORS, AUTHORIZED ARCSERVE RESELLERS OR MSPs ARE AUTHORIZED TO MODIFY ANY OF THE ABOVE WARRANTIES OR MAKE ANY ADDITIONAL WARRANTIES ON BEHALF OF ARCSERVE.
- G. SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO LICENSEE AND LICENSEE MAY HAVE OTHER LEGAL RIGHTS THAT VARY FROM STATE TO STATE OR BY JURISDICTION. IF ANY IMPLIED WARRANTY IS NOT DISCLAIMED UNDER APPLICABLE LAW, THEN SUCH IMPLIED WARRANTY IS LIMITED TO THIRTY (30) DAYS FROM LICENSEE'S ACQUISITION OF THE LICENSE FOR THE SOFTWARE PRODUCT, SUBJECT TO THE EXCLUSIVE REMEDY PROVISION SET FORTH IN THIS AGREEMENT.

## **9. ARCSERVE INDEMNITY.**

- A. Arcserve will indemnify, hold Licensee harmless, and defend or, at its option, settle any third-party claim that Licensee's use of the Software Product as authorized hereby infringes any patent, copyright or other intellectual property right of any third party. Arcserve's indemnity obligation set forth in this Section is contingent upon Licensee (i) promptly notifying Arcserve in writing, not later than ten (10) days after Licensee receives notice of the claim (or sooner if required by applicable law); (ii) providing Arcserve with sole control of the defense and any settlement negotiations; (iii) providing information, authority, and assistance to Arcserve to defend against or settle the claim; (iv) promptly ceasing use or possession the Software Product that is subject to the claim; and (v) without Arcserve's prior written consent, not acknowledging the validity of the claim or taking any action that might impair the ability of Arcserve to contest the claim.
- B. If Arcserve believes or it is determined that any of the materials comprising the Software Product may have violated a third party's intellectual property rights, Arcserve may choose to either modify the material to be non-infringing (while substantially maintaining its functionality) or obtain from the third party a license to permit Licensee's continued use. If neither of the foregoing is possible, upon reasonable terms, cost and expense, Arcserve may terminate this Agreement on written notice to the Licensee and Arcserve or the authorized reseller will: (i) for a perpetual license, refund the Fees Licensee paid for the infringing Software Product, depreciated on a straight line five (5) years basis, commencing on the date of purchase, only when Licensee returns the Software Product to Arcserve or its authorized reseller from whom it obtained the Software Product, with the purchase receipt included or (ii) for a subscription license, refund any pre-paid and unused Fees Licensee paid Arcserve for the infringing Software Product.

- C. Arcserve will have no liability or responsibility to indemnify, defend or hold Licensee harmless if Licensee (i) alters or modifies the Software Product or materials comprising the Software Product, (ii) uses the Software Product outside of the scope of use set forth in this Agreement, the Order Form, and any related Documentation, including in a manner other than that for which it was furnished by Arcserve or its authorized reseller, (iii) uses a version of the Software Product which has been superseded, if the infringement could have been avoided by using the current version of the Software Product, or (iv) uses the Software Product with other software, hardware or other materials not supplied or approved in writing by Arcserve. Lastly, Arcserve will not indemnify Licensee if the claim is based on use or possession in a country that is not a party to the World Intellectual Property Organization treaties on patents, trademarks, and copyrights.
- D. The infringement indemnity set forth in this Section does not apply to Community Edition versions, as defined in section 15.E below, alpha/beta versions of the Software Product, Software Products licensed on a trial or evaluation basis, any other product licenses covered by or referenced in Section 15 below or to SDKs/APIs. Further, this Section provides Licensee's sole and exclusive remedy for any infringement claims and damages.

**10. LICENSEE INDEMNITY.** Licensee shall, to the fullest extent permitted by law and at Licensee's own cost and expense, defend, indemnify and hold harmless Arcserve including its parent, subsidiaries, affiliates or associated companies, and its and their directors, officers, employees and agents from and against any and all actions, suits, judgments, claims, proceedings, orders, losses, liabilities, damages, penalties, fines, costs, expenses (including attorneys' fees and court costs) and any incidental or consequential damage, loss, cost or expense flowing from any of the foregoing, that in any way is connected to, arises out of, or relates directly or indirectly to (i) Licensee's unauthorized use or misuse of the Product, Product Support or Portal provided by Arcserve, (ii) Licensee's use of the Product, Portal or any data that it stores, backs up, replicates, manages, manipulates or transfers through the use of the Products or Portal in violation of any applicable law or third-party intellectual property rights, (iii) Licensee uses the Software Product in violation of Third Party Terms (defined below), or (iv) Licensee's breach of any Sanctions and Export Control Laws (defined below).

## **11. LIMITATION OF LIABILITY.**

- A. IN NO EVENT WILL ARCSERVE OR ANY OF ITS THIRD PARTY LICENSORS AND SUPPLIERS OR THE CONTRIBUTORS OF INCLUDED SOFTWARE BE LIABLE TO LICENSEE OR ANY OTHER PARTY FOR ANY (I) USE, DELAY, OR INABILITY TO USE THE SOFTWARE, (II) LOST REVENUES OR PROFITS, (III) DELAYS, INTERRUPTION, OR LOSS OF SERVICES, BUSINESS, OR GOODWILL, (IV) LOSS, DISCLOSURE OR CORRUPTION OF DATA OR LOSS RESULTING FROM SYSTEM OR SYSTEM SERVICE FAILURE, MALFUNCTION, OR SHUTDOWN, (V) FAILURE TO ACCURATELY TRANSFER, READ, OR TRANSMIT INFORMATION OR FAILURE TO UPDATE OR PROVIDE CORRECT INFORMATION, (VI) SYSTEM INCOMPATIBILITY OR PROVISION OF INCORRECT COMPATIBILITY INFORMATION OR BREACHES IN SYSTEM SECURITY, (VII) ANY LOSS OR DAMAGE RELATED TO ANY THIRD PARTY SOFTWARE, OR (VIII) FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES, WHICH MAY ARISE FROM THE USE, OPERATION OR MODIFICATION OF THE PRODUCT AND WHETHER ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER CAUSE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT ARCSERVE WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.



- B. IN ADDITION TO THE FOREGOING, IF ARCSERVE IS LIABLE TO LICENSEE HEREUNDER OR OTHERWISE IN CONNECTION WITH THE PRODUCT, THEN IN SUCH EVENT ARCSERVE SHALL ONLY BE LIABLE FOR DIRECT DAMAGES AND SUCH LIABILITY SHALL BE LIMITED, IN THE AGGREGATE, TO THE AMOUNT OF THE LICENSE FEE ACTUALLY PAID FOR THE PRODUCT BY LICENSEE OR IN THE CASE OF PRODUCT LICENSED ON A SUBSCRIPTION BASIS, THE AMOUNT PAID BY LICENSEE TO ARCSERVE FOR SUCH USE IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING WRITTEN NOTICE OF THE FIRST CLAIM.
- C. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY. CONSUMERS IN CERTAIN COUNTRIES MAY BE SUBJECT TO CERTAIN CONSUMER PROTECTION LAWS UNIQUE TO THEIR LOCALE AND WHICH MAY LIMIT THE ABILITY TO MODIFY OR EXCLUDE LIABILITY. IF LICENSEE ACQUIRED THE PRODUCT FOR BUSINESS PURPOSES, LICENSEE CONFIRMS THAT ANY APPLICABLE CONSUMER PROTECTION LAWS DO NOT APPLY TO LICENSEE OR LICENSEE'S USE OF THE PRODUCT. IF ARCSERVE BREACHES A CONDITION OR WARRANTY IMPLIED BY APPLICABLE LAW AND WHICH CANNOT LAWFULLY BE MODIFIED OR EXCLUDED BY THIS AGREEMENT THEN, TO THE MAXIMUM EXTENT PERMITTED BY LAW, ARCSERVE'S LIABILITY TO LICENSEE IS LIMITED, AT ARCSERVE'S OPTION, TO: (I) REPLACEMENT OR REPAIR OF THE SOFTWARE PRODUCT AND/OR RE-SUPPLY OF PRODUCT SUPPORT; OR (II) REFUND THE FEES PAID BY LICENSEE IN ACCORDANCE WITH THE FOLLOWING: (1) FOR A PERPETUAL LICENSE, REFUND THE FEES LICENSEE PAID FOR THE PRODUCT, DEPRECIATED ON A STRAIGHT LINE FIVE (5) YEARS BASIS, COMMENCING ON THE DATE OF PURCHASE, ONLY WHEN LICENSEE RETURNS THE PRODUCT TO ARCSERVE OR ITS AUTHORIZED RESELLER FROM WHOM IT OBTAINED THE PRODUCT, WITH THE PURCHASE RECEIPT INCLUDED OR (2) FOR A SUBSCRIPTION LICENSE, REFUND ANY PRE-PAID AND UNUSED FEES LICENSEE PAID ARCSERVE FOR THE PRODUCT.

