

# AGREEMENT FOR MYST CLOUD SERVICES AND RELATED PROFESSIONAL SERVICES

---

## 1 AGREEMENT

- 1.1 This document contains the terms and conditions on which We grant You the right to Access and use our MySTCloud Service and under which You may acquire Professional Services that are related to the MySTCloud Services. You must read the document from start to finish. **Only if You agree with all its terms and conditions should You Access the MySTCloud Service and/or use the Professional Services.**
- 1.2 When You click "I Agree" in the sign up process for the MySTCloud Service on Our Website an agreement is made between:
- (a) Us; and
  - (b) the person who clicks "I Agree", or if that person is an employee acting in the course of his/her employment, the agreement is made by, and binds, the employer of that person (the employer will be deemed to be the entity that is named as the "customer" in the Contract Details), or if that person is acting as agent for another person, the agreement binds the principal named as the "customer" in the Contract Details. The person who clicks "I Agree" and is acting in the course of his/her employment or as agent warrants to Us that he/she has authority to act on behalf of his/her employer (or the "customer", as applicable) to enter into the Agreement.
- 1.3 Where You require Professional Services as well as MySTCloud Services then You and Us may agree and sign a Statement of Work (SOW) off line. An SOW will describe the details of the Professional Services and the Fees payable for those Professional Services. Any SOW will be subject to the terms and conditions in this Agreement.

---

## 2 ACCESSING AND USING THE MYSTCLOUD SERVICE

- 2.1 We grant to You a non-exclusive, non-transferable, limited right to Access the MySTCloud Service to receive the features and benefits of the relevant Service Plan for the Time Period during the Term (and subject to any Minimum Term):
- (a) for use in a non-production environment, where the Service Plan describes the MySTCloud Service for use as an environment described as a "sandbox", "test", "development" or with other non-production terminology; or
  - (b) for the purpose of processing Your own internal data in a production environment, where the Service Plan describes the MySTCloud Service as an environment for "production" use,
  - (c) subject to any other limitations of use, all as set out in the Service Plan.
- 2.2 If You wish to vary the MySTCloud Services, the level of the Service Plan, add any features, benefits or service items that are offered as part of the MySTCloud Services that are available from Us, end a particular MySTCloud Service or terminate the Agreement, including all the MySTCloud Services, You may make the change using the Service Management Functionality within the MySTCloud Service. These changes will become effective on the same day unless stated otherwise in the Service Management Functionality within the MySTCloud Service. No refunds will be made for any MySTCloud Services paid for in advance when you end the MySTCloud Service in this way, including where You end a MySTCloud Service prior to the end of its Minimum Term.
- 2.3 If You do not use all of the Time Period or other component/features/benefits/service items of the MySTCloud Service during the relevant time set out in the Service Plan, then, unless stated otherwise in the Service Plan, such time/feature/benefit/service item is not rolled over to any subsequent period and is forfeit without further recourse to Us.
- 2.4 Where the relevant Service Plan states that You must provide the license for Third Party Software to use in connection with the MySTCloud Service then:

- (a) it is solely Your responsibility to acquire and license the Third Party Software, at Your own cost;
  - (b) You must, at Your own cost, maintain the Third Party Software at a release level that is subject to standard production support from its Third Party Software licensor;
    - (i) You are solely responsible for ensuring that You have the necessary licensing rights from the relevant Third Party Software licensor during the Term;
    - (ii) for You to use that software in conjunction with the MySTCloud Service; and
    - (iii) for Us, Our Affiliates and their respective contractors to install, use, operate, copy and modify that software in so far as is necessary, convenient or desirable for Us to perform Our obligations, or exercise Our rights, under this Agreement;
  - (c) You must use Third Party Software in strict compliance with Your agreement the relevant Third Party Software licensor;
  - (d) where We enter data into, set a parameter, exercise an option or otherwise operate the Third Party Software in any way, We do so only as Your lawful agent, and You appoint Us as Your lawful agent for this purpose.
- 2.5 For clarity, You are responsible for:
- (a) to install any Third Party Software in a timely manner, including any updates or new releases to that software;
  - (b) any work (and any associated cost) connected with integrating/interfaces and testing (in a non-production environment) any update or new release of Third Party Software, with any technology, software, network or data that You require the Third Party Software and Customer Data to integrate/interface with to ensure that the Third Party Software and Customer Data will operate properly in a production environment.
  - (c) If You wish Us to do any of this work, We may provide Professional Services to do so on a time and material basis, for additional Fees and subject to You and Us signing an SOW relating to such work.
- 2.6 We have appointed a third party who We believe to be a professional and capable contractor to provide Rubicon Red with hosting, disaster recovery and back up service for the MySTCloud Service and the data entered in it, including Customer Data. However owing to the nature of hosting, disaster recovery and back ups We do not warrant or guarantee that:
- (a) the MySTCloud Service will be uninterrupted or error free;
  - (b) any data, including Customer Data will be backed up and/or recoverable by Us.
  - (c) The features of the MySTCloud Service enables You to easily download and save Your Customer Data to another location at any time during the Term, and it is solely Your responsibility to download and back up that data at regular intervals (and to verify the completeness of the back up) to ensure that You do not lose any of that data. You must not rely on Our back ups of that data.
- 2.7 We may change the features, benefits or service items of any MySTCloud Service from time to time in Our discretion. If the changed features, benefits or service items will deprive You of more than an insubstantial benefit of the MySTCloud Service then You may give Us written notice of that fact within 15 days of the change. If We receive such a notice from You and We are unable to agree with You an acceptable alternative within 30 days of the date that We made the change then You may:
- (a) continue to use that MySTCloud Service and the changed MySTCloud Service will become the new MySTCloud Service; or
  - (b) terminate that MySTCloud Service using the Service Management Functionality at any time up 30 days after the change was made. In this case We will provide You with a pro-rate refund of any Fees that have been paid in advance for the MySTCloud Service that will not be provided (after deducting any monies owed by You to Us), and such payment will be Our entire liability and Your sole remedy in connection with the changed MySTCloud Service and/or termination.
- 2.8 You acknowledge and agree that You:
- (a) are solely responsible for the creation, posting, updating and maintenance of any Customer Data;
  - (b) must manage, renew, create, delete, edit, maintain and otherwise control the editorial content of any Customer Data.
- 2.9 We are not responsible for any delays, delivery failures or any other loss of damage resulting from the transfer of data over communications networks (other than the Network) or facilities, including the internet, and You acknowledge and agree that the MySTCloud Service may be subject to limitations, delays or other problems inherent in the use of such communications.

- 2.10 During the Term:
- (a) You may notify Us of any defect that You believe is in the MySTCloud Service using the process set out in the MySTCloud Service and We will use reasonable efforts to remedy any material defects in the MySTCloud Service in a timely manner;
  - (b) We may implement any new version of the MySTCloud Service (including adding new features or removing existing features) as part of Our product roadmap, correct defects in the MySTCloud Service, perform maintenance, on or vary the Hosted Environment, Network, data center, other infrastructure, hardware, Software (including installing updates or new releases) or other material that supports the MySTCloud Service in Our absolute discretion, and without liability or prior notice to You. We do not guarantee that any change, addition, deletion, error correction, patch, update or new version of the MySTCloud Service (or any part of it) will be compatible with any of Your data, applications, other software or interfaces that connect to or interface with the MySTCloud Service.
- 2.11 The Term will be renewed automatically at the end of the current Term unless You terminate the MySTCloud Service in accordance with section 2.2 or We give You notice at least 15 days' notice prior to the end of the current Term that We do not wish for the MySTCloud Service to continue. Any renewal of the Term be for the same period of the Term as the previous period (including any Minimum Term) and will be on the terms and conditions, Fees and Taxes, descriptions of the MySTCloud Services in the Services Plan and limitations of use that are applicable at the time of renewal.

