

# TERMS OF USE

Last updated 4 October 2022

All clauses in these Terms displayed in **BOLD** are provisions which limit the risk or liability of the Company and constitute an assumption of risk or liability by you, impose an obligation on you to indemnify the Company or is an acknowledgement of a fact by you. Please read these clauses carefully before agreeing to these Terms.

## 1. INTERPRETATION AND PRELIMINARY

The headings of the clauses in these Terms are for the purpose of convenience only and shall not be used in the interpretation of, nor modify nor amplify the terms of these Terms, nor any clause of these Terms. Unless a contrary intention clearly appears:

- 1.1. words importing:
  - 1.1.1. any gender includes all others;
  - 1.1.2. the singular includes the plural and *vice versa*; and
  - 1.1.3. natural persons include created entities (corporate or unincorporate) and the state and *vice versa*;
- 1.2. the following terms have the meanings assigned to them in this clause 1.2 and cognate expressions shall have corresponding meanings, namely:
  - 1.2.1. **"Affiliate"** means (with respect to any company, close corporation, trust or individual) any other company, close corporation, trust or individual which is related or controlled by or controls the first mentioned company, close corporation, trust or individual as described by section 2 of the Companies Act 71 of 2008;
  - 1.2.2. **"Artwork"** means any work of art capable of registration on the System;
  - 1.2.3. **"Art Collection"** means the collection of Artworks of the Client, the Art Detail of which shall be stored on the System and which collection the Services will be rendered for;
  - 1.2.4. **"Art Detail"** means the information and details of the Artwork and/or Art Collection which is relevant and necessary for the Company to provide the Services and which shall include, without limitation, information related to the artist, the Artwork, its history, valuations related to the Artwork and similar information;

- 1.2.5. **"Business Day"** means any day excluding a Saturday, Sunday and a public holiday in South Africa;
- 1.2.6. **"Business Hours"** means the time between 08h00 and 17h00 on Business Days;
- 1.2.7. **"Client"**, **"User"** and **"you"** means the person making use of the Services;
- 1.2.8. **"Company"** means Capital Art Services Proprietary Limited, (Company Registration No. 2020/820436/07) whose registered physical address is 5 Brampton, 56 Culross Road, Bryanston, Johannesburg, Gauteng, 2191; email: [hello@capitalart.co](mailto:hello@capitalart.co) ;
- 1.2.9. **"Confidential Information"** means the terms and conditions of these Terms, and any other information disclosed by one Party to the other, including, but not limited to, information regarding each Party's products, services, product designs, prices and costs, trade secrets, know how, inventions, development plans, techniques, processes, programs, schematics, software, data, customer lists, financial information, sales and marketing plans, business opportunities, personnel data, research and development activities, pre-release products and any other information which the receiving Party ("**Receiving Party**") knows or reasonably ought to know is confidential, proprietary or trade secret information of the disclosing Party ("**Disclosing Party**"). This definition also includes any information disclosed by or to any Affiliate concerning the Purpose;
- 1.2.10. **"Documentation"** means the documents made available to the Client by the Company online and which documentation stipulates the usage guidelines, functionalities and/or limitations of the Services as published by the Company from time to time, which shall be in addition to any usage guidelines, functionalities and/or limitations provided in these Terms and, where there is a conflict, these Terms shall prevail;
- 1.2.11. **"Estimated Value"** means the estimated valuation of an Artwork, which estimate shall be based on a series of factors, which shall include valuations provided by third party valutors and data provided by art index providers (such as the original Artist's price index or the most relevant general price index for the Artwork), historical currency data provided by a currency data provider, as well as relevant information provided by the Client;