## **12. COMPLIANCE WITH APPLICABLE LAWS; EXPORT CONTROL; ANTI-BRIBERY.**

- A. Licensee warrants that its use and possession of the Product is and will continue to be in accordance with all international, national, state, regional, and local laws and regulations.
- B. Licensee agrees that Arcserve, its employees, and its agents are subject to U.S. export control laws that prohibit or restrict: (i) transactions with certain parties and (ii) the type and level of technologies and services that may be exported from the U.S. Licensee shall comply fully with all Sanctions and Export Control Laws to assure that neither the Product, nor any direct products thereof are: (1) exported, directly or indirectly, in violation of the Sanctions and Export Control Laws or (2) used for any purpose prohibited by Sanctions and Export Control Laws, including without limitation, nuclear, chemical, or biological weapons proliferation. Licensee shall comply with all relevant import and export regulations, including those adopted by the Office of Export Administration of the US Department of Commerce and those applicable to Arcserve and/or Licensee.
- C. Each party warrants that in entering into this Agreement, neither party nor any of its officers, employees, agents, representatives, contractors, intermediaries, or any other person or entity acting on its behalf has taken or will take any action, directly or indirectly, that contravenes (i) the United Kingdom Bribery Act 2010, or (ii) the United States Foreign Corrupt Practices Act 1977, or (iii) any other applicable anti-bribery laws or regulations in any part of the world.
- D. Licensee acknowledges and agrees that neither the Product nor any of its underlying information or

technology may be downloaded or otherwise exported or re-exported: (i) into (or to a national or resident of) Cuba, North Korea, Iran, Sudan, Syria, the Crimea region of Ukraine, or any other country subject to U.S. sanctions applicable to the export or re-export of goods; or (ii) to anyone ordinarily resident in, located in, or organized under the laws of any country or region subject to economic or financial sanctions or trade embargoes imposed, administered, or enforced by the European Union, the United Kingdom, or the United States; (iii) an individual or entity on the Consolidated List of Persons, Groups, and Entities Subject to European Union Financial Sanctions; the U.S. Department of the Treasury's List of Specially Designated Nationals and Blocked Persons or Foreign Sanctions Evaders List; the U.S. Department of Commerce's Denied Persons List or Entity List; or any other sanctions or restricted persons lists maintained by the European Union, the United Kingdom, or the United States; or (iv) otherwise the target or subject of any Sanctions and Export Control Laws. Licensee further certifies that it will not, directly or indirectly, export, re-export, transfer, or otherwise make available the Products, or any data, information, software programs and/or materials resulting from the Products (or direct product thereof) to any country, region, or person described in this Section or in violation of, or for purposes prohibited by, Sanctions and Export Control Laws, including for proliferation-related end uses. By downloading or using the Product, Licensee agrees to the foregoing and represents and warrants that neither Licensee nor any party that owns or controls or is owed or controlled by Licensee is located in, under the control of, or a national or resident of any such country or on any such list, and Licensee acknowledges that it is responsible to obtain any necessary U.S. Government authorization to ensure compliance with Sanctions and Export Control Laws.

### 13. GOVERNMENT USE.

- A. This Section 13 applies if Licensee is a Government End User, or a prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement, or other activity with the U.S. Federal Government. In such case, the terms and conditions of this Section shall pertain to the Government End User's use and disclosure of the Product and Documentation and shall supersede any conflicting terms or conditions.
- B. If Licensee is a Government End User purchasing a Product pursuant to a U.S. Government Contract, Licensee accepts the terms of this Agreement by placing an order for the Product under the applicable U.S. Government Contract, effective as of the date of such order.
- C. Notwithstanding any language in this Agreement to the contrary, disputes with the U.S. Federal Government shall be subject to resolution pursuant to the Contract Disputes Act of 1978, as amended. This Agreement does not limit or disclaim any of the warranties specified in a valid Government Contract under Federal Acquisition Regulation 52.212-4(o). In the event of a breach of warranty, the U.S. Federal Government reserves all rights and remedies under the: (i) Government Contract under which it placed an order for the Software, (ii) Federal Acquisition Regulations, and (iii) Contract Disputes Act, 41 USC 7101-7109.
- D. The Product and any accompanying Documentation have been developed entirely at private expense and are commercial in nature. The Software Products and Documentation are "Commercial Items", as that term is defined in 48 C.F.R. § 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as such terms are defined in 48 C.F.R. § 252.227-7014(a)(1), (4)-(5), and used in 48 C.F.R. § 12.212 and 48 C.F.R. § 227.7202, as applicable. Government End Users acknowledge that the Software Product and Documentation are licensed only as Commercial Items with only those rights that are granted to all other end users of the Software Product, according to the terms and conditions contained in this Agreement.
- E. Sections 20.I (Governing Law), and 20.K (Dispute Resolution) of this Agreement shall not apply to Government End Users but shall continue to apply to prime contractors and subcontractors of the

U.S. Federal Government. All other provisions of this Agreement remain in effect as written.

**14. THIRD PARTY SOFTWARE.** Licensee acknowledges that the Software Product may be distributed alongside certain third-party software ("Third Party Software") or open source software licenses of third parties ("Open Source Components"), which both are provided under separate license terms (the "Third Party Terms"). Information regarding Third Party Software and Open Source Components provided to Licensee by Arcserve is set forth in more detail at <https://www.arcserve.com/third-party-terms>. Licensee further acknowledges that the provisions of the Third Party Terms will apply to such Third Party Software and Open Source Components in lieu of the terms of this Agreement. No provision of the Third Party Terms gives Licensee any right, title or interest in the Software Product. To the extent the provisions of the Third Party Terms applicable to an Open Source Component prohibit any of the restrictions in this Agreement with respect to such Open Source Component, such restrictions will not apply to the Open Source Component affected by such prohibition. To the extent the provisions of the Third Party Terms applicable to the Open Source Components require Arcserve to make an offer to provide source code or related information in connection with Open Source Components, such offer is hereby made. Any request for source code or related information should be directed only to [opensource@arcserve.com](mailto:opensource@arcserve.com). Licensee acknowledges receipt of notices for the Open Source Components for the initial delivery of the Software Product.

**15. ALPHA/BETA VERSIONS; NO CHARGE EDITION; INTERNAL USE/NOT-FOR-RESALE; TRIAL/EVALUATION VERSIONS; UDP COMMUNITY EDITION.**

- A. Alpha/Beta License. If the Software Product is an alpha or beta version of the program, hereinafter referred to as the "beta program" or "beta version" and not generally available to date, Arcserve does not guarantee that the generally available release will be identical to the beta program or that the generally available release will not require reinstallation. Licensee agrees that if required by Arcserve, Licensee shall provide Arcserve with specific information concerning Licensee's experiences with the operation of the Software Product. Licensee agrees and acknowledges that the beta version of the Software Product (i) is to be used only for testing purposes and not to perform any production activities unless Arcserve shall have otherwise approved in writing and (ii) has not been tested or debugged and is experimental and that the documentation may be in draft form and will, in many cases, be incomplete. Licensee agrees that Arcserve makes no representations regarding the completeness, accuracy or Licensee's use or operation of the beta version of the Software Product. If Licensee is also a Tester of the beta version of the Software Product (as "Tester" is defined by the Beta Testing Agreement that was agreed to by Licensee during the registration process before obtaining the beta version of the Software Product), Licensee agrees that the terms of this Agreement are in addition to, and do not supersede, the terms of the Beta Testing Agreement.
- B. No Charge Edition. If the Software Product is a No Charge Edition, then this edition runs in a limited capability mode, with limited Product Support for some languages that the Software Product presently supports. It is possible to upgrade to a paid version of the Software Product to enable functions that are disabled in the No Charge Edition. Support options and languages supported for the No Charge Edition are subject to change without notice.
- C. Internal Use/Not-For-Resale ("NFR") License. If the Software Product is an Internal Use/NFR License, the Software Product may be used solely for internal use, may not be sold, resold, transferred or leased, and is subject to suspension, deactivation, and/or termination at Arcserve's sole discretion.
- D. Trial/Evaluation License. If the Software Product is being licensed on a trial or evaluation basis, Licensee agrees to use the Software Product solely for evaluation purposes such as testing and/or assessing the Software Product's features, functionality, and interoperability, in accordance with

the usage restrictions set forth in Section 3, for a thirty (30) day evaluation period unless a different period is otherwise noted (the "Trial Period"). At the end of the Trial Period, Licensee's right to use the Software Product automatically expires and Licensee agrees to de-install the Software Product and return to Arcserve all copies or partial copies of the Software Product or certify to Arcserve in writing that all copies or partial copies of the Software Product have been deleted from Licensee's computer libraries and/or storage devices and destroyed. If Licensee desires to continue its use of the Software Product beyond the Trial Period, Licensee may contact Arcserve to acquire a license to the Software Product for the applicable fee.