---

### 3 RESTRICTIONS

- 3.1 Nothing in this Agreement permits You to:
- (a) copy, adapt, translate, publish, communicate to the public, or create any derivative work or translation of the Software or MySTCloud Service, unless expressly permitted by law or this Agreement;
  - (b) process the data of any third party as part of any time sharing, outsourced service, shared service or other service that uses any of the MySTCloud Services for the benefit of any other person;
  - (c) sub-license, lease, rent, loan, assign, novate or otherwise transfer any part of the Software or MySTCloud Service or the benefit or burden of this Agreement in whole or in part to any third party;
  - (d) disclose the Software or MySTCloud Service to any third party other than to any of Your contractors who are bound by obligations of confidentiality which are no less restrictive than those set out in section 9 and who are using the Software or MySTCloud Service solely for Your authorised use of the MySTCloud Service;
  - (e) reverse engineer, reverse compile, de-compile or disassemble the object code of the Software or any part of the Software, or otherwise attempt to derive the source code of the Software, except to the extent the permitted by law;
  - (f) remove, alter or obscure any of Our Marks, or any proprietary or restricted use notice on the Software or MySTCloud Service;
  - (g) use the MySTCloud Service for the purpose of building a competitive product or MySTCloud Service or copying its features or user interface;
  - (h) attempt to download or Access the object code or source code of the Software;
  - (i) use the MySTCloud Service to display, store, process or otherwise use any data (in any format, and whether readable by humans or by machines, and including data that is Customer Data) that, in Our opinion:
    - (i) infringes any person's Intellectual Property Rights, right to privacy, right to keep confidential information confidential, right to publicity or induces any person to breach a contract;
    - (ii) is unlawful (including breaching laws relating to the wrongful distribution of email or other electronic messages "spam"), discriminatory, derogatory, defamatory, slanderous, malicious, obscene, contains child pornography or is immoral;
    - (iii) contains any virus, Trojan horse or other malicious code, or is used to gain unauthorised access to, does harm to, wrongfully intercepts, expropriates, accesses or uses for any wrongful purpose, any person's hardware, software, network or data;
    - (iv) wrongly identifies, or disguises, the sender or place of origin of any communication;
    - (v) contains links to any other website that contains information that is of a type described in this section (i);

- (vi) exceeds “fair use” by using a disproportionate or inappropriate amount of the infrastructure or resources that are used to operate the MySTCloud Service;
  - (j) access, monitor or copy any content of the MySTCloud Service using any robot, spider, scraper or automated process or manual process, or deep link or any part of the MySTCloud Service;
  - (k) bypass or circumvent, or attempt to bypass or circumvent any measure that is designed to limit access to any part of the MySTCloud Service, including any Service Management Functionality;
  - (l) frame, mirror or otherwise include any part of the MySTCloud Service in any other website or application;
  - (m) use the MySTCloud Service in any way that could endanger, disable, impair or compromise Our systems or security, or interfere with other users;
  - (n) allow any part of the MySTCloud Service to become the subject of any charge, lien, encumbrance or security interest; or
  - (o) deal in any other manner with any or all of Your rights and obligations under this Agreement.
- 3.2 You acknowledge and agree that:
- (a) the MySTCloud Service includes comprehensive audit and verification features, which track and record individual’s use of the MySTCloud Service in detail;
  - (b) We may inspect the usage logs, audit and verification features in the MySTCloud Service for the purposes of ensuring that You are complying with the terms of this Agreement; and
  - (c) We may delete the relevant Customer Data and/or suspend or prevent Access to the MySTCloud Service if:
    - (i) You breach the provisions of section 3.1(i) or the law; or
    - (ii) We act in good faith to comply with Our understanding of the law as it relates to requiring Us to delete or not display or publish certain data.

---

## 4 PROFESSIONAL SERVICES

- 4.1 From time to time You may request Us to provide You with Professional Services. Where We agree to provide Professional Service You and Us will sign an SOW that sets out the details of the Professional Services and the Fees payable for those Professional Services. Unless stated otherwise on an SOW, all Professional Service will be provided on a time and materials basis and You must pay for all the time We spend providing the Professional Service (whether greater than or less than any estimate that We provide), and any expenses, which will be charged in accordance with Our then current rates and expense policy.
- 4.2 We may request that You sign Our consultant’s time sheets and expense claim forms. If You sign the time sheet and/or the expense claim form this signifies Your acceptance of the Professional Services performed during the time set out on the time sheet, and that You will pay the expenses set out on the expense claim.
- 4.3 Where We are providing Professional Services You must:
- (a) provide Us with the necessary facilities, equipment and resources to enable Us to perform the Professional Services;
  - (b) provide Us with complete and accurate information in a timely manner as may be needed to facilitate Us performing the Professional Services;
  - (c) ensure that where there are multiple stakeholders within Your organization who have an interest in the Professional Services, the person that is dealing with Us is authorized to represent the views of all Your stakeholders, has obtained those views prior to providing information or instructions to Us, and provides information or instructions that are Your organization’s single authorized position;
  - (d) make available appropriately trained personnel in a timely manner who are capable of answering Our questions; and
  - (e) promptly make any decisions needed by Us to perform the Professional Services.
- 4.4 You acknowledge and agree that a failure to meet the obligations in section 4.3 may result in delays in the provision of the Professional Services. We are not responsible for any such delays. We are entitled to charge You for any time or expenses incurred as a result of Your failure to comply with its obligations under this Agreement, including those in section 4.3.

- 4.5 If the Professional Services are performed at Your offices, You must provide office space and facilities to Our personnel commensurate with those provided to Your own employees of similar standing.
- 4.6 You warrant that You have the authority to allow Us and/or Our contractors to use any facilities, equipment, resources and/or Intellectual Property Rights that You provide to Us or Our contractors for use in connection with performing the Professional Services.
- 4.7 You must provide a safe place to work for any of Our personnel that are working at Your site.
- 4.8 You must maintain an adequate data recovery system in order to facilitate the efficient restoration of data. You are responsible for taking effective back ups of data, and for ensuring that You have duplicate copies of all data that is provided to Us during any Professional Services.