- 1.2.12. "**Fees**" mean the fees payable by the Client in respect of the Services rendered by the Company to the Client, as recorded on the Website;
- 1.2.13. "**Force Majeure Event**" means an event which is beyond the scope of control of either of the Parties as set out in clause 15;
- 1.2.14. "**Free Account**" means a free account as specified in clause 11
- 1.2.15. "**Intellectual Property**" means (without limitation) any know-how, methodologies, patents, copyright (including all copyright in any designs and computer programs), registered design, trade marks, service marks, designs, design rights, source codes, inventions and trade secrets, and other intellectual property rights and rights of a similar character whether registered or capable of registration and all applications and rights to apply for the protection of any of the same anywhere in the world or other industrial or intellectual property rights, whether registered or not and whether or not capable of being registered, and any application for any of the aforementioned;
- 1.2.16. "**Parties**" means the parties to these Terms;
- 1.2.17. "**POPIA**" means the Protection of Personal Information Act 04 of 2013, as amended from time to time, including any regulations and/or code of conduct made under the Act;
- 1.2.18. "**Purpose**" means the execution of these Terms, as well as the implementation of these Terms;
- 1.2.19. "**Report Only Services**" means the provision by the Company of an ad hoc report as further set out on the Website and clause 5.2;
- 1.2.20. "**Services**" means the services rendered by the Company to the Client in accordance with these Terms, which are set out in more detail on the Website and may include the Report Only Services;
- 1.2.21. "**Service Sources**" means all information and documentation made available to the Client as part of the Services, which may include historical reports, general reports of Estimated Values, the documentation and general evidence based information related to the Art Collection and such further related information, such as related exhibitions and articles, which shall be stored on the System;
- 1.2.22. "**System**" means the online cloud based storage repository, administered by the Company and accessible by the Client, where the Art Detail of the Art Collection of the Client shall be stored, where the

Client may store and input certain information relating to their Art Collection, generate Art Collection general and management related reports and, furthermore, the results of any Services to be rendered in terms of these Terms will be recorded and stored in the System, this being the Service Sources;

- 1.2.23. **"Tax Invoice"** means the document as required by Section 20 of the Value-Added Tax Act, 89 of 1997, as may be amended from time to time;
- 1.2.24. **"Tax"** means all taxes, charges, duties, levies, deductions, withholdings or fees of any kind whatsoever, or any amount payable arising out of the foregoing, imposed, levied, collected, withheld or assessed by a governmental authority, together with any penalties, fines or interest relating thereto;
- 1.2.25. **"Terms"** means these terms in this legally binding agreement that regulate your use of the Services and our relationship with you;
- 1.2.26. **"Warranty"** or **"Warranties"** means those warranties (or any one of them) as described or referred to in clause 12;
- 1.2.27. **"Website"** means <https://capitalart.co>, including all sub-domains;
- 1.3. when any number of days is prescribed in these Terms, the method for calculation shall be to exclude the first day and include the last day, unless the last day falls on a day that is not a Business Day, in which case the last day shall be the next succeeding Business Day;
- 1.4. if figures are referred to in numerals and in words and if there is any conflict between the two, the words shall prevail;
- 1.5. expressions defined in these Terms shall bear the same meanings in schedules or annexures to these Terms which do not themselves contain their own conflicting definitions;
- 1.6. if any term is defined within the context of any particular clause in these Terms, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of these Terms, notwithstanding that the term has not been defined in clause 1.2;
- 1.7. the expiration or termination of these Terms shall not affect such of the provisions of these Terms that expressly provide will operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration

or termination, notwithstanding that the clauses themselves do not expressly provide for this;

- 1.8. any reference in these Terms to any other agreement or document shall be construed as a reference to such other agreement or document as same may have been, or may from time to time be, amended, varied, novated or supplemented.

## 2. INTRODUCTION

The Client wishes to make use of the Company's Services and in terms of which, the Client shall be bound to these Terms for as long as he/she/it uses the Services or has access to the System, or as otherwise set out in these Terms.

## 3. COMMENCEMENT AND DURATION

- 3.1. **By using the Services you agree to be bound to these Terms as a Client, to the extent that they are applicable to you. You may not access the Services if you do not agree with these Terms.**
- 3.2. Unless otherwise set out in these Terms, the Services will be rendered for a fixed period of 6 (six) or 12 (twelve) months (as determined by you) from the date of payment ("**Initial Period**"), and will only renew for successive 6 (six) or 12 (twelve) month periods (whichever is relevant) upon payment for such further period, a reminder of which shall be provided to the Client periodically before the end of the relevant period ("**Further Periods(s)**") (the Initial Period or Further Period being referred to as a "**Period**") and must be paid on or before 1 (one) week before the expiry of the relevant period.
- 3.3. Failure to make payment in terms of clause 3.2 above will result in your account being converted to a Free Account and access to premium paid for features shall be restricted until payment is made,
- 3.4. Should you sign up for a free membership, the duration will be for the period as set out on the Website and these Terms shall be applicable thereto, as are applicable to such membership.
- 3.5. Users who make use of the Report Only Service shall not be bound by clause 3.2.
- 3.6. The Services will be made available to you immediately if payment is made by credit card or within 2 (two) Business Days after payment has been received and cleared in the bank account of the Company.