- E. Community Edition. If the Software Product is being licensed as a Community Edition as defined below, in addition to the usage restrictions set forth in Section 3, above, the following shall apply: (i) Licensee shall only have up to 1 TB of protected source data. Licensee's ability to backup data will stop once 1 TB of protected source data is reached and Licensee will be required to license a paid for version of UDP for the total storage capacity needed; (ii) Licensee may only download one copy of the Community Edition per customer; (iii) Licensee may not combine the Community Edition with a paid for version of UDP (i.e. combine 1 TB community edition with 9 TB of paid for license to have 10 TB of storage). For purposes herein, "Community Edition" shall mean a fully functional, premium edition of UDP minus Arcserve Backup, license of the Software Product at no cost to Licensee. Arcserve shall provide Licensee with access to its UDP Community Forum but has no further obligation to provide Licensee Product Support or assistance. Licensee agrees that Arcserve makes no representations regarding the completeness, accuracy or Licensee's use or operation of the UDP Community Edition.
- F. With respect to the Software Products and licenses set forth in subsections A through E of this Section 15, such Software Products and licenses shall be PROVIDED ON AN "AS IS" BASIS, WITHOUT WARRANTIES OR REPRESENTATIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, UNINTERRUPTED USE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE AS WELL AS ANY EXPRESS WARRANTIES PROVIDED ELSEWHERE IN THIS AGREEMENT. ADDITIONALLY, ARCSERVE DOES NOT WARRANT THAT THE SOFTWARE PRODUCTS OR LICENSES WILL MEET LICENSEE'S REQUIREMENTS OR THAT USE THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

## **16. SOFTWARE DEVELOPMENT KIT; APIs.**

- A. If the Software Product includes a Software Development Kit ("SDK") or one or more application programming interfaces, scripts, and/or associated tools ("APIs"), the terms and conditions of this paragraph apply. The SDK may include software, APIs and associated documentation. The SDK and APIs are provided solely for Licensee's internal use (except in the case of an MSP delivering managed services to third parties, who may use the API to benefit their customer) to develop software that enables the integration of third-party software or hardware with the Software Product, or to develop software that functions with the Software Product, such as an agent. Licensee's use of the SDK and APIs are restricted solely to enhance Licensee's (or its customer's) internal use of the Software Product. Furthermore, Licensee agrees that the SDK and APIs shall be used solely in conjunction with the particular Software Product licensed to Licensee; only used with the user interface delivered with the Software Product or with an approved third-party user interface, service, agent, or module; not be used in conjunction with or to develop products or services competitive to the particular Software Product licensed; and shall not be used in a manner that suggests ownership by Licensee or anyone other than Arcserve. No distribution rights of any kind are granted to Licensee regarding the Software Product or SDK/APIs. In addition to the limitations on use set forth in Section 3(A), above, Licensee may not reproduce, disclose, market, or distribute the SDK/APIs

or the documentation or any applications containing any executable versions of the SDK/APIs to third parties, on the internet, or use such executables in excess of the Authorized Use. If there is a conflict between the terms of this section and the terms of any other section in this Agreement, the terms of this section will prevail solely with respect to the use of the SDK/APIs.

- B. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, SDKs AND APIs ARE PROVIDED ON AN "AS IS" BASIS WITHOUT ANY WARRANTIES OR REPRESENTATIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, UNINTERRUPTED USE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE AS WELL AS ANY EXPRESS WARRANTIES PROVIDED ELSEWHERE IN THIS AGREEMENT. ADDITIONALLY, ARCSERVE DOES NOT WARRANT THAT THE PRODUCTS OR LICENSES WILL MEET LICENSEE'S REQUIREMENTS OR THAT USE THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

## 17. FEES.

- A. Payment of the Fees specified on the Order Form or as agreed between Licensee and an authorized reseller of Arcserve, shall entitle Licensee to use the Product for the Term, which use may include the right to receive Product Support therefore for the period set forth on the Order Form. All Fees payable hereunder shall be payable in advance unless otherwise set forth in Your executed agreement with Arcserve. Licensee will install each new release of the Software Product delivered to Licensee. After the Term, continued usage and/or Product Support as provided herein shall be subject to the payment by Licensee of the Fees. Notwithstanding the foregoing, if the Software Product was licensed under this Agreement without an Order Form, Licensee shall be entitled to use the Software Product for an indefinite period, but the license does not include the right to receive Product Support; provided however, with respect to any Software Product that relies on continuous content updates, such as signature files and security updates, Licensee shall be entitled to such content updates for a period of one (1) year from the effective date of the license.
- B. All Fees are net of applicable taxes. Licensee agrees to pay any tariffs, duties or taxes imposed or levied by any government or governmental agency including, without limitation, federal, state and local, sales, use, value added and personal property taxes, (other than franchise and income taxes for which Arcserve is responsible) upon a presentation of invoices by Arcserve. Any claimed exemption from such tariffs, duties or taxes must be supported by proper documentary evidence delivered to Arcserve.
- C. Any invoice which is unpaid by Licensee when due shall be subject to an interest charge equal to the lower of 1.5% per month or the highest applicable legal rate.

## 18. TERMINATION AND SUSPENSION.

- A. Arcserve shall have the right to terminate this Agreement immediately and, in addition to all other rights of Arcserve, demand all amounts due or that will become due hereunder immediately payable to Arcserve if: (i) Licensee fails to pay the Fees to Arcserve in accordance with the agreed payment terms, (ii) if Licensee breaches any term of this Agreement or any other agreement Licensee has entered into with Arcserve or (iii) if Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee ("Events of Default").

- B. If this Agreement or Licensee's license terminates for any reason, Licensee shall cease all use of the Software Product and Documentation and shall within one (1) month after the date of termination, certify to Arcserve in writing that all copies and partial copies of the Software Product have been deleted from all computers and storage devices and are returned to Arcserve or destroyed and are no longer in use. Notwithstanding the foregoing, Licensee's continued use of the Software Products will at all times be subject to and governed by this Agreement. This Section 18.B shall survive termination or expiration of the Agreement indefinitely.
- C. Licensee's right to use and access the Software Products that are licensed on a subscription basis will automatically terminate on expiry of the applicable Term unless and until Licensee renews Licensee's subscription license for the Software Products.
- D. Except as expressly set forth herein, all Fees paid or payable are non-cancellable and non-refundable to the maximum extent permitted by law.
- E. Arcserve shall have the right to withhold its own performance hereunder including suspending or withholding Licensee's access to certain functionality of the Product, Product Support or any access to the Portal until the breach is cured if: (i) Licensee fails to pay the Fees to Arcserve in accordance with the agreed payment terms, (ii) Arcserve reasonably believes Licensee has used the Product in violation of Sections 2 – 5; (iii) Licensee breaches any term of this Agreement or any other agreement Licensee has entered into with Arcserve or (iv) Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee. Arcserve's decision to suspend functionality or access is without prejudice to its right to terminate the Agreement for the same cause(s) underlying the suspension.
- F. The provisions of Sections 2-5, 10-12, 18, 19, 20, 21 and other provisions that by their nature survive termination, shall survive any termination or expiration of this Agreement.

**19. CONFIDENTIALITY.** By virtue of the Agreement, Licensee will have access to information that is confidential to Arcserve ("Confidential Information"). Confidential Information includes non-public information that is designated "confidential" or that a reasonable person should understand is confidential. Licensee will protect Arcserve's Confidential Information from unauthorized dissemination and use with the same degree of care that it uses to protect its own Confidential Information, but in no event less than a reasonable amount of care. Licensee shall only use Arcserve's Confidential Information in performance of this Agreement. Furthermore, Licensee agrees not to disclose Arcserve's Confidential Information to any third party other than those set forth in the following sentence. Licensee may disclose Arcserve Confidential Information only to those employees or agents or subcontractors who are required to protect it against unauthorized disclosure in a manner no less protective than under this Agreement and who have a genuine need to know. Nothing shall prevent Licensee from disclosing Confidential Information to a governmental entity as required by law, provided however that Licensee shall provide Arcserve with notice (unless otherwise directed by law enforcement authorities) with the intent that Arcserve has an opportunity to seek a protective order, and where no protective order is granted, Licensee shall disclose only the Confidential Information as necessary to comply with the law, rule, regulation, summons, subpoena or order, and will advise the party seeking such Confidential Information of the confidential nature of such information.

## **20. GENERAL.**

- A. Shipping. All Software Products are provided FOB shipping point or electronic delivery. Acceptance is deemed to have occurred at the earliest of point of physical shipment or delivery of keys/access codes for electronic delivery.