---

## 5 STANDARDS OF SERVICE

- 5.1 We will use all commercially reasonable efforts to ensure that the Hosted Environment and the Network are Available to the percentage set out in the relevant Service Plan in each full calendar month during the Service Period, subject to any Scheduled Maintenance or outage caused or contributed to by any Reasonable Excuse.
- 5.2 We shall measure Availability over each full calendar month and will determine the calculation method for the Availability percentage and Our calculation shall bind the parties conclusively.
- 5.3 We will schedule to perform all Scheduled Maintenance between 8:00 pm GMT on a Saturday and 6:00 am GMT on the following Sunday. We will use all commercially reasonable efforts to ensure that Scheduled Maintenance does not exceed 4 hours per calendar month.
- 5.4 We warrant to You that any Professional Service will be performed, and any Deliverable will be provided:
  - (a) with due skill and care; and
  - (b) in a timely manner.
- 5.5 If You believe that any MySTCloud Services, Professional Service or any Deliverables are not provided in accordance with this Agreement, You must give Us written notice of the deficiency within 14 days of the date when the deficiency occurred and We must, at Our option and cost, rectify the deficiency (including by providing a workaround), re-perform the MySTCloud Service, Professional Service or correct the Deliverable or refund the Fee paid for the deficient MySTCloud Service, Professional Service or Deliverable. This is Our entire liability and Your sole remedy for any breach of:
  - (a) sections 5.1 or 5.4; or
  - (b) any other obligation relating to the performance of the MySTCloud Service, Professional Service or the supply of any Deliverable.
- 5.6 IN SOME COUNTRIES IT IS NOT LAWFUL TO EXCLUDE CERTAIN WARRANTIES AND/OR SOME WARRANTIES ARE REQUIRED TO BE PROVIDED BY LAW. WE DO NOT SEEK TO EXCLUDE ANY SUCH WARRANTIES, AND THIS AGREEMENT MUST BE INTERPRETED SUBJECT TO SUCH STATUTORY REQUIREMENTS.
- 5.7 OTHER THAN THE PROVISIONS IN SECTIONS 5.1 AND 5.4, AND SUBJECT TO SECTION 5.5, THE MYSTCLOUD SERVICE, PROFESSIONAL SERVICE AND ANY DELIVERABLE IS PROVIDED "AS IS" AND WITHOUT ANY OTHER WARRANTY OR REPRESENTATION, AND WE DISCLAIM ALL WARRANTIES, CONDITIONS AND REPRESENTATIONS OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, INCLUDING IMPLIED WARRANTIES AND CONDITIONS OF MERCHANTABILITY, MERCHANTABILITY OR SATISFACTORY QUALITY OR FITNESS FOR A PARTICULAR PURPOSE, WHETHER ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM A COURSE OF DEALING OR USES OF TRADE.

---

## 6 FEES AND TAXES

- 6.1 Payment for MySTCloud Services
- 6.2 Where We enter into and/or renew an agreement for the MySTCloud Services using the process on Our Website then You must pay Us the Fees and related Taxes by Approved Card, in the currency stated on the Website, in accordance with the payment process on the Website. We will issue You with an invoice/receipt at the time of payment/receipt.
- 6.3 If You exceed the amount of any feature, benefit or service item that has a cap, maximum amount or other limitation on use in any relevant period set out in the Service Plan then:

- (a) You must purchase additional credits for that feature, benefit or service item in order to be able to use more of that feature, benefit or service item; or
  - (b) You will be automatically charged for, and You must pay for, the excess use at the rates set out in the Service Plan,
  - (c) in the manner set out in the Service Plan, or using such other payment process agreed by Us in writing.
- 6.4 We may, in particular cases, agree to You making payment outside of the process on Our Website. In this case You must pay Us the Fees and related Taxes either:
- (a) in advance on the first day of the period, by Approved Card or other form of payment supported by Us, in the currency stated on the Website. We will issue You with an invoice/receipt at the time of payment/receipt;
  - (b) if We agree in writing in Our discretion, You may pay the Fees and Taxes within 14 days of date of invoice, such invoice will be sent in advance of the MySTCloud Service being provided; or
  - (c) as otherwise maybe agreed in a Variation.
- 6.5 If We allow You to pay the Fees in instalments or in periodic payments, it is acknowledged and agreed that the entire amount (the sum of all instalments or periodic payments) is due on the first day of the MySTCloud Service (as applicable), but payment may be received in the instalments or periodic payments set out on Our Website. You must pay the instalment or periodic payment by the date of the installment or periodic payment set out on Our Website.
- 6.6 We may change the Fees for any MySTCloud Service at any time by updating the Fees on the Website. The updated Fees will apply to the relevant MySTCloud Service from the beginning of the next calendar month or from the end of any Minimum Term, whichever is the later.
- 6.7 Payment for Professional Services
- 6.8 Where We provide You with Professional Services then, unless stated otherwise on an SOW:
- (a) We will invoice You for any Professional Services performed, and expenses incurred in providing the Professional Services, in the month after the Professional Services were performed or the expense was incurred; and
  - (b) You must pay these Fees, expenses and Taxes within 14 days of date of invoice.
- 6.9 Payment issues for MySTCloud Services and Professional Services
- 6.10 All amounts that are payable under this Agreement by You are non-cancellable and non-refundable and must be paid without set off or deduction. All payments made by You under this Agreement must be made free and clear and without deduction for any and all present and future Taxes. Payments due to Us under the Agreement must be increased so that amounts received by Us, after provisions for Taxes and all Taxes on such increase, will be equal to the dollar amounts required under the Agreement, as if no Taxes were due on such payments.
- 6.11 Where the Fees, expenses and Taxes are denominated in a currency other than the currency that is used as the default currency of Your Approved Card (i.e. Your Approved Card is not issued in the country which uses the currency of payment), You agree:
- (a) to pay any charge from the provider of the Approved Card for an international transaction;
  - (b) to use the exchange rate used by the provider of the Approved Card for the conversion of the Fees, Taxes or other amounts payable under this Agreement into the currency We use;
  - (c) that the net amount that is to be received by Us must always be the Fees, Taxes and other amounts that are dominated in the local currency set out in this Agreement or on the Website (as applicable).
- 6.12 You irrevocably authorise Us to deduct from any Approved Card that You have used to pay any amount under this Agreement or for which You have provided the details to Us, any:
- (a) Fees and Taxes that are due under this Agreement;
  - (b) charge backs or fees, including any related Taxes, incurred by Us for any failed transaction from the Approved Card, as well as Our then current administration fee for dealing with any failure to receive payment; and
  - (c) amount payable as damages, losses or expenses, or any amount payable under an indemnity, arising out of or in connection with this Agreement.
- 6.13 If there is any failure to make payment by the Approved Card by the due date for any reason, including that the Approved Card ceases to be valid, ceases to be authorised for debiting any amount stated in this Agreement or there is insufficient funds in the relevant account, then You must within 7 days:

- (a) provide an alternative Approved Card and authorise all amounts due to be deducted from that Approved Card; and/or
  - (b) make payment of all amounts due by another payment method agreed with Us.
- 6.14 With Your agreement We may charge the Fees, expenses and Taxes in a currency other than the currency used to denominate the Fees, expenses and Taxes in the Service Plan. In this case We will convert the amounts payable using the same exchange rate that We use internally in our own financial reporting.

---

## 7 TRADE MARKS

- 7.1 You acknowledge and agree that We are the owner and/or licensor of Our Marks and that all goodwill arising out of Your use of Our Marks under this Agreement shall inure to Us. You will not acquire any right to, or interest in, any of Our Marks. You must not at any time or in any way indicate Your ownership of, or any right in, Our Marks and You must not contest the right of Us or any of Our Affiliates to the use of any of Our Marks.
- 7.2 You agree to allow reference to You and our relationship under the Agreement in Our marketing presentations, marketing materials, lists of customers and websites, as well as in discussion with prospective resellers and customers, and industry/financial analysts. We may use Your logos and trade marks in connection with such materials and websites, with Your prior written consent, such consent not to be unreasonably withheld.