#### 4. CHANGES TO THESE TERMS

- 4.1. We may change or add to these Terms, change or cancel the Services or offer new Services to you from time to time and at our discretion. We will notify you of any material changes *via* email which will contain a link to the updated terms. Your continued use of the Services will constitute your deemed acceptance to be bound to the revised Terms and you may not access the Services if you do not agree with these revised Terms.
- 4.2. We will give you 30 (thirty) calendar days' notice of a material change to these Terms.

#### 5. SERVICES

- 5.1. The Company will render the Services to you, as are set out in more detail on the Website.
- 5.2. Further to the above, Users are entitled to request *ad hoc* Report Only Services from the Company, in terms of which:
  - 5.2.1. a User may purchase any selected number of future once off reports similar to that provided in terms of the Services and these Terms shall apply to such Report Only Services, to the extent permitting;
  - 5.2.2. Users need not create an Account or subscribe for any subscription packages;
  - 5.2.3. Users shall be required to make payment in terms of clause 7 immediately, subject to the following terms regarding refunds:
    - 5.2.3.1. **Cooling off:** Users may request a full refund within 7 (seven) calendar days of purchasing the Report Only Services, reckoned from the date of payment of the Fees related thereto, unless the User has already started to receive the relevant Services (i.e. you have used the Services during this period). **We will not refund any Fees in terms of this clause 5.2.3.1 if you have used the Services or if you request a refund after 7 (seven) calendar days of making payment of the Fees;**
    - 5.2.3.2. Users may request a 50% (fifty percent) refund if requested within 8 (eight) and 30 (thirty) calendar days of purchasing the Report Only Services, reckoned from the date of payment of the Fees related thereto; or

- 5.2.3.3. Users may request a 20% (twenty percent) refund if requested within 31 (thirty one) and 60 (sixty) calendar days of purchasing the Report Only Services, reckoned from the date of payment of the Fees related thereto; and
- 5.2.3.4. No refund will be granted after 61 (sixty one) calendar days of purchasing the Report Only Services, reckoned from the date of payment of the Fees related thereto.
- 5.3. Save where a User requests a Report Only Service, the Services may be in the form of a Free Account or a premium subscription-based account.
- 5.4. The Company may make changes to the Services at any time (in the form of an updated Services schedule) and shall inform the Client in writing prior to such change (any such change to the Services shall not result in a change to the Fees already paid / payable for that particular Term).
- 5.5. In terms of the Services to be rendered by the Company, the Client acknowledges that reports to be issued in terms of the Services shall be published in the System within a commercially reasonable period. The Company shall aim to publish within 3 (three) to 6 (six) weeks after each 1 January, April, July and October of each year, as long as a Client remains subscribed at the date of the report. For ad hoc reports, a report request will also be fulfilled on or within the time periods aforementioned in this clause 5.5. Larger Art Collections can delay the aforementioned timelines. The Company gives no warranty that such a report and/or valuation will be forthcoming in such periods.
- 5.6. **In relation to the Services to be rendered by the Company, the Client hereby accepts and understands that:**
- 5.6.1. **The Company uses data of external third parties to update the Estimated Value of an Art Collection; and**
- 5.6.2. **any Estimated Value provided by the Company in terms of the Services is merely a proxy value, as it does not take into account the physical attributes or condition of an Artwork and such valuations are based on information provided by the Client and/or may be based on the Artworks original artist's price index or the most relevant general price index.**
- and in terms of which, the Client hereby:**
- 5.6.3. **warrants that any valuation and/or purchase price of an Artwork, submitted by the Client to the Company, is accurate and based on**