- B. Feedback. Any suggestions, feedback or proposed modifications to the Product (in any form) provided by Licensee to Arcserve may be freely used by Arcserve without limitation, and any modifications to the Product resulting from such suggestions, feedback or proposed modifications shall be exclusively owned by Arcserve.
- C. Monitoring. The Software Product contains technological copy protection or other security features designed to prevent unauthorized use of the Software Product, including features to protect against any use of the Software Product that is prohibited under Sections 2-5. Licensee shall not, and shall not attempt to, remove, disable, circumvent, or otherwise create or implement any workaround to, any such copy protection or security features.
- D. Audit. Licensee agrees to perform a self-audit upon ten (10) working days' prior written notice from Arcserve, calculating the number of Authorized Users, computers, servers or other applicable units benefiting from the Software Products. If Licensee's self-audit reveals that Licensee's actual usage exceeds the Authorized Use, Licensee shall procure the additional licenses required from Arcserve or its preferred reseller. If Licensee does not perform a self-audit upon request from Arcserve, or if Arcserve has reason to doubt the results of such self-audit, upon prior written notice to Licensee, Licensee shall permit Arcserve or an independent certified accountant appointed by Arcserve to access Licensee's premises and inspect Licensee's books of account and records at any time during normal business hours for the purpose of inspecting, auditing, verifying or monitoring the manner and performance of Licensee's obligations under this Agreement, including without limitation the payment of all applicable Fees. Any such audit shall minimize the disruption to Licensee's business operations. Arcserve shall not be able to exercise this right more than once in each calendar year. If an audit reveals that Licensee has underpaid Fees to Arcserve, Licensee shall be invoiced for and shall pay to Arcserve or the applicable reseller within thirty (30) days of the date of invoice an amount equal to the shortfall between the Fees due and those paid by Licensee. If the amount of the underpayment exceeds five percent (5%) of the Fees due or the audit reveals a violation of any Authorized Use pursuant to this Agreement then, without prejudice to Arcserve's other rights and remedies, Licensee shall also pay Arcserve's reasonable costs of conducting the audit.
- E. Notice. All notices given or served under this Agreement shall be in writing and: (i) personally delivered to the party to be notified, in which instance notice shall be deemed to have been given and received upon actual delivery; (ii) sent by a reputable international overnight commercial courier service (such as FedEx) addressed to the party to be notified, in which instance notice shall be deemed to have been given one (1) business day after deposit with such courier service for delivery; (iii) sent by email, in which instance notice shall be deemed to have been given and received upon actual delivery; or (iv) delivered to the party to be notified by any other means where it can be established that the party to be notified received such notice, in which instance notice shall be deemed to have been given and received upon the date of receipt. Arcserve's notice address is: Arcserve (USA) LLC, Attn: Chief Financial Officer, 8855 Columbine Road, Suite 150, Eden Prairie, Minnesota 55347. Licensee's notice address is the address and/or email address Licensee or its authorized distributor or reseller provided to Arcserve. Either party may change its contact information for notice purposes by giving ten (10) days' prior written notice to the other party in any manner described above.
- F. Remedies. Arcserve's remedies set forth in this Agreement are cumulative and are in addition to, and not in lieu of, all other remedies Arcserve may have at law or in equity, whether under this Agreement or otherwise.
- G. Assignment. Licensee may not assign this Agreement nor transfer the Software Products to any third party without the prior written consent of Arcserve. If such consent is obtained from Arcserve, Licensee must ensure that (i) the entire Software Product is transferred to a single recipient and is not sub-divided, (ii) the Software Product is deleted by the Licensee at the time of transfer, (iii) the Licensee passes full details of the recipient to Arcserve, and (iv) the recipient agrees to be bound

by the terms and conditions of this Agreement. Any attempt by Licensee to transfer the rights or obligations under this Agreement in violation of this Section will be null and void and will constitute a material breach of this Agreement. Arcserve may assign this Agreement to any third party that succeeds to Arcserve's interests in the Software Product and assumes the obligations of Arcserve hereunder and Arcserve may assign its right to payment hereunder or grant a security interest in this Agreement or such payment right to any third party.

- H. Severability. If a court holds that any provision of this Agreement to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.
- I. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota, without regard to its choice of law provisions. Notwithstanding the foregoing, the laws of the country in which Licensee acquires a license for the Product shall govern this Agreement, except as otherwise provided in the Country Specific Terms set forth in section 21 below.
- J. Jurisdiction. The Parties irrevocably submit to the personal jurisdiction of the state or federal courts of Minnesota. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Any action for provisional relief concerning this Agreement or the Parties' relationship hereunder, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure, shall be brought exclusively in Hennepin County, State of Minnesota, U.S.A. The Parties consent and submit to the exclusive jurisdiction of the state or federal courts in Hennepin County, State of Minnesota, U.S.A., for purposes of any action for such provisional remedy or interim or conservatory measure.
- K. Dispute Resolution. At the election of either party to this Agreement, any dispute, controversy, or claim arising out of, relating to, or in connection with the following may be submitted for final resolution by arbitration: the Product's performance, including without limitation any alleged deficiency or defect; the existence or breach of a contractual, statutory, or common-law warranty associated with this Agreement or a Product; the terms and obligations of this Agreement as they pertain to the foregoing; and the performance, termination, rescission, or alleged breach of this Agreement as they pertain to the foregoing (collectively, "Arbitral Dispute"). In the event arbitration is elected, both parties expressly waive any right to a trial by jury for any claim constituting an Arbitral Dispute. Any claim by Arcserve for infringement, violation of copyright, trademark, or Intellectual Property Rights, or breach of this Agreement arising from facts constituting infringement or violation of Intellectual Property Rights is not an Arbitral Dispute, but shall be brought exclusively before a court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A. If the claimant is the party electing arbitration, they must do so in writing before filing a complaint or otherwise bringing an action in court. If the respondent is the party electing arbitration, they must do so in writing on or before the last day to answer and/or respond to a summons and/or complaint brought by the other party. If Licensee is a resident of or is headquartered in the U.S., the arbitration shall be conducted by the American Arbitration Association (the "AAA") in accordance with the AAA Commercial Arbitration Rules ("Rules") in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the parties. If the Licensee is not a U.S. resident or does not maintain a place of business in the U.S., the arbitration shall be conducted by the International Centre for Dispute Resolution (the "ICDR") in accordance with the ICDR International Arbitration Rules in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the Parties. The Commercial Arbitration Rules and International Arbitration Rules are collectively referred to as the "Rules." Copies of the Rules can be obtained, free of charge, at <http://www.adr.org/>. The parties shall be entitled to conduct discovery as follows: twenty (20) interrogatories, twenty (20) requests for production of documents, three (3) subpoenas to third parties, three (3) oral depositions, and one (1) written-question deposition. The parties intend that



any arbitration between them shall involve only the claims between the parties and not any claims by a party against a third party. No other dispute between a party and a third party shall be included in the arbitration. Class arbitration shall not be permitted. The arbitration shall be conducted by a single arbitrator selected in accordance with the Rules except that the arbitrator must be a retired state or federal judge or foreign equivalent who has previous experience in technology disputes. Filing fees, arbitrator fees, and other fees charged by the arbitral body shall be paid initially by the claimant in the proceeding. Arbitration shall be conducted in the English language. The place of arbitration shall be Hennepin County, State of Minnesota, U.S.A. Any award is final and binding on the parties and may be challenged in a court of competent jurisdiction only upon those grounds allowed under the Minnesota Uniform Arbitration Act. In the absence of challenge, judgment on the award may be entered in any court of competent jurisdiction. Without otherwise limiting the authority conferred on the arbitrator by this Agreement and the Rules, the arbitrator shall not have the authority to exercise equitable principles or award equitable remedies. By agreeing to Arbitration, the parties do not intend to deprive any court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A., of its ability to hear disputes that are not Arbitral Disputes or to issue any form of provisional remedy, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure. A request for such provisional remedy or interim or conservatory measure by a party to a court shall not be deemed a waiver of the agreement to arbitrate. In any Arbitral Dispute, the arbitrator may award the successful party all of its costs incurred in the proceeding, including if applicable and without limitation filing, arbitrator, and administrative fees, and other fees imposed by the arbitrator.