---

## 8 PROPRIETARY RIGHTS

- 8.1 As between You and Us, You own all Customer Data.
- 8.2 You grant Us, Our Affiliates and their respective contractors the right to use, copy, modify and otherwise deal with any Customer Data in so far as is necessary, convenient or desirable for Us to perform Our obligations, or exercise Our rights, under this Agreement or for Us to meet any obligation under the law.
- 8.3 All Intellectual Property Rights:
  - (a) that are created by any person that are adaptations, translations and derivative works in the Software or MySTCloud Services;
  - (b) in any Professional Service or Deliverables that are created by Us, Our Affiliates and/or their respective contractors, and any adaptations, translations and derivative works of any of them,
  - (c) are and shall remain the exclusive property of Us (and Our licensors, if any) or shall vest in or be transferred to Us immediately upon creation, as the case may be.
- 8.4 Subject to the payment of all Fees, expenses and Taxes due under the relevant SOW, We grant You a non-exclusive, non-transferrable right to use, copy, adapt and translate any Deliverable provided under the relevant SOW for processing Your own internal data, at no additional cost.
- 8.5 Except for the rights granted by Us to You under this Agreement:
  - (a) We and Our licensors, if any, reserve all right, title and interest in or to the Software, MySTCloud Services, Professional Services and any Deliverables and all Intellectual Property Rights in them;
  - (b) no right, title or ownership interest in or to the Software, MySTCloud Services, Professional Services and any Deliverables whether by implication, estoppel or otherwise, is granted, assigned or transferred to You under or in connection with this Agreement.
- 8.6 You acknowledge and agree that the unauthorised disclosure, use or copying of the Software, MySTCloud Services, Professional Services and/or any Deliverables may cause Us serious financial loss that may not be adequately compensated by monetary damages. Accordingly, in the event of any unauthorised disclosure, use or copying of the Software, MySTCloud Services, Professional Service and any Deliverables, You agree that We shall have the right to seek injunctive relief to stop such unauthorised disclosure, use or copying.
- 8.7 If You provide Us with any feedback, comments or suggestions relating to the Our products or MySTCloud Services, Professional Services and/or Deliverables (**Feedback**), You grant Us an irrevocable, non-cancellable, worldwide, royalty-free, license to use, copy, adapt, translate, create derivative works from, sub-license or otherwise exploit in any way (including without hindrance, restriction or subject to any exercise of any person's moral rights) that Feedback for any purpose, including to assist Us to develop or improve current products or MySTCloud Services, Professional Service and any Deliverables or to assist Us develop or improve future products and services.

---

## 9 CONFIDENTIAL INFORMATION AND PRIVACY

### Confidential Information

- 9.1 The Recipient must not use any of the Discloser's Confidential Information except in connection with the performance of its obligations set out in this Agreement.
- 9.2 The Recipient must not disclose the Discloser's Confidential Information to any third party without obtaining the Discloser's prior written consent, provided that the Recipient may disclose the Discloser's Confidential Information to:
- (a) its employees, agents and contractors, and those of any of its Affiliates, who have entered into a written agreement with the Recipient that is no less protective of the Discloser's Confidential Information than this Agreement provided those persons have a need to know such information for the purposes of this Agreement;
  - (b) its lawyers, bankers, auditors, accountants and insurers, who have a need to know the information in order to provide professional advice to the Discloser relating to this Agreement.
- 9.3 You must ensure that each person who is issued with a password to access the MySTCloud Service does not disclose their password to any other person.
- 9.4 The Recipient must use, and must ensure that any person to whom it is permitted by this Agreement to disclose the Discloser's Confidential Information to uses, the same measures to protect the Discloser's Confidential Information as it uses to protect its own confidential information, but in no event less than reasonable measures.
- 9.5 The restrictions of this section 9 shall not apply to information that:
- (a) is independently developed by the Recipient without any access to the Confidential Information of the Discloser;
  - (b) becomes known to the Recipient without restriction, from a third party who, to the Recipient's knowledge, was not bound by a confidentiality agreement with the Discloser, or otherwise prohibited from disclosing the information to the Recipient, or had the right to disclose it;
  - (c) was available to the Recipient on a non-confidential basis prior to disclosure by the Discloser;
  - (d) was lawfully in the possession of the Recipient before the information was disclosed to it by the Discloser;
  - (e) is or becomes in the public domain through no act or omission of the Recipient;
  - (f) the parties agree in writing is not confidential or may be disclosed; or
  - (g) is required to be disclosed under an order or requirement of a court, administrative agency, or other governmental body (but only to the minimum extent required to comply), provided however, that Recipient shall provide prompt notice to Discloser of any potential disclosure and shall use its reasonable efforts to prevent disclosure of such information.

### Privacy

- 9.6 Each party must:
- (a) comply with the requirements of the any Privacy Law in the country in which the party (and/or the individual about whom the Personal Information relates) is located, and in any country to which the Personal Information is to be sent;
  - (b) only use, manipulate, store, process and handle Personal Information for the purposes of performing its obligations, or exercising its rights, under this Agreement or as may be required by law;
  - (c) take all reasonable steps to:
    - (i) ensure that the Personal Information that it holds is accurate, up to date and complete;
    - (ii) protect the Personal information from misuse, interference, loss, damage, unauthorised access, modification or disclosure, unlawful use or processing, including by taking appropriate technical and organisational measures;
  - (d) promptly delete Personal Information that is no longer required for a permitted purpose under this Agreement or the law;
  - (e) allow the individual about whom Personal Information is kept to obtain access to that Personal Information, inspect it and ensure that it is kept accurate and up to date (including requiring errors to be corrected), at no cost to the individual;



- (f) ensure that at the time the party collects of the Personal Information from the individual, that the party has that individual's consent to the both parties' collection, use, manipulation, storage, processing, handling and transfer overseas of the Personal Information for any purposes that are reasonably contemplated by this Agreement.
- 9.7 You warrant to Us that You have obtained the express informed consent from each individual about whom We will obtain Personal Information from You in connection with this Agreement for Us, Our Representatives and their permitted successors, assignees and sub-licensees to use that individual's Personal Information in any manner that may be reasonably contemplated by this Agreement and/or as stated in Our privacy policy (as available on Our Website), including a transfer overseas to the countries stated in that privacy policy.
- 9.8 You consent to:
- (a) Us obtaining from a credit reporting agency, or any person You authorise Us to contact, any of Your personal or corporate information, including information relating to creditworthiness, credit standing, credit history or credit capacity (**Credit Information**), for the purposes of assessing Your creditworthiness and/or deciding whether to grant or continue to provide credit approval to You; and
- (b) the provision by Us of any of Your personal or corporate information, including Credit Information and any information concerning the status of your account or any default, to a credit reporting agency, credit provider or person you authorise Us to contact, in connection with Our use of the credit reporting agency's services, on the understanding that such information may be held by the credit reporting agency to provide its/their credit reporting services (including the provision of such services to other customers of the credit reporting agency). You consent to Us being given a consumer credit report to collect overdue payment on commercial credit.