**relevant evidence/documentation supporting such valuation and/or purchase price;**

**5.6.4. the Client acknowledges that any valuation or Estimated Value provided by the Company in terms of the Services are based on information provided by the Client, the Artwork's original artist price index or the most relevant general price index (whichever is available) and exchange rates, if applicable, and that the Company has no obligation to validate any such purchase price or valuation submitted by a Client and the Company does not guarantee that a valuation provided in terms of the Services is the actual value for an Artwork; and**

**5.6.5. the Client acknowledges that any valuation or Estimated Value of an Artwork provided by the Company in terms of the Services is merely indicative of a potential valuation and by no means represents a guaranteed valuation or price that a Client may achieve from a sale or similar action of any Artwork(s) or an Art Collection.**

## **6. PROMOTIONAL CODES**

- 6.1. We may, at our discretion, make promotional codes available to you in a form or manner to be managed by us, providing a discounted fee.
- 6.2. The promotional codes will be distributed for free by us and will be strictly enforced regarding any expiry date linked to such promotional code and other terms that may apply to the promotional code

## **7. FEES AND PAYMENT**

- 7.1. The Services shall be rendered according to the Fees, the current rate and any further terms thereof being recorded on the Website.
- 7.2. The Fees are subject to change from time to time, however, changes to the Fees will not apply to Services already purchased.
- 7.3. Payment of the Fees is required before you can use or receive the Services. You warrant that you are authorised to use the relevant billing details provided when paying the Fees, and we reserve the right to terminate any Service if you are not authorised to use such details. You must ensure that there are enough funds to cover the Fees when they are billed, and you acknowledge that the Company will not be liable for any overdraft fees that you might incur.



- 7.4. Fees can be paid *via* third-party gateways and you agree to adhere to the terms and conditions stipulated by any third-party payment gateway that may be used by us and agree to pay any fees that may be charged by such third party.
- 7.5. **Under no circumstances will the Company be responsible for any fees incurred by you to any third parties in this regard.**
- 7.6. The Company will not have access to your credit card or payment information.
- 7.7. To make payment of the Fees, you will be directed to a third party payment gateway to provide your credit card or other payment information *via* a secure connection. All payments for Fees will be *via* the third party payment gateway and the Company will not have access to your credit card information.
- 7.8. **We** will make all documentation relating to transactions between you and us available to you on your Account or *via* email.
- 7.9. The Fees may change from time to time, subject to us giving you 30 (thirty) calendar days' notice of such change.
- 7.10. All Fees exclude any applicable taxes unless stated otherwise. To the extent allowed under applicable laws, you are responsible for any applicable taxes, whether they are listed on the transaction documents or not.
- 7.11. **Should** payment for the Fees be unsuccessful, you will be notified of this and will be able to attend to payment again. In the event of a failed purchase, you will be unable to access the Services until the Fees have been successfully paid. If the Fees remain unpaid, the Company reserves the right to terminate your access to the Services and shall notify you of such termination *via* email.
- 7.12. If you cancel a payment by giving instruction to your bank to return your funds, and they do so, or your billing details provided are no longer valid, you will be liable to us for any penalty which we incur to that bank or other payment processor.
- 7.13. If the Fees are described in a different currency to that which you use, you accept all risk for any currency fluctuations, and you undertake to pay the Fees in full in our stated currency. You similarly undertake to pay any levy that may arise because of the currencies differing.

## **8. CLIENT OBLIGATIONS**

- 8.1. The Client acknowledges that successful implementation of these Terms requires co-operation and ongoing communications between the Parties.

- 8.2. Unless otherwise agreed or if part of the agreed Services rendered by the Company, the Client will ensure that its systems are kept up to date to ensure that the systems, including any third party systems that the Client relies on, are compatible with the Services and shall take all steps to ensure future compatibility with the Services. The Company shall not be liable for any Service failure in the event that the Client's systems are incompatible with the Services.
- 8.3. The Client agrees that the Services shall only be used in accordance with the terms of these Terms, the Documentation and applicable laws and regulations.
- 8.4. The Client agrees to adhere to any fair use policy of the Company, which may be provided to the Client alongside these Terms and which may be made available to the Client from time to time.