- L. Force Majeure. The failure of Arcserve to comply with any provision of this Agreement due to an act of God, hurricane, war, fire, riot, earthquake, terrorism, and act of public enemy, actions of governmental authorities (excepting compliance with applicable codes and regulations) or other force majeure event will not be considered a breach of this Agreement.
- M. Waiver. Failure by either party to enforce any particular term or condition of this License Agreement shall not be construed as a waiver of any of its rights under it. No waiver of any breach of this Agreement shall be a waiver of any other breach and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.
- N. Entire Agreement. This Agreement, the Hardware Product Schedule and all documents and policies referenced herein constitute the entire agreement between the parties relating to the licensing and use of the Products and supersede any other oral or written communications, agreements or representations with respect to the Products.
- O. No Third-Party Beneficiary. No third party is or shall be a beneficiary of this Agreement and no third party shall have the right to enforce this Agreement. This includes, without limitation, a third party from which Licensee purchased the Product, a third party that provides services to Licensee in relation to the Product, or a customer to which Licensee provides services using the Product.
- P. Electronic Transaction; Electronic Communications. The parties agree that this Agreement may be formed, executed, and/or delivered by electronic means, including the use of electronic signatures and/or electronic agents. Arcserve shall be entitled to communicate with Licensee via email or other electronic communications. Licensee consents to these communications and others regarding the Product, new product releases, upgrades, Product Support, and other information that Arcserve believes may be relevant to use of the Products.

**21. COUNTRY SPECIFIC TERMS.** In the event Licensee acquires a Hardware Product, a license for the Software Product and/or Cloud Services outside of the United States, the provisions set forth at <https://www.arcserve.com/country-specific-terms> will apply to the use of the Product and/or Cloud



ARCSERVE (USA) LLC  
END USER LICENSE AGREEMENT COUNTRY SPECIFIC TERMS

**Argentina**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Argentina. Any dispute hereunder shall be determined by the Tribunales de la Ciudad de Buenos Aires.

**Australia**

The following is added to each of the end of Sections 6:

Although Arcserve specifies that there are no warranties, Licensee may have certain rights under the Trade Practices Act 1974 and other state and territory legislation which may not be excluded but may be limited. To the full extent permitted by law Arcserve excludes all terms not expressly set out in the express terms of this Agreement, and limits any terms imposed by the Trade Practices Act 1974 and other state and territory legislation to the full extent permitted by the applicable legislation.

The last sentence of Section 16.H is deleted and replaced with:

The laws of the State or Territory in which the transaction is performed govern this Agreement. The following is added to Section 6:

Where Arcserve is in breach of a condition or warranty implied by the Trade Practices Act 1974 or other state and territory legislation, Arcserve's liability is limited, in the case of goods, to the repair or replacement of the goods, or payment for the repair or replacement of the goods, and in the case of services, the supplying of the services again or payment for the re-supply of the services, as Arcserve may elect. Where that condition or warranty relates to a right to sell, quiet possession or clear title, in respect of goods or if the goods supplied by Arcserve are of a kind ordinarily acquired for personal, domestic or household use or consumption, then none of the limitations in this Section apply.

**Austria**

Section 16.H is deleted and replaced with:

The laws of Austria govern this Agreement. The following is added to Section 16(E): In addition, Arcserve is entitled to bring action against Licensee in a court located in Licensee's place of incorporation, establishment or permanent residence.

The following is added to Section 8:

Any liability for the slight negligence of Arcserve is excluded. The following is added to the Agreement:

In the event the Licensee qualifies as a consumer according to Austrian Consumer Protection Act ("Konsumentenschutzgesetz" -"KSchG") Sections 6, 7, 8 and 11 of this Agreement are not applicable to the extent they reduce Arcserve's liability and the consumer's warranty.

## **Belgium**

Section 16.H is deleted and replaced with:

The courts of Arcserve's registered office shall have exclusive jurisdiction regarding any dispute that may arise between the parties dealing with the formation, execution, interpretation, or termination of this Agreement, including but not limited to measures of conservation, emergency proceedings, warranty proceedings, petition or in case of more than one defendant.

## **Brazil**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Brazil. Any dispute hereunder shall be determined by a court of the São Paulo City Hall.

## **Canada**

Section 16.H is deleted and replaced with:

The laws in the Province of Ontario shall govern this Agreement.

## **Chile**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Chile. Any dispute hereunder shall be determined by the Tribunales Ordinarios de la Ciudad de Santiago.

## **China**

Section 13 is revised to replace where applicable: All fees are inclusive of VAT.

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of the People's Republic of China, without regard to its choice of law provisions. Any dispute hereunder shall be determined by a competent court located in Beijing.

## **Colombia**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Colombia. Any dispute hereunder shall be determined by the Tribunales Ordinarios de la Ciudad de Bogotá.

## **Czech Republic**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of the Czech Republic, without regard to its choice of law provisions. Any dispute hereunder shall be determined by a court of competent jurisdiction within the Czech Republic.

Section 6.A is deleted and replaced with:

Arcserve warrants that it can enter into this Agreement. Arcserve also warrants that the Product will operate substantially in accordance with the specifications set forth in the documentation for a period of ninety (90) days from Licensee's acquisition of the license for the Product and if the Licensee is a consumer (i.e. individual not acting within the scope of his/her business or independent carrying out of a profession) for a period of six (6) months from Licensee's acquisition of the license. If Licensee who is not a consumer notifies Arcserve in writing of a breach of this warranty during the warranty period set forth above, Arcserve's entire liability and Licensee's sole remedy shall be for Arcserve, at Arcserve's sole option (i) to correct, repair or replace the Product within a reasonable time, or (ii) if within a reasonable time after receiving Licensee's written notice of breach of the above warranty, Arcserve is unable to cause the Product to operate in accordance with Arcserve's written specifications, then either party may terminate this Agreement on written notice to the other party and Arcserve or the authorized reseller will refund the relevant license Fees Licensee paid for such non-compliant Product only when Licensee returns the Product to Arcserve or its authorized reseller from whom it obtained the Product, with the purchase receipt within the warranty period noted above. If the Licensee who is a consumer notifies Arcserve in writing of a breach of this warranty during the warranty period set forth above and (a) the breach is correctable the Licensee may claim either correction of the defect or reasonable discount from license Fees the Licensee paid for such non-compliant Product, (b) the breach is not correctable and hinders reasonable use of the Product, the Licensee may claim either reasonable discount from the license Fees the Licensee paid for such non-compliant Product or the Licensee may terminate this Agreement on written notice to Arcserve and Arcserve or the authorized reseller will refund the relevant license Fees the Licensee paid for such non-compliant Product only when Licensee returns the Product to Arcserve or its authorized reseller from whom it obtained the Product, with the purchase receipt. The warranties set forth in this Section do not apply to beta versions of the Product, Products licensed on a trial or evaluation basis or to Software Development Kits.

Section 6.D is deleted and replaced with:

Except as set forth above, to the full extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve.

### **Denmark**

The third paragraph of the Preamble is deleted and replaced with:

By installing, copying or using the product or by selecting the "I accept the terms of the License Agreement" radio button below, and the clicking on the "Next" button, you are:

- (I) Representing that you are not a minor and have full legal capacity and have the authority to bind yourself and your employer, as applicable, to the terms of this Agreement;
- (II) Consenting on behalf of yourself and/or as an authorized representative.

The following is added to the last paragraph of the Preamble:

In the event that you select the "I do NOT accept the terms of the License Agreement" radio button below, and then click on the "Cancel" button, the installation shall cease. You should delete all copies of the

Product from your computer systems and return, by registered first class post, the Product, complete with box and any documentation, to Arcserve or the authorized reseller from whom you purchased the Product with your proof of purchase within thirty (30) days of the date of purchase. You will promptly be issued a full refund of any license fees paid for the Product and, if applicable, maintenance fees paid. If requested at the time of return and provided that receipts of costs incurred are provided, Arcserve or the authorized reseller shall also refund to you any postage costs you incurred in returning the Product.

The second to last sentence of Section 11.A is deleted and replaced with:

Beta products are provided on an "as is" basis, without warranties or representations of any kind, either express or implied including, without limitation, any warranties, conditions or representations of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

The last sentence of Section 11.C is deleted and replaced with:

Licensee's use of the product during the trial period is on an "as is" basis without any warranty, and Arcserve disclaims all warranties including, without limitation, any implied warranties or conditions of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

Section 3.A(v) is deleted and replaced with:

Licensee may not disclose, de-compile, disassemble nor otherwise reverse engineer the Product save to the extent expressly permitted by law;

Section 3.A(viii) is deleted and replaced with:

Licensee may not permit the use of the Product by any third party without the prior written consent of Arcserve, save for contract staff of the Licensee who are acting on the Licensee's business, not engaged in facilities management and who the Licensee agrees as a condition of this Agreement to ensure such contract staff shall comply with all the terms of this Agreement, including without limitation, confidentiality provisions.

Section 6.D is deleted and replaced with:

Except as set forth above, to the full extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve. For the avoidance of doubt, in the event that Licensee qualifies as a consumer under the Danish Sale of Goods Act, Licensee has a mandatory two-year right of complaint in relation to defects.

The following is added at the end of Section 8:

The foregoing exclusions and limitations upon liability shall not apply to any liability for damages arising from:

- a. Tangible property damage to the extent that such is due to the negligence of an employee or authorized agent of Arcserve, in which event Arcserve's maximum liability shall be limited to \$1,000,000 for each event or series of events;
- b. Death or personal injury caused by the negligence of an employee or authorized agent of Arcserve.