---

## 10 LIMITATION OF LIABILITY

- 10.1 TO THE EXTENT PERMITTED BY LAW, AND SUBJECT TO SECTION 10.2, OUR LIABILITY TO YOU FOR ANY CLAIM MADE UNDER ANY THEORY OF LAW WHETHER IT BE IN CONTRACT (INCLUDING UNDER AN INDEMNITY), TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY OR OTHERWISE, ARISING OUT OF OR IN CONNECTION WITH THE SOFTWARE, MYSTCLOUD SERVICES, PROFESSIONAL SERVICES, DELIVERABLES, THIS AGREEMENT OR THE RELATIONSHIP BETWEEN THE PARTIES, SHALL BE LIMITED TO THE GREATER OF ONE THOUSAND US DOLLARS (US\$1,000) OR THE FEES PAID FOR THE MYSTCLOUD SERVICE, PROFESSIONAL SERVICE OR DELIVERABLE FROM WHICH THE CLAIM AROSE IN THE 6 MONTHS PRIOR THE DATE THAT THE CLAIM FIRST AROSE
- 10.2 WE WILL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR EXPENSE WHICH IS INDIRECT, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES, NOR FOR ANY LOST PROFITS, LOST REVENUE, FAILURE TO REALIZE EXPECTED SAVINGS, LOST OR DAMAGED DATA, BUSINESS INTERRUPTION OR LOSS OF GOODWILL, EVEN IF WE HAVE BEEN ADVISED OF, KNEW OF, OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH LOSS, DAMAGE OR EXPENSE.
- 10.3 YOU ACKNOWLEDGE AND AGREE THAT OWING TO THE NATURE OF THE SOFTWARE, MYSTCLOUD SERVICES, PROFESSIONAL SERVICES OR DELIVERABLES WE DO NOT REPRESENT OR WARRANT THAT:
- (a) THE SOFTWARE, MYSTCLOUD SERVICES, PROFESSIONAL SERVICES OR DELIVERABLES WILL MEET YOUR OR ANY USERS' PARTICULAR NEEDS OR PURPOSES;
- (b) THE SOFTWARE, MYSTCLOUD SERVICES, PROFESSIONAL SERVICES OR DELIVERABLES WILL BE FIT FOR ANY PARTICULAR PURPOSE OR BE OF MERCHANTABLE QUALITY;
- (c) ACCESS TO THE SOFTWARE, MYSTCLOUD SERVICES OR DELIVERABLES WILL BE CONTINUOUSLY AVAILABLE; OR
- (d) THE SOFTWARE, MYSTCLOUD SERVICE, PROFESSIONAL SERVICE OR DELIVERABLE WILL BE ERROR FREE.
- 10.4 YOU MUST INDEMNIFY US, OUR AFFILIATES AND ALL THEIR RESPECTIVE CONTRACTORS AND PAY ANY LOSS, DAMAGE OR EXPENSE (INCLUDING REASONABLE LAWYERS'/ATTORNEY'S FEES) SUFFERED OR INCURRED BY ANY OF THEM ARISING OUT OF OR IN CONNECTION WITH:
- (a) BREACH OF ANY OF THE PROVISIONS IN SECTIONS 0, 2.3, 3.1, ANY SECTION THAT PROVIDES YOU WITH AN OBLIGATION TO MAKE PAYMENT TO US, 13.5 OR 13.6;
- (b) ANY ACTION TAKEN BY US IN CONNECTION WITH SECTION 3.2(c),

- 10.5 EXCEPT TO THE EXTENT THAT THE LOSS, DAMAGE OR EXPENSE WAS DIRECTLY CAUSED BY OUR BREACH OF CONTRACT OR NEGLIGENCE.

---

## 11 INTELLECTUAL PROPERTY RIGHT INDEMNIFICATION

- 11.1 We undertake at Our own expense to indemnify and defend You or, at Our option, settle any claim or action brought against You alleging that the use of the MySTCloud Service or any Deliverable in accordance with this Agreement infringes any Intellectual Property Right that is enforceable in Australia, Canada, any country in the European Union, Hong Kong, Japan, New Zealand, Norway, Singapore, Switzerland or the United States (an “**Infringement Claim**”) and shall be responsible for any losses, damages, expenses or costs (including reasonable lawyers’/attorneys’ fees) incurred by, or awarded against You as the result of, or in connection with, any such Infringement Claim, provided that:
- (a) You promptly notify Us of the Infringement Claim in writing, specifying the nature of the claim in reasonable detail and providing access to, and copies of, documents, software any other material, that are relevant to the Infringement Claim, as well as providing prompt access to any Representative who may be relevant to Our defense of the Infringement Claim;
  - (b) You do not make any admission of liability, agreement or compromise in relation to the Infringement Claim without Our prior written consent;
  - (c) You grant Us the sole right to defend, negotiate and settle the Infringement Claim, at Our expense;
  - (d) You provide Us with reasonable assistance, at Our expense, to defend, negotiate and settle the Infringement Claim.
- 11.2 We will have no obligation under this section 11 or otherwise with respect to any Infringement Claim based upon:
- (a) any use of the Software, MySTCloud Service or Deliverable not in accordance with this Agreement or documentation provided by Us;
  - (b) the combination, operation or use of the Software, MySTCloud Service or Deliverable with any other product, equipment, business method, software (including Third Party Software) or data; or
  - (c) any modification of the Software, MySTCloud Service or Deliverable by any person other than Us or Our authorised agents or contractors.
- 11.3 If an Infringement Claim is made based on one of the exclusions in section 11.2, You must indemnify Us and pay for all losses, damages, expenses or costs (including reasonable lawyers’/attorneys’ fees) We suffer or incur arising out of or in connection with such an Infringement Claim.
- 11.4 If any Infringement Claim is made, or in Our opinion is likely to be made, then We may (at Our sole option and expense) either:
- (a) procure for You the right to continue using the affected Software, MySTCloud Service or Deliverable, or substantially similar software or service that does not substantially affect the functionality or features of the Software, MySTCloud Service or Deliverable, in accordance with this Agreement;
  - (b) replace or modify the affected Software, MySTCloud Service or Deliverable so that it becomes non-infringing but performs substantially the same functions or has the same features; or
  - (c) IF NEITHER (a) OR (b) IS COMMERCIALY REASONABLE, AS DETERMINED IN OUR DISCRETION, THEN WE MAY TERMINATE YOUR RIGHTS TO USE THE AFFECTED SOFTWARE, MYSTCLOUD SERVICE OR DELIVERABLE AND PAY DAMAGES OF UP TO AN AMOUNT EQUAL TO THE GREATER OF ONE THOUSAND US DOLLARS (US\$1,000) OR THE FEES PAID FOR THE RELEVANT MYSTCLOUD SERVICE OR DELIVERABLE IN THE 6 MONTHS PRIOR TO THE DATE THAT THE CLAIM FIRST AROSE.
- 11.5 THIS SECTION 11 STATES OUR ENTIRE LIABILITY AND YOUR SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIMS RELATED TO ANY INFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHTS IN RESPECT OF THE SOFTWARE, MYSTCLOUD SERVICES, PROFESSIONAL SERVICES OR DELIVERABLES.