## **9. INTELLECTUAL PROPERTY**

- 9.1. The Parties shall each retain all rights, title and interest in and to their respective Intellectual Property and nothing in these Terms shall be construed as an assignment or transfer of Intellectual Property from one Party to the other Party, unless expressly provided in these Terms.
- 9.2. The Company reserves all right, title and interest in and to all Intellectual Property emanating from the provision of the Services and/or Documentation to the Client, which shall include (without limitation) reports, expression of Estimated Values and any similar material distributed to the Client by means of the Services.
- 9.3. The Client is provided with a right to use the information expressed in any report or Estimated Value, but strictly for the Client's own personal and private use (which may include the disclosure of such information to a financial or similar manager for estate management services).
- 9.4. If the Client becomes aware of, or suspects any infringement, unauthorised or illegal use, reproduction, exploitation and/or exercise of the Services or the Company's (and/or its Affiliates') Intellectual Property, the Client undertakes that it shall:
- 9.4.1. immediately provide the Company with a written notice containing full details of such conduct; and
- 9.4.2. provide, upon request, reasonable assistance and co-operation to the Company in pursuing measures, including legal proceedings, taken by the Company for protection against such conduct.

## 10. **THIRD PARTY SOFTWARE**

10.1. The Client acknowledges that:

10.1.1. the Company may use its own and/or may purchase third party licenses for products or services that are necessary for the Company to provide the Services ("**Third Party Software**"); and

10.1.2. any Third Party Software used to provide the Services is owned by the Company and/or such third parties and shall remain the property of the Company and/or such third parties.

10.2. The Company warrants that it is authorised to use and/or sub-license the Third Party Software to the Client on the terms of these Terms, subject to the Client using such Third Party Software in compliance with the applicable license terms.

## 11. **LIMITED APPLICATION**

The Company may offer a free version of the System to Users and, in terms of which, such Users shall be Clients for purposes of and in terms of these Terms (i.e. a Free Account). Furthermore:

11.1. Clients shall be bound to the terms of these Terms;

11.2. Client shall be entitled only to limited access to the System and Services, to be determined by the Company at its discretion;

11.3. Company shall be entitled to change the terms and Client's access to the System and Services at its discretion.

## 12. **WARRANTIES**

12.1. The Client or any person acting on behalf of the Client unconditionally and irrevocably warrants that:

12.1.1. they have the legal authority, capacity and power to enter into and perform, and take all necessary actions in terms of corporate governance (including obtaining all authorisations, consents and resolutions from the board and shareholders of the Client) to authorise its conclusion and performance of its obligations as provided for in these Terms;

12.1.2. the obligations that the Client has agreed to as provided for in these Terms are legal, valid and binding on the Client;

- 12.1.3. the Client will discharge its obligations pursuant to these Terms with all due skill, care and diligence;
  - 12.1.4. in carrying out the Client's obligations in terms of these Terms, it will not cause any infringement, or infringe any right of privacy, or any rights of third persons; and
  - 12.1.5. it will at all times uphold the reputation, interests and goodwill of the Company and will not perform any act or fail to perform any act which may result in the Company's reputation, interests and goodwill being prejudiced.
- 12.2. The Company unconditionally and irrevocably warrants that:
- 12.2.1. it has the legal authority, capacity and power to enter into and perform, and take all necessary actions in terms of corporate governance (including obtaining all authorisations, consents and resolutions from the board and shareholders of the Company) to authorise its conclusion and performance of its obligations as provided for in these Terms;
  - 12.2.2. the obligations that the Company has agreed to as provided for in these Terms are legal, valid and binding on the Company;
  - 12.2.3. it is solvent and liquid as described in section 4 of the Companies Act 71 of 2008, and is not financially distressed (as defined by that Act);
  - 12.2.4. it will discharge its obligations pursuant to these Terms with all due skill, care and diligence;
  - 12.2.5. it has the right to grant the Client the right to use the Services, any Third Party Software included in the Services and the Company's Intellectual Property; and
  - 12.2.6. it will at all times uphold the reputation, interests and goodwill of the Client and will not perform any act or fail to perform any act which may result in the Client's reputation, interests and goodwill being prejudiced.
- 12.3. Other than is provided under clause 12.2, the Company makes no warranties to the Client of any nature whatsoever and, in particular does not warrant, represent or undertake that the Client's use of the Services will be uninterrupted or error-free.
- 12.4. Each of the warranties given by the Parties in this clause 12 and further in these Terms will be given at all material times and be deemed to be material, and to have induced the Parties to enter into these Terms.