## **France**

Section 16.H is deleted and replaced with:

The Commercial Court of Paris shall have exclusive jurisdiction regarding any dispute that may arise between the parties dealing with the formation, execution, interpretation, or termination of this Agreement, including but not limited to measures of conservation, emergency proceedings, warranty proceedings, petition or in case of more than one defendant.

## **Germany**

The first sentence of Section 12.A is deleted and replaced with:

Licensee shall comply with all relevant import and export regulations, including those adopted by the Office of Export Administration of the US Department of Commerce, any competent EU government and German export regulations. Licensee understands and acknowledges that US, EU and German restrictions vary regularly and, depending on Product, Licensee must refer to then current US, EU or German regulations.

The following is added to Section 7.C:

Arcserve shall not be liable for any infringement based upon use of other than an unaltered release of the Product unless altered with Arcserve's prior written consent.

The following is added to Section 8:

In case of (i) willful misconduct, no limitation of liability applies;(ii) personal injury or damage to property, Arcserve's liability to Licensee is limited to the maximum amount that Arcserve will recover under its insurance policies; (iii) gross negligence that results in other damage than personal injury or damage to property, Arcserve's liability to Licensee shall be limited to an amount equal to the license fee for the Product; (iv) negligence that results in damages other than personal injury or damage to property, Arcserve's liability to Licensee shall be limited to an amount equal to fifty percent (50%) of the license fee for the Product. Notwithstanding the foregoing, the aggregated liability according to (iii) and (iv) above shall never exceed an amount equal to the purchase price of the Product. Except in case of willful misconduct or gross negligence, neither party shall be liable to the other for indirect, incidental, special or consequential damage, including but not limited to harm to services supplied by Licensee, or loss of business, loss of profit, or loss of data, arising out of or in connection with the implementation or the use of the Product. No actions, regardless of form, arising out of this Agreement may be brought by either party more than three (3) years after the cause of action has arisen, or, in the cause of non- payment, more than three (3) years from the date of the relevant invoice. Neither party shall be liable for delay in performing or failure to perform any of its obligations under this Agreement if the delay or failure results from events or circumstances outside its reasonable control. Such delay or failure shall not constitute a breach of this Agreement and time for performance shall be extended by time equivalent to the length of the delay caused by force majeure.

## **Greece**

Section 16.H is deleted and replaced with: Any dispute hereunder shall finally be determined by Athens Courts.

## **Hong Kong**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Hong Kong. The courts of Hong Kong will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

The following is added at the end of Section 8:

The aforementioned liability limitation and the aforementioned maximum liability amount will not affect or prejudice the statutory rights of the licensee under the sale of goods ordinance, the supply of services (implied terms) ordinance or the control of exemption sections ordinance, nor will they limit or exclude any liability for death or personal injury solely caused by Arcserve's negligence.

### **India**

Section 16.H is deleted and replaced with:

This Agreement and the terms hereof shall be governed and construed in accordance with the laws of India and the courts of Mumbai shall have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

### **Indonesia**

Section 16.H is deleted and replaced with:

This Agreement and the terms hereof shall be governed and construed in accordance with the laws of Indonesia. The courts of Indonesia, located in Jakarta, will have the sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

Section 6.A is amended by adding the following:

Licensee represents that Licensee (i) has full corporate power and authority; and (ii) is legally capable to execute, deliver and perform this Agreement. Arcserve and Licensee agree to waive any provisions, procedures and operation of any applicable law to the extent that a court order is required for termination of this Agreement.

### **Israel**

Section 16.H is deleted and replaced with:

Any dispute hereunder shall finally be determined by Tel Aviv Courts.

### **Italy**

Section 6.A shall be amended as below:

Arcserve warrants that it can enter into this Agreement. Arcserve also warrants that the Product will operate substantially in accordance with the specifications set forth in the documentation for a period of



1 year from Licensee's acquisition of the license for the Product. If Licensee notifies Arcserve in writing of a breach of this warranty during the warranty period set forth above, Arcserve's entire liability and Licensee's sole remedy shall be for Arcserve, (i) to correct, repair or replace the Product within a reasonable time, or (ii) to reduce the price of the Product proportionally to what incurred or (iii) if within a reasonable time after receiving Licensee's written notice of breach of the above warranty, Arcserve is unable to cause the Product to operate in accordance with Arcserve's written specifications, then either party may terminate this Agreement on written notice to the other party and Arcserve or the authorized reseller will refund the relevant license Fees Licensee paid for such non-compliant Product only when Licensee returns the Product to Arcserve or its authorized reseller from whom it obtained the Product, with the purchase receipt within the warranty period noted above. The warranties set forth in this Section do not apply to beta versions of the Product, Products licensed on a trial or evaluation basis or to Software Development Kits.

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Italy. Any dispute hereunder shall finally be determined exclusively by the Court of Milan.

According to article 1341 of the Italian Civil Code, the Licensee expressly accepts the terms and conditions set in Sections 6 (Warranty), 7 (Indemnity), 8 (Limitation of Liability), 12 (Software Development Kit), 16.H (Court).

#### **Japan**

The second sentence of Section 17.B is deleted and replaced with:

Licensee agrees to pay any tariffs, duties or taxes imposed or levied by any government or governmental agency other than the taxes for which Arcserve is responsible upon a presentation of invoices by Arcserve.

Section 20.I is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of the country of Japan, without regard to its choice of law provisions. Any dispute hereunder shall finally be determined by Tokyo District Court located in Tokyo Japan.

In the event that additional or alternative information is provided on the Arcserve website located at [www.arcserve.com/jp](http://www.arcserve.com/jp), such information shall supersede the terms set forth above and in the End User License Agreement.

#### **Korea**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Republic of Korea, without regard to its choice of law provisions.

#### **Lybia, Egypt, Lebanon, Jordan, Iraq, Kingdom of Saudi Arabia, Kuwait, Qatar, United Arab Emirates, Oman, Yemen and Pakistan**

Section 16.H is deleted and replaced with:

This Agreement shall be interpreted according to, and governed by, the Laws of Dubai and the Federal Laws of the United Arab Emirates.

Any disputes shall be finally settled by arbitration in accordance with the Rules of Commercial Conciliation and Arbitration of the Dubai Chamber of Commerce & Industry, which Rules are deemed to incorporate reference to this Clause. The place of arbitration shall be Dubai. The arbitration proceedings and award shall be conducted and written in the English language. Judgment upon the award rendered may be executed by any court having jurisdiction, or application may be made to such court for a judicial recognition of the award or any order of enforcement thereof, as the case may be.

The award of the arbitration shall be the sole and exclusive remedy between the parties regarding any and all claims and counterclaims presented to the arbitrators.

### **Malaysia**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Malaysia. The courts of Malaysia will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

The following is added to Section 6:

Although Arcserve specifies that there are no other warranties, Licensee may have certain rights under the Consumer Protection Act 1999 and the warranties are only limited to the extent permitted by the applicable legislation.

### **Mexico**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of México. Any dispute hereunder shall be determined by the Tribunales de la Ciudad de México.

### **Netherlands**

The third paragraph of the Preamble is deleted and replaced with:

By installing, copying or using the product or by selecting the "I accept the terms of the License Agreement" radio button below, and then clicking on the "Next" button, you are

- (I) Representing that you are not a minor and have full legal capacity and have the authority to bind yourself and your employer, as applicable, to the terms of this Agreement;
- (II) Consenting on behalf of yourself and/or as an authorized representative.

The following is added to the last paragraph of the Preamble:

In the event that you select on "I do NOT accept the terms of the License Agreement" radio button below, and then click on the "Cancel" button, the installation shall cease. You should delete all copies of the Product from your computer systems and return, by registered first class post, the Product, complete with

box and any documentation, to Arcserve or the authorized reseller from whom you purchased the Product with your proof of purchase within thirty (30) days of the date of purchase. You will promptly be issued a full refund of any license fees paid for the Product and, if applicable, maintenance fees paid. If requested at the time of return and provided that receipts of costs incurred are provided, Arcserve or the authorized reseller shall also refund to you any postage costs you incurred in returning the Product.

The second to last sentence of Section 11.A is deleted and replaced with:

Beta products are provided on an "as is" basis, without warranties or representations of any kind, either express or implied including, without limitation, any warranties, conditions or representations of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

The last sentence of Section 11.C is deleted and replaced with:

Licensee's use of the product during the trial period is on an "as is" basis without any warranty, and Arcserve disclaims all warranties including, without limitation, any implied warranties or conditions of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

Section 3.A(v) is deleted and replaced with:

Licensee may not disclose, de-compile, disassemble nor otherwise reverse engineer the Product save to the extent expressly permitted by law;

Section 3.A(viii) is deleted and replaced with:

Licensee may not permit the use of the Product by any third party without the prior written consent of Arcserve, save for contract staff of the Licensee who are acting on the Licensee's business, not engaged in facilities management and who the Licensee agrees as a condition of this Agreement to ensure such contract staff shall comply with all the terms of this Agreement, including without limitation, confidentiality provisions.