---

## 12 TERMINATION

- 12.1 We may immediately terminate this Agreement and/or any SOW and/or suspend Access to the MySTCloud Service by giving You written notice if You:
- (a) breach any of the provisions of sections 0, 2.3, 3, 7.1, 8.3, 9, 13.5 and 13.6;

- (b) breach any other provision of the Agreement and You do not remedy it within 14 days of Us providing You written notice of the breach;
  - (c) cease to carry on business, are unable to pay Your debts as they fall due, file for bankruptcy, become or are declared insolvent, are the subject of any proceedings (not dismissed within 30 days) related to liquidation, insolvency or appointment of a receiver, controller, managing controller, liquidator or administrator or similar officer in relation to You, make an assignment for the benefit of all or substantially all of its creditors or You suffer any similar event in any jurisdiction;
  - (d) if You are a partnership, You have the partnership dissolved or wound up (or a similar event occurs to You in Your jurisdiction); or
  - (e) merge with another entity, sell substantially all of Your assets or You are subject to a change of control. A "change of control" shall be deemed to occur when an entity acquires fifty percent (50%) or more of Your voting shares or equity interest or fifty percent (50%) or more of Your assets, in the event of a change of a majority of Your Board of Directors (or majority of the partners if a partnership) or if there is any other effective change of control.
- 12.2 In addition to Your right to terminate the Agreement for convenience as set out in the section 2.2, You may immediately terminate this Agreement for cause by giving Us written notice if We:
- (a) breach any provision of this Agreement and We do not remedy it within 30 days of You providing Us written notice of the breach; or
  - (b) cease to carry on business, are unable to pay Our debts as they fall due, file for bankruptcy, become or are declared insolvent, are the subject of any proceedings (not dismissed within 30 days) related to liquidation, insolvency or appointment of a receiver, controller, managing controller, liquidator or administrator or similar officer in relation to Us, make an assignment for the benefit of all or substantially all of its creditors or We suffer any similar event in any jurisdiction.
- 12.3 You may immediately terminate an SOW for cause by giving Us written notice if We breach any provision of this Agreement in relation to that SOW and We do not remedy it within 30 days of You providing Us written notice of the breach.
- 12.4 If this Agreement terminates:
- (a) any right to Access and use the MySTCloud Service terminates immediately;
  - (b) any unpaid instalments or periodic payments must be paid immediately;
  - (c) each party must immediately return to the other (or at the other party's request destroy) any of the other's Confidential Information.
- 12.5 If an SOW is terminated (but the Agreement is not terminated):
- (a) any right to Access and use the MySTCloud Service is not affected;
  - (b) each party must immediately return to the other (or at the other party's request destroy) any of the other's Confidential Information that relates to the SOW that is terminated;
  - (c) by Us, then Your license to use the Deliverables from that SOW is also immediately terminated.
- 12.6 You are solely responsible for ensuring that You have extracted any of Your information, including Customer Data that is in the MySTCloud Service prior to the end of the Term. We may, but are under no obligation to, delete all Your information, including Customer Data that is in the MySTCloud Service at any time after the end of the Term.
- 12.7 Any termination of this Agreement or any SOW shall not prejudice, limit or restrict any other rights or remedies either party may have arising prior to such termination. To the extent permitted by law, We shall be under no obligation to refund any amounts paid by You for any of the MySTCloud Services or Professional Services that have been provided or performed prior to any termination of this Agreement.

---

## 13 GENERAL

### Notices

- 13.1 Any notice that is given under this Agreement:
- (a) by Us; may be:
    - (i) posted using pre-paid post to You at any address that You have provided Us for sending any invoice or Your registered office;
    - (ii) emailed to You at any email address provided by You;

- (iii) posted on the Website; or
- (iv) included on any invoice (which may be emailed or posted to You);
- (b) by You; must be posted to Us at the address stated on the Our Website as Our global head office and addressed to the Chief Executive Officer and copied to the General Counsel.

- 13.2 A notice is deemed to be received:
- (a) when posted with pre-paid post within the same country; within 3 business days of the date when it was posted;
  - (b) when posted with pre-paid post internationally, within 7 business days of the date when it was posted;
  - (c) when emailed; within 1 business day of the time that the email was sent, provided no notice of failure has been received by the sender within that business day; or
  - (d) within 10 days of being posted on the Website. You are responsible for ensuring that You check Our Website regularly to see any notice that is posted there.

#### **Relationship of Parties**

- 13.3 The parties to this Agreement are independent contractors. Nothing in this Agreement shall be deemed to create an employment, association, partnership, fiduciary or joint venture relationship between the parties, constitute any party the agent of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party. Except as stated in this Agreement, neither party is authorised to act as the legal agent of the other. Our Affiliates are third party beneficiaries under this Agreement and are entitled to rely on all the rights, representation, warranties and covenants made in this Agreement by You. There are no third party beneficiaries on behalf of You, intended or unintended.

- 13.4 Compliance with Laws

- 13.5 You must comply with all laws which are relevant to You performing its obligations under this Agreement.

#### **Assignment**

- 13.6 You must not assign or transfer this Agreement or any rights or obligations under this Agreement, in whole or part, without Our prior written consent.
- 13.7 We may assign or transfer this Agreement, in whole or part, without Your consent. This Agreement will bind and inure to the benefit of each party's permitted successors and assigns. Notwithstanding section 9, We may disclose any of Your Confidential Information or Personal Information which is reasonably necessary to affect any assignment or transfer.

#### **Waiver**

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

#### **Remedies**

- 13.9 Except as specifically provided otherwise in this Agreement, the rights and remedies provided under this Agreement are cumulative and in addition to, and not exclusive of, any rights or remedies provided by law.

#### **Severability**

- 13.10 If any part of this Agreement is determined to be invalid, illegal or unenforceable by any court or competent authority, such part will be severed from the remainder of the Agreement and the remaining provisions will continue in force.
- 13.11 If any invalid, unenforceable or illegal provision of this Agreement would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

#### **Force Majeure**

- 13.12 Except for Your obligations to pay Us under this Agreement, neither party shall be in breach of this Agreement nor liable to the other party for any failure or delay in performance caused by events beyond its reasonable control.

#### **Agreement**

- 13.13 Subject to sections 2.2 and 2.11, this Agreement, or any part of it, may be varied by the parties agreeing to the Variation in writing (and the Variation will be binding when both parties have signed the Variation).
- 13.14 The parties are entitled to rely on any notice or communication in electronic format, including any facsimile or email, that on its face appears authentic, and that has the purported author's name on it to the same extent as if it were a document written by the author. The parties consent to this Agreement being signed or varied through electronic communication.
- 13.15 TO THE EXTENT PERMITTED BY LAW THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES REGARDING THE SUBJECT MATTER AND SUPERSEDES ALL PRIOR OR CONTEMPORANEOUS AGREEMENTS, ARRANGEMENTS, UNDERSTANDINGS AND COMMUNICATIONS, WHETHER WRITTEN OR ORAL.
- 13.16 All sections which naturally survive termination of the Agreement will survive termination of this Agreement.

#### **Export**

- 13.17 You acknowledge and agree that the Software or Deliverables may be subject to applicable export and import laws. You agree not to export the Software, Deliverables or any direct product thereof, directly or indirectly in violation of these laws, nor will they be used for any purpose prohibited by these laws, including nuclear, chemical or biological weapons proliferation.