### **13. CONFIDENTIALITY**

- 13.1. The Receiving Party is obliged to treat all the Confidential Information as confidential. In addition, the existence and terms of these Terms shall not be disclosed by any Party to any third party without the consent of the other Party, except as may be required by law.
- 13.2. The Receiving Party may use the Confidential Information exclusively for the Purpose.
- 13.3. The Receiving Party shall only disclose Confidential Information to its employees and contractors who (i) have a need to access such Confidential Information solely for the Purpose, and (ii) have been advised of the obligations of confidentiality and are under obligations of confidentiality substantially similar to those set out in these Terms.
- 13.4. The Receiving Party shall have no obligation to retain as confidential any information which (i) was legally in its possession or known to the Receiving Party without any obligation of confidentiality prior to receiving it from the Disclosing Party; (ii) is, or subsequently becomes, legally and publicly available without breach of these Terms; or (iii) is legally obtained by the Receiving Party from a third Party source without any obligation of confidentiality.
- 13.5. The Receiving Party may disclose Confidential Information pursuant to a valid order issued by a court or government agency, provided that the Receiving Party provides the Disclosing Party: (i) prior written notice of such obligation; and (ii) the opportunity to oppose such disclosure or obtain a protective order.
- 13.6. Upon termination of these Terms or as requested by the Disclosing Party, the Receiving Party shall immediately delete all electronic copies and destroy all hard copies of all Confidential Information and provide the Disclosing Party with written confirmation if requested, unless otherwise required by Applicable Laws.
- 13.7. Subject to the provisions of clause 13.4, this clause 13 shall remain in force and effect from the earlier of the commencement date of these Terms or receipt of Confidential Information by either Party and shall survive termination of these Terms.

### **14. DATA PROTECTION**

- 14.1. In this clause, the capitalised terms shall have the meanings as defined in POPIA and cognate expressions shall have corresponding meanings.

- 14.2. The Parties acknowledge that as a result of the Services rendered in terms of these Terms, or otherwise in their dealings, Personal Information (in various forms) of the Client may be accessed, viewed and Processed by the Company.
- 14.3. The Company warrants that it has familiarised itself with the requirements and provisions of POPIA and has implemented processes and measures to meet the compliance requirements to the extent applicable to the Company.
- 14.4. The Company warrants that it will establish and maintain appropriate security measures to secure the integrity and confidentiality of Personal Information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to, unauthorised destruction of, unlawful access or Processing of Personal Information and shall take reasonable measures to:
- 14.4.1. identify all reasonably foreseeable internal and external risks to Personal Information in its possession or under its control;
  - 14.4.2. establish and maintain appropriate safeguards against the risks identified;
  - 14.4.3. regularly verify that the safeguards are effectively implemented;
  - 14.4.4. ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.
- 14.5. The Company agrees to Process Personal Information received from the Client as a result of these Terms in a manner that is adequate, relevant and not excessive for purposes of providing the Services as stated in these Terms and only as authorised and specified in terms of these Terms, unless the Client provides written consent to the Company to Process the Personal Information for any other purpose.
- 14.6. The Company will only share Personal Information with any third parties, including Operators of the Company, in compliance with POPIA and the Client consents to such sharing of Personal Information and the use by the Company of Operators.
- 14.7. In the event of further sharing of Personal Information in terms of clause 14.6, the Company will remain fully liable to the Client for performance in terms of these Terms and agrees to only share Personal Information by way of a written agreement with Operators which imposes the same obligations on the Operator as are imposed on the Company in terms on these Terms.

- 14.8. The Company will notify the Client where there are reasonable grounds to believe, within the discretion of the Company, that the Personal Information belonging to the Client has been accessed or acquired by any unauthorised person.
- 14.9. The Client hereby indemnifies and holds the Company harmless against any claim by or liability arising out of the Company's performance of the Services and its other obligations in accordance with the terms of these Terms and any instructions given to it by the Client from time to time, to the extent that such claims do not arise as a result of the Company's wilful and/or negligent acts or omissions.