Section 6.D is deleted and replaced with:

Except as set forth above, to the fullest extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve.

The following is added at the end of Section 8:

The foregoing exclusions and limitations upon liability shall not apply to any liability for damages arising from:

- a. Tangible property damage to the extent that such is due to the negligence of an employee or authorized agent of Arcserve, in which event Arcserve's maximum liability shall be limited to \$1,000,000 for each event or series of events;
- b. Death or personal injury caused by the negligence of an employee or authorized agent of Arcserve, or

c. Willful misconduct or gross negligence of Arcserve.

## **New Zealand**

Notwithstanding Section 13.C, the applicable interest charge on invoices unpaid by Licensee is 1.5% per month.

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of New Zealand. The courts of New Zealand will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

The following is added to Section 6:

Although Arcserve specifies that there are no warranties, Licensee may have certain rights under the Consumer Guarantees Act 1993 or other legislation which cannot be excluded or limited. The Consumer Guarantees Act 1993 will not apply in respect of any goods or services which Arcserve supplies, if Licensee acquires the goods and services for the purposes of a business as defined in that Act. Where the Product is not acquired for the purposes of a business as defined in the Consumer Guarantees Act 1993, the limitations in this Section are subject to the limitations in that Act.

The following is added to Section 14.A:

Arcserve's rights under this Section shall also apply if any resolution is passed or proceedings are commenced for the liquidation or winding up of Licensee.

## **Norway**

The third paragraph of the Preamble is deleted and replaced with:

By installing, copying or using the product or by selecting the "I accept the terms of the License Agreement" radio button below, and then clicking on the "Next" button, you are:

- (I) Representing that you are not a minor and have full legal capacity and have the authority to bind yourself and your employer, as applicable, to the terms of this Agreement;
- (II) Consenting on behalf of yourself and/or as an authorized representative. The following is added to the last paragraph of the Preamble:

In the event that you select the "I do NOT accept the terms of the License Agreement" radio button below, and then click on the "Cancel" button, the installation shall cease. You should delete all copies of the Product from your computer systems and return, by registered first class post, the Product, complete with box and any documentation, to Arcserve or the authorized reseller from whom you purchased the Product with your proof of purchase within thirty (30) days of the date of purchase. You will promptly be issued a full refund of any license fees paid for the Product and, if applicable, maintenance fees paid. If requested at the time of return and provided that receipts of costs incurred are provided, Arcserve or the authorized reseller shall also refund to you any postage costs you incurred in returning

the Product.

The second to last sentence of Section 11.A is deleted and replaced with:

Beta products are provided on an "as is" basis, without warranties or representations of any kind, either express or implied including, without limitation, any warranties, conditions or representations of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

The last sentence of Section 11.C is deleted and replaced with:

Licensee's use of the product during the trial period is on an "as is" basis without any warranty, and Arcserve disclaims all warranties including, without limitation, any implied warranties or conditions of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

Section 3.A(v) is deleted and replaced with:

Licensee may not disclose, de-compile, disassemble nor otherwise reverse engineer the Product save to the extent expressly permitted by law;

Section 3.A(viii) is deleted and replaced with:

Licensee may not permit the use of the Product by any third party without the prior written consent of Arcserve, save for contract staff of the Licensee who are acting on the Licensee's business, not engaged in facilities management and who the Licensee agrees as a condition of this Agreement to ensure such contract staff shall comply with all the terms of this Agreement, including without limitation, confidentiality provisions. Section 6.D is deleted and replaced with:

Except as set forth above, to the full extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve.

The following is added at the end of Section 8:

The foregoing exclusions and limitations upon liability shall not apply to any liability for damages arising from:

- a. Tangible property damage to the extent that such is due to the negligence of an employee or authorized agent of Arcserve, in which event Arcserve's maximum liability shall be limited to \$1,000,000 for each event or series of events.
- b. Death or personal injury caused by the negligence of an employee or authorized agent of Arcserve.
- c. Willful misconduct or gross negligence of Arcserve.

## **Peru**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Peru. Any dispute hereunder shall be determined by the Tribunales Ordinarios de La Ciudad de Lima.

## **Philippines**

Section 4.A is deleted and replaced with:

Title to the Product and all modifications thereto shall remain with Arcserve. The Product is a trade secret and the proprietary property of Arcserve or its licensors. Usage rights respecting the Product may not be exchanged for any other Arcserve product. Licensee and its employees will keep the Product and the terms of this Agreement strictly confidential. To the maximum extent permitted by applicable law, Licensee will not disclose, de-compile, disassemble nor otherwise reverse engineer the Product.

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of the Philippines.

The courts of Makati City will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

Section 14.A is deleted and replaced with:

If Licensee breaches any term of this Agreement or if Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee, Arcserve shall have the right to withhold its own performance hereunder and/or to terminate this

Agreement immediately upon notice and, in addition to all other rights of Arcserve, all amounts due or to become due hereunder will immediately be due and payable to Arcserve.

## **Poland**

If payments are to be made in PLN, Section 13.C is replaced as follows:

Any invoice which is unpaid by Licensee when due shall be subject to an interest charge equal to the lower of 1.5% per month or the statutory delay interest rate then applicable in Poland.

Section 16.H is deleted and replaced with: The laws of Poland govern this Agreement.

Section 14.A is deleted and replaced with:

If Licensee breaches any term of this Agreement or if Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee, Arcserve shall have the right to withhold its own performance hereunder and/or, to the extent permitted by the applicable law, to terminate this Agreement immediately and, in addition to all other rights of Arcserve, all amounts due or to become due hereunder will immediately be due and payable to Arcserve.

## **Portugal**

Section 16.H is deleted and replaced with:

Any dispute hereunder shall finally be determined by Lisbon Courts.

## **Singapore**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Singapore. The courts of Singapore will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

The following is added to the end of Section 6.D:

To the full extent permitted by applicable law, Arcserve disclaims all implied conditions or warranties of satisfactory quality or fitness for purpose.

The following is added at the end of Section 8:

The limitation of liability set forth in this Section above will not apply to any breach of Arcserve's obligations implied by Section 12 of the Sales of Goods Act (Cap 393). In addition, if you are a consumer, the limitation of liability will not apply to any breach of Arcserve's obligations implied by Sections 13, 14 or 15 of the Sale of Goods Act (Cap 393).

### **South Africa**

The following is added to the Preamble as Paragraph (VI):

(VI) Consenting to Your Personal Information (as defined in Chapter 1, Section 1 of Protection of Personal Information Act 4 of 2013) being shared with third parties outside of South Africa in accordance with Arcserve's Data Protection Agreement, Privacy Policy, and Business Associate Agreement, as applicable, for purposes of Arcserve providing the Product to You hereunder.

### **Sweden**

The third paragraph of the Preamble is deleted and replaced with:

By installing, copying or using the product or by selecting the "I accept the terms of the License Agreement" radio button below, and then clicking on the "Next" button, you are:

- (I) Representing that you are not a minor and have full legal capacity and have the authority to bind yourself and your employer, as applicable, to the terms of this Agreement;
- (II) Consenting on behalf of yourself and/or as an authorized representative.

The following is added to the last paragraph of the Preamble:

In the event that you select the "I do NOT accept the terms of the License Agreement" radio button below, and then click on the "Cancel" button, the installation shall cease. You should delete all copies of the Product from your computer systems and return, by registered first class post, the Product, complete with box and any documentation, to Arcserve or the authorized reseller from whom you purchased the Product with your proof of purchase within thirty (30) days of the date of purchase (but in no event less than fourteen (14) days from the date that You receive the Product). You will promptly be issued a full refund of any license fees paid for the Product and, if applicable, maintenance fees paid. If requested at the time of return and provided that receipts of costs incurred are provided, Arcserve or the authorized reseller shall also refund to you any postage costs you incurred in returning the Product.

The second to last sentence of Section 11.A is deleted and replaced with:

Beta products are provided on an "as is" basis, without warranties or representations of any kind, either express or implied including, without limitation, any warranties, conditions or representations of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

The last sentence of Section 11.C is deleted and replaced with:

Licensee's use of the product during the trial period is on an "as is" basis without any warranty, and Arcserve disclaims all warranties including, without limitation, any implied warranties or conditions of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

Section 3.A(v) is deleted and replaced with:

Licensee may not disclose, de-compile, disassemble nor otherwise reverse engineer the Product save to the extent expressly permitted by law;

Section 3.A(viii) is deleted and replaced with:

Licensee may not permit the use of the Product by any third party without the prior written consent of Arcserve, save for contract staff of the Licensee who are acting on the Licensee's business, not engaged in facilities management and who the Licensee agrees as a condition of this Agreement to ensure such contract staff shall comply with all the terms of this Agreement, including without limitation, confidentiality provisions. Section 6.D is deleted and replaced with:

Except as set forth above, to the full extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve.