#### **Governing Law**

- 13.18 The Uniform Computer Information Transactions Act (“**UCITA**”) will not apply to this Agreement regardless of when and how it is adopted, enacted and further amended under the laws of the applicable jurisdiction. If UCITA is adopted and enacted in the applicable jurisdiction and, as a result of such adoption and enactment or any subsequent amendment, the parties agree to take such action as may be reasonably required, including amending the Agreement accordingly.
- 13.19 If You are located in Australia or any country other than the United States of America then the Agreement will be governed by the laws of the State of Queensland, without regard to its conflict of law principles. The parties submit to the exclusive jurisdiction of the court in the State of Queensland, Australia. In addition the provisions of section 15 may be included in Your Agreement.
- 13.20 If You are located in the United States of America then the Agreement will be governed by and construed in accordance with the applicable laws of the State of California. Each party irrevocably agrees that any legal action, suit or proceeding brought by it in any way arising out of this Agreement must be brought solely and exclusively in, and will be subject to the service of process and other applicable procedural rules of, the State or Federal court in the County of San Mateo, California, and each party irrevocably submits to the sole and exclusive personal jurisdiction of the courts in the County of San Mateo, California generally and unconditionally, with respect to any action, suit or proceeding brought by it or against it by the other party. Notwithstanding this section, claims for equitable relief may be brought in any court with proper jurisdiction within the United States. BOTH PARTIES AGREE TO WAIVE ANY RIGHT TO HAVE A JURY PARTICIPATE IN THE RESOLUTION OF THE DISPUTE OR CLAIM, WHETHER BASED IN CONTRACT, TORT OR OTHERWISE, BETWEEN ANY OF THE PARTIES ARISING OUT OF, CONNECTED WITH, RELATED TO OR INCIDENTAL TO THE AGREEMENT.

---

## **14 DEFINITIONS**

- 14.1 In this Agreement the following capitalized words have the following meaning given to them, unless the context requires otherwise.
- 14.2 **Access** means obtaining access to the MySTCloud Service via the internet.
- 14.3 **Agreement** means the terms and conditions in this document and:
- (a) in relation to the MySTCloud Services: the Contract Details and the Service Plan completed or selected by You when You sign up for the MySTCloud Service on Our Website, as may be amended from time to time;
  - (b) in relation to the Professional Service: any SOW that is signed by You and Us.
- 14.4 **Affiliate** means:
- (a) in relation to Us: any company or other legal person that, whether alone or together with another person:
    - (i) trades under a name that includes “Rubicon Red” or “RR”; or
    - (ii) controls, or is controlled by, directly or indirectly by any means, any company or other legal person that trades under a name that includes “Rubicon Red” or “RR”; or

- (b) in relation to You or any other entity referred to in this Agreement: any entity that is under the effective control of the entity that ultimately has effective control of the first-mentioned entity.
- 14.5 **Approved Card** means any Visa, MasterCard, debit card, charge card or other payment mechanism that We support from time to time as an acceptable payment method.
- 14.6 **Availability (and Available)** means any period when the Hosted Environment on which the Software is running and the Network are operating in accordance with the manufacturer's or supplier's documentation.
- 14.7 **Confidential Information** means any non-trivial information however recorded, preserved, disclosed or communicated (whether directly, indirectly, orally or by writing), disclosed by either party or its Representatives to the other party or its Representatives in connection with this Agreement that, if disclosed in writing is marked as "Confidential" or "Proprietary," or, if disclosed orally is identified as "Confidential" or "Proprietary" at the time of disclosure and is specifically identified as confidential in a written document provided by Discloser to Recipient within thirty (30) days after the oral disclosure, or which is, or ought to have been, understood by the parties, using reasonable business judgment, to be confidential.
- 14.8 **Contract Details** means Your identity, the identity of Your employer, billing details and other details that are selected or completed by You at the time when You complete the sign on process to the MySTCloud Service on the Website or at the time that You make a change using the Service Management Functionality.
- 14.9 **Customer Data** means any software, materials, code, data, text (whether or not perceptible by users), metatags, multimedia information (including sound, data, audio, video, graphics, photographs, or artwork), e-mail, chat room content, bulletin board postings, or any other items or materials that are provided by or otherwise permitted by, You to be entered in, or processed by, the MySTCloud Service.
- 14.10 **Deliverable** means any materials that are required to be provided to You as a result of the performance of any Professional Services.
- 14.11 **Discloser** means the party that makes a disclosure of Confidential Information.
- 14.12 **Effective Date** means the date when a user has selected "I Agree" as part of the sign on process in the MySTCloud Service.
- 14.13 **Fees** means:
- (a) in relation to the MySTCloud Services: the amount payable for the MySTCloud Service, including any features, benefits or other service items set out in the Service Plan, as well as any Fees for using an Approved Payment Mechanism, exclusive of Taxes, as set out on the Website;
  - (b) in relation to the Professional Services: the amounts payable under an SOW that are calculated in accordance with the SOW, exclusive of Taxes.
- 14.14 **MySTCloud Service** means:
- (a) being granted Access to the Software set out on the Service Plan, and any new version of the Software that may be implemented into the MySTCloud Service by Us, in Our discretion and related Online Help Documentation, from the Hosted Environment via the Network (but excludes the internet and any data center facility networking that connects the end users' device to Our Network);
  - (b) the provision of the website through which You Access the MySTCloud Service via the internet;
  - (c) any other feature, benefit or service item that is set out in the Service Plan.
- 14.15 **Hosted Environment** means the server and/or processing capacity operating system software, database and other equipment provided as part of the Hosted Environment, (whether using shared, virtual or dedicated software and/or equipment) on which the Software operates.
- 14.16 **Intellectual Property Rights** means copyright, moral rights, trade marks, design rights, service marks, patent, semiconductor or circuit layout rights, trade secrets, know-how, database rights or other rights in the nature of intellectual property rights (whether registered or unregistered), or any right to registration of such rights, existing in anywhere in the world, or protected by statute from time to time.
- 14.17 **Minimum Term** means the minimum period for which You must pay to Access and use the relevant MySTCloud Service, feature, benefit or service item.
- 14.18 **Network** means the telecommunications network comprised of equipment, wiring and circuits within and between the network backbone nodes (points of presence) and the servers in the Hosted Environment. The term Network does not include any:
- (a) circuits to a backbone node, customer premises or any network or equipment not owned or controlled by Us; or