## 15. FORCE MAJEURE

- 15.1. Other than the obligation to pay any amounts owed in terms of these Terms in respect of transactions that have already been entered into at the time of this clause 15 becoming applicable, a Party will not be liable for any failure to perform any of its obligations under these Terms insofar as such failure is as a result of (hereafter "**Force Majeure Event**"):
- 15.1.1. an event beyond the reasonable control of the Party;
  - 15.1.2. which was not reasonably foreseeable at the time of conclusion of these Terms; and
  - 15.1.3. that the Party could not have reasonably avoided or overcome the Force Majeure Event, or at least its effects.
- 15.2. A Force Majeure Event referred to in clause 15.1 will include, without limitation, acts of nature, violent storms, earthquakes, floods or destruction by lightning, war, blockage, embargo, boycott, revolution, invasion, insurrection, riot, mob violence, sabotage, epidemic, accident, quarantine, strikes, lock-outs, occupation of premises and work stoppages, black-outs, load shedding, pandemics, explosions, fires, destruction of machines, hardware or any kind of installation.
- 15.3. If a Party is prevented or delayed in the performance of any of its obligations under these Terms by a Force Majeure Event, that Party will within 5 (five) Business Days of becoming aware of the Force Majeure Event notify the other Party, specifying the nature and extent of the circumstances giving rise to the Force Majeure Event.
- 15.4. The relief-seeking Party shall, subject to service of the notice under this clause 15, have no liability in respect of the performance of such of its obligations as are directly prevented by the Force Majeure Event(s) during the continuation of such event(s), and for such time after they cease as is reasonably necessary for that Party to begin re-performing the affected obligation.

- 15.5. The relief-seeking Party will use all reasonable endeavours both to notify the other Party of the end of the Force Majeure Event and to recommence its affected operations as soon as reasonably practicable in order for it to perform its obligations under these Terms.
- 15.6. The relief-seeking Party shall use all reasonable endeavours to bring the Force Majeure Event(s) to a close or to find a solution by which these Terms may be performed despite the continuance of the Force Majeure Event.
- 15.7. The Parties agree that, should the Force Majeure Event last more than 6 (six) weeks, either Party may terminate these Terms by giving 14 (fourteen) Business Days written notice to the other Party.

## **16. LIMITATION OF LIABILITY**

- 16.1. **The Client agrees that the Company will not, under any circumstances, be liable to the Client for any costs, claims, damages, penalties, actions, judgements, suits, expenses, disbursements, fines or other amounts which the Client may sustain or suffer (or with which the Client may be threatened) as the result of, whether directly or indirectly, any act or omission in the course of or in connection with the implementation of these Terms (which includes the use, exploitation, reliance on and/or exercise of the Services) or in the course of the discharge or exercise by the Client or their employees, agents, professional advisors or delegates of their obligations or rights in terms of these Terms, or the termination of these Terms for any reason.**
- 16.2. **Under no circumstances whatsoever will the Company be liable for any indirect, extrinsic, special, penal, punitive, exemplary or consequential loss or damage of any kind whatsoever or howsoever caused (whether arising under contract, delict or otherwise and whether the loss or damage was actually foreseen or reasonably foreseeable), including but not limited to any loss of commercial opportunities or loss of profits, and whether as a result of negligent acts or omissions of the Company or its servants, agents or contractors or other persons for whose actions the Company may otherwise be liable in law.**

## **17. INDEMNITY**

**The Client hereby indemnifies and holds harmless the Company against any claim by the Client and/or any third party, for any costs, damages (including, without limitation, indirect, extrinsic, special, penal, punitive, exemplary or consequential loss or damage of any kind), penalties, actions, judgements, suits, expenses, disbursements,**



**finances or other amounts arising, whether directly or indirectly, from a breach of these Terms by the Client.**

**18. BREACH**

If any Party breaches any material provision or term of these Terms (other than those which contain their own remedies or limit the remedies in the event of a breach thereof) and fails to remedy such breach within 7 (seven) Business Days of receipt of written notice requiring it to do so then the aggrieved Party will be entitled without notice, in addition to any other remedy available to it at law or under these Terms, including obtaining an interdict, to cancel these Terms or to claim specific performance of any obligation whether or not the due date for performance has arrived, in either event without prejudice to the aggrieved Party's right to claim damages.