The following is added at the end of Section 8:

The foregoing exclusions and limitations upon liability shall not apply to any liability for damages arising from:

- a. Tangible property damage to the extent that such is due to the negligence of an employee or authorized agent of Arcserve, in which event Arcserve's maximum liability shall be limited to \$1,000,000 for each event or series of events;
- b. Death or personal injury caused by the negligence of an employee or authorized agent of Arcserve;
- c. Willful misconduct or gross negligence of Arcserve.

## **Switzerland**

The following is added at the end of Section 2.A:

The place of performance of any duties of Arcserve under this Agreement is Islandia, New York. Section 16.H is deleted and replaced with:



Any dispute hereunder shall be determined by a court of competent jurisdiction within the state of New York, U. S. A.

#### **Taiwan**

The first sentence of Section 13.B is deleted and replaced with: All fees are inclusive of VAT.

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Taiwan, without regard to its choice of law provisions. Any dispute hereunder shall be determined by Taipei District Court.

#### **Thailand**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Thailand. The courts of Thailand will have sole and exclusive jurisdiction with respect to any disputes arising out of this Agreement.

#### **Turkey**

The following is added at the end of Section 15:

Licensee undertakes to keep all information of trade secret nature strictly private and confidential, and to use all necessary measures and its best efforts in order to assure and maintain the confidentiality thereof and to prevent and protect it, or any part thereof, from disclosure to any third person. Furthermore, Licensee hereby expressly undertakes:

- (I) Not to use a Arcserve trade secret directly or indirectly in any respect or for whatever reason on its own behalf or on behalf of any third party or allow it to be used for any other purpose except as expressly permitted by Arcserve;
- (II) Not to disclose, de-compile, disassemble nor otherwise reverse engineer the Product and to avoid such a disclosure in whatever form;
- (III) Not to copy or permit the others to copy without Arcserve's prior written consent. Licensee

acknowledges that in the event of a breach of any one of the obligations imposed upon it under this Section, Arcserve might suffer significant damage, notwithstanding the return of all copies of the Product, arising out of the fact that it has breached the aforesaid obligations. Consequently, Licensee undertakes to indemnify Arcserve in full against any such damage.

Licensee acknowledges that Arcserve has the right to prevent any threat to confidentiality or restrain ongoing infringement or breach of confidentiality by Licensee through legal proceedings and in case an order is obtained against Licensee for breach, Licensee shall reimburse Arcserve's juridical costs and expenses including the attorney fees.

The following is added at the end of Section 16:

In the event that Arcserve is rendered unable, wholly or in part, to perform or implement any of its warranties herein set forth, by force majeure which includes governmental controls or orders of the

government of Turkey, acts of God, wars, commotion or riot, epidemics, strikes, lockouts and any other events or forces beyond its reasonable control, it shall be relieved from such warranties and shall not be held liable for the non-fulfillment and/or suspended implementation thereof, as long as and to the extent that the effect of such events or forces remains unabated.

The following is added at the end of the second sentence of Section 8:

EXCEPT THAT MAY ARISE FROM ARCSERVE'S WILFUL FAULT OR NEGLIGENCE.

### **United Kingdom**

The third paragraph of the Preamble is deleted and replaced with:

By installing, copying or using the product or by selecting the "I accept the terms of the License Agreement" radio button below, and then clicking on the "Next" button , you are:

- (I) Representing that you are not a minor and have full legal capacity and have the authority to bind yourself and your employer, as applicable, to the terms of this Agreement;
- (II) Consenting on behalf of yourself and/or as an authorized representative.

The following is added to the last paragraph of the Preamble:

In the event that you select the "I do NOT accept the terms of the License Agreement, and then click on the "Cancel" button, the installation shall cease. You should delete all copies of the Product from your computer systems and return, by registered first class post, the Product, complete with box and any documentation, to Arcserve or the authorized reseller from whom you purchased the Product with your proof of purchase within thirty (30) days of the date of purchase. You will promptly be issued a full refund of any license fees paid for the Product and, if applicable, maintenance fees paid. If requested at the time of return and provided that receipts of costs incurred are provided, Arcserve or the authorized reseller shall also refund to you any postage costs you incurred in returning the Product.

The second to last sentence of Section 11.A is deleted and replaced with:

Beta products are provided on an "as is" basis, without warranties or representations of any kind, either express or implied including, without limitation, any warranties, conditions or representations of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

The last sentence of Section 11.C is deleted and replaced with:

Licensee's use of the product during the trial period is on an "as is" basis without any warranty, and Arcserve disclaims all warranties including, without limitation, any implied warranties or conditions of merchantability or satisfactory quality and fitness for a particular purpose, as well as any express warranties provided elsewhere in this Agreement.

Section 3.A(v) is deleted and replaced with:

Licensee may not disclose, de-compile, disassemble nor otherwise reverse engineer the Product save to the extent expressly permitted by law;

Section 3.A(viii) is deleted and replaced with:

Licensee may not permit the use of the Product by any third party without the prior written consent of Arcserve, save for Licensee's contractors who are acting on the Licensee's business, not engaged in facilities management and who the Licensee agrees as a condition of this Agreement to ensure such contract staff shall comply with all the terms of this Agreement, including without limitation, confidentiality provisions.

Section 16.H is deleted and replaced with:

All disputes relating to this Agreement will be governed by the laws of England and Wales and will be submitted to the exclusive jurisdiction of the English courts.

Section 6.A shall be amended as below:

Arcserve warrants that it can enter into this Agreement. Arcserve also warrants that the Product will operate substantially in accordance with the specifications set forth in the documentation for a period of ninety (90) days from Licensee's acquisition of the license for the Product. If Licensee notifies Arcserve in writing of a breach of this warranty during the warranty period set forth above, Licensee's remedies include (i) ask for a full refund within thirty (30) days from the Licensee's acquisition of the license of the Product if the Licensee is a consumer as defined under Consumer Rights Act 2015; or (ii) ask Arcserve to correct, repair or replace the Product within a reasonable time, or (iii) if within a reasonable time after receiving Licensee's written notice of breach of the above warranty, Arcserve is unable to cause the Product to operate in accordance with Arcserve's written specifications, then either party may terminate this Agreement on written notice to the other party and Arcserve or the authorized reseller will refund the relevant license Fees Licensee paid for such non-compliant Product only when Licensee returns the Product to Arcserve or its authorized reseller from whom it obtained the Product, with the purchase receipt within the warranty period noted above. The warranties set forth in this Section do not apply to beta versions of the Product, Products licensed on a trial or evaluation basis or to Software Development Kits.

Section 6.D is deleted and replaced with:

Except as set forth above, to the full extent permitted by applicable law, no other warranties, whether express or implied, including, without limitation, any implied warranties or conditions of merchantability, satisfactory quality and fitness for a particular purpose, are made by Arcserve.

The following is added at the end of Section 8:

The foregoing exclusions and limitations upon liability shall not apply to any liability for damages arising from:

- a. Tangible property damage to the extent that such is due to the negligence of an employee or authorized agent of Arcserve, in which event Arcserve's maximum liability shall be limited to \$1,000,000 for each event or series of events;
- b. Death or personal injury caused by the negligence of an employee or authorized agent of Arcserve;
- c. Willful misconduct or gross negligence of Arcserve.

**Venezuela**

Section 16.H is deleted and replaced with:

This Agreement shall be governed by and interpreted in accordance with the laws of Venezuela. Any dispute hereunder shall be determined by the Tribunales Ordinarios de la Ciudad de Caracas.

If the Product contains third party software, and the licensor requires the incorporation of specific license terms and conditions for such software into this Agreement, those specific terms and conditions, which are hereby incorporated by this reference, are located below this Agreement.

Licensee acknowledges that this license has been read and understood and by selecting the ["I accept the terms of the License Agreement "] radio button, licensee accepts its terms and conditions. Licensee also agrees that this license (including any order form referencing this Agreement and any terms relating to third party software which are set forth below this Agreement) constitutes the complete Agreement between the parties regarding this subject matter and that it supersedes any information licensee has received relating to the subject matter of this Agreement, except that this Agreement (excluding the third party terms below) will be superseded by any written Agreement, executed by both licensee and Arcserve, granting licensee a license to use the product. This Agreement may only be amended by a written Agreement signed by authorized representatives of both parties.

Select the ["I accept the terms of the License Agreement"] radio button, and then click on the "Next" button to accept the terms and conditions of this Agreement as set forth above and proceed with the installation process.

Select the ["I do NOT accept the terms of the License Agreement"] radio button and then click on the "Cancel" button to halt the installation process.