- (b) third party networks or equipment not owned or maintained by Us, including connections to peer networks and the internet.
- 14.19 **Online Help Documentation** means the documentation related to the MySTCloud Service that is available online as part of the MySTCloud Service, which We may change from time to time, in Our discretion.
- 14.20 **Our Marks** means all trademarks, service marks, logos or other words or symbols identifying the Software, MySTCloud Services, Professional Services or Our business.
- 14.21 **Personal Information** means any information or data that is subject to any Privacy Law.
- 14.22 **Privacy Law** means any law, regulation or common law which governs the use of information that is about, identifies or can be used to identify, any identifiable individual, or which is generally understood in the relevant jurisdiction to protect an individual's privacy and/or to govern the collection, use, disclosure or transmission of personal information or data.
- 14.23 **Professional Service** means any ad hoc consultancy or training service that may be agreed from time to time during the Term. The details of Professional Services, Fees and Taxes will be agreed in an SOW that is signed by the parties.
- 14.24 Reasonable Excuse means:
- (a) a failure or degradation of performance or malfunction resulting from scripts, data, applications, equipment, infrastructure, software, penetration testing, performance testing, or monitoring agents directed or provided or performed by You;
  - (b) planned outages, Scheduled Maintenance or announced maintenance or maintenance windows, or outages initiated by Us at the request or direction of You for maintenance, activation of configurations, backups or other purposes that require the service to be temporarily taken offline;
  - (c) unavailability of management, auxiliary or administration services, including administration tools, reporting services, utilities, or other services supporting core transaction processing;
  - (d) outages occurring as a result of any actions or omissions taken by Us at the request or direction of You;
  - (e) outages resulting from Your equipment, Third Party Software, third party equipment or the data center infrastructure (including the data centers' network connections to our Network) not within Our sole control;
  - (f) events resulting from an interruption or shut down of the services due to circumstances reasonably believed by Us to be a significant threat to the normal operation of the services, the operating infrastructure, the data center from which the services are provided, access to, or the integrity of Customer Data (e.g., a hacker or a virus attack);
  - (g) outages due to system administration, commands, or file transfers performed by Your users or representatives;
  - (h) outages due to denial of service attacks, natural disasters, changes resulting from government, political, or other regulatory actions or court orders, strikes or labor disputes, acts of civil disobedience, acts of war, acts against parties (including carriers and Our other vendors) and other force majeure events;
  - (i) inability to access the services or outages caused by Your conduct, including negligence or breach of Your obligations under the Agreement, or by other circumstances outside of Our control;
  - (j) lack of availability or untimely response time of You to respond to incidents that require Your participation for source identification and/or resolution, including meeting Your responsibilities for any services;
  - (k) outages caused by failures or fluctuations in electrical, connectivity, network or telecommunications equipment or lines due to Your conduct or circumstances outside of Our control.
- 14.25 **Recipient** means the party that receives a disclosure of Confidential Information.
- 14.26 **Representatives** means the employees, agents, contractors of a party, or those of any Affiliate, and the professional representatives of a party providing advice in relation to the Agreement, including the lawyers, bankers, auditors, accountants and insurers of a party.
- 14.27 **Scheduled Maintenance** means the routine maintenance for the Software, Network and Hosted Environment that is recommended by the manufacturer or supplier of the Hosted Environment, Network or data center facility to prevent failures or defects, and includes any Software updates or new releases, and any updates, new releases, engineering changes or replacement/substitutions to any part of the Hosted Environment, Network or data center facility.

- 14.28 **Service Plan** means the description of the MySTCloud Services, the Service levels, the features, benefits or other service items, the Term, the Minimum Term (if any), any limitations of use, the Fees, including the metric used to calculate the Fees, related Taxes, and other details that are selected or completed by You at the time when You complete the sign on process to the MySTCloud Service on the Website or at the time that You make a change using the Service Management Functionality.
- 14.29 **Software** means the object code version of Our software program (including the Online Help Documentation) that is part of the MySTCloud Service, and any update and new release that may be made available by Us in Our discretion. The term Software does not include any Third Party Software.
- 14.30 **Statement of Work (SOW)** means a document that sets out the details of the Professional Services, Fees and Taxes that are to be acquired by You, which when agreed by both parties will be signed by each party. A SOW includes any Variation to the SOW.
- 14.31 **Taxes** includes goods and services taxes, sales taxes, duties, withholding taxes, levies, imposts, charges or duties levied by any federal, state or local government which arise out of or in connection with the Software, MySTCloud Services, Deliverables or this Agreement, and any interest, penalties or liabilities incurred on such amounts, but excludes taxes based on Our net income.
- 14.32 **Term** means the period for which You have acquired the right to Access the MySTCloud Service, which shall be a month unless set out otherwise in the Service Plan. The Term may be renewed in accordance with section 2.11.
- 14.33 **Third Party Software** means software that is owned by any person other than Us or Our Affiliates and which the MySTCloud Service is designed to integrate with and the details of which are set out in the Online Help Documentation.
- 14.34 **Time Period** means the maximum number of minutes/hours/calendar days/24 hour periods or other time based metric set out in the Service Plan for which You are entitled to Access the relevant MySTCloud Service, feature, benefit or service item.
- 14.35 **Variation** means any addition, deletion or substitution to any part of this Agreement that is made in accordance with this Agreement.
- 14.36 **You** (and other grammatical forms of You) means the entity referred to in section 1.2(b).
- 14.37 **We, Us, Our** means:
- (a) Rubicon Red LLC, if You are located in the United States of America;
  - (b) MyST Software Pty Ltd ABN 85 634 424 990 , if You are located in any country other than the United States of America.
- 14.38 **Website** means Our website, currently at [www.mystsoftware.com](http://www.mystsoftware.com).

---

## 15 AUSTRALIAN CONSUMERS

- 15.1 **Australian Consumer Law** means the *Competition and Consumer Act 2010 (Cth)*.
- 15.2 Where You are entitled to the benefits of the Australian Consumer Law, and You are accessing the Software under a “consumer contract” as defined by the Australian Consumer Law, then the provisions of this section 15 apply.
- 15.3 The Agreement, including sections 6.10, 10.1, 10.2, 11.5, 12.3, 13.1, 13.2 and 13.15 must be interpreted subject to the provisions of the Australian Consumer Law. Section 5 of the Agreement does not apply to You; You are entitled to the statutory guarantees provided under the Australian Consumer Law.
- 15.4 You may send us any notice relating to a claim under the Australian Consumer Law in accordance with the Australian Consumer Law.
- 15.5 You may also have the right to terminate the Agreement in accordance with Australian Consumer Law.

### WARRANTY AGAINST DEFECTS

- 15.6 Where the You are entitled to the benefits of the statutory guarantees under sections 54 to 59 and/or 60 to 62 of the Australian Consumer Law, then Regulation 90 (issued under that Act) applies.
- 15.7 Accordingly, Rubicon Red Pty Ltd provides You with the following information as is required by Regulation 90:

The services that are provided to remedy any defect in the MySTCloud Service, Professional Service or Deliverable are a “Warranty Against Defects” as defined in Regulation 90. These services are provided by Rubicon Red Pty Limited (ABN 17 138 910 371) of Suites 3-4, Level 1, 220 Melbourne Street, South Brisbane, Queensland 4101, telephone number 1300 799 959, email address [support@rubiconred.com](mailto:support@rubiconred.com).



In order to make use of this service You must contact Our support desk during the period of Your agreement using the web form on Our Website support webpages at support.rubiconred.com.

When You make use of these services, We will use Our commercially reasonable efforts to provide a remedy or a workaround for any defect in the MySTCloud Service, Professional Service or Deliverable in a time period that reflects the impact on Your business.

The costs for this service is included within the Fees stated in this Agreement. No additional fees are payable by You for this service. You are responsible for any expenses You incur in using this service.

***“Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.”***

The benefits that we provide to consumers under our Warranty Against Defects are in addition to any other rights or remedies a consumer may have in respect of these goods or services under the Australian Consumer Law.

15.8 Where You are entitled to a statutory guarantee under sections 54 to 59 of the Australian Consumer Law then to the extent that We fail to comply with such guarantee, Our liability for a failure to comply with such statutory guarantee is limited to one or more of the following, at Our option:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the repair of the goods;
- (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (d) the payment of the cost of having the goods repaired,

unless it is not fair or reasonable for Us to rely on this term of the Agreement.

15.9 Where You are entitled to a statutory guarantee under sections 60 to 62 of the Australian Consumer Law then to the extent that We fail to comply with such statutory guarantee, Our liability for a failure to comply with such statutory guarantee is limited to one of the following, at Our option:

- (a) supplying the services again; or
- (b) payment of the cost of having the services supplied again,

unless it is not fair or reasonable for Us to rely on this term of the Agreement.