**19. ARBITRATION**

19.1. Any dispute which arises out of or pursuant to these Terms (other than where an interdict is sought, or urgent relief may be obtained from a court of competent jurisdiction) shall be submitted to and decided by arbitration in accordance with the arbitration rules and legislation for the time being in force in the Republic of South Africa.

19.2. The parties shall jointly appoint an arbitrator within 14 (fourteen) calendar days of either party demanding arbitration from the other Party, failing which either party shall be entitled to approach the Secretariat of the Arbitration Foundation of South Africa ("**AFSA**") to recommend an arbitrator to preside over the arbitration proceedings, which recommendation will immediately be deemed to have been accepted by the parties as soon as such recommendation is made to either party and the arbitration process may immediately commence.

19.3. Unless otherwise agreed, the rules of Commercial Arbitration as stipulated by AFSA will apply to such arbitration.

19.4. That arbitration shall be held:

19.4.1. with only the parties and their representatives present;

19.4.2. at Johannesburg.

19.5. The provisions of this clause 19.5 are severable from the rest of these Terms and shall remain in effect even if these Terms are terminated for any reason.

19.6. The arbitrator's award shall be final and binding on the Parties and incapable of appeal.

## 20. GENERAL

- 20.1. Subcontract: the Company reserves the right to subcontract the Services to a third party organisation to provide the Services to the Client. Any such subcontract shall not relieve the Company of any of its obligations under these Terms.
- 20.2. Good faith: the Parties will in their dealings with each other display good faith.
- 20.3. No assignment: the Client will not be entitled to cede its rights or delegate its obligations in terms of these Terms without the express prior written consent of the Company.
- 20.4. Relationship between the Parties: the Parties agree that neither Party is a partner or agent of the other Party and neither Party will have any right, power, or authority to enter into any agreement for, or on behalf of, or incur any obligation or liability of, or to otherwise bind, the other Party.
- 20.5. No representation: to the extent permissible by law, no Party will be bound by any express or implied or tacit term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not.
- 20.6. Severability: any provision in these Terms which is or may become illegal, invalid or unenforceable will be ineffective to the extent of such prohibition or unenforceability and will be severed from the balance of these Terms, without invalidating the remaining provisions of these Terms.
- 20.7. No stipulation: no part of these Terms will constitute a stipulation in favour of any person who is not a party to these Terms unless the provision in question expressly provides that it does constitute such a stipulation.
- 20.8. Address for service: any notice, approval, request, authorisation, direction, or other communication under these Terms shall be given in writing, directed to the addresses of the Parties set forth in clause 1, and shall be deemed to have been delivered and given for all purposes:
- 20.8.1. on the delivery date if delivered by email, provided that any notice sent outside of Business Hours on a Business Day shall be deemed received on the next Business Day at 08h00;
- 20.8.2. on the delivery date if delivered personally to the Party to whom the same is directed;
- 20.8.3. 1 (one) Business Day after deposit with a commercial overnight carrier with written verification of receipt; or

- 20.8.4. 5 (five) Business Days after the mailing date whether or not actually received, if sent by registered or recorded delivery post or any other means of rapid mail delivery for which a receipt is available to the contact at the address of the Party to whom the same is directed.
- 20.9. Governing law: these Terms and any action related thereto shall be governed, controlled, interpreted and defined by and under the laws of the Republic of South Africa and the Parties submit to the exclusive jurisdiction of the *High Court of South Africa (Gauteng Division)*. Notwithstanding the foregoing, the Company is still entitled to institute proceedings in any Magistrate's Court of Gauteng or other court it deems to be an appropriate forum.
- 20.10. Whole agreement: these Terms set forth the entire agreement and supersedes any and all prior or contemporaneous agreements and representations, written or oral, of the Parties with respect to the transactions set forth herein, all of which are excluded, except for fraudulent misrepresentations. The Parties acknowledge that as of the date hereof, no binding commitments exist between the Parties with respect to the subject matter of these Terms except as may be provided herein.