

SMARTWAY2 LIMITED

and

CUSTOMER'S NAME

SOFTWARE AS A SERVICE SUBSCRIPTION AGREEMENT

Contents

Clause

1.	Interpretation	1
2.	Evaluation period	2
3.	User subscriptions	3
4.	Additional user subscriptions	5
5.	Services	5
6.	Customer data	6
7.	Third party providers	7
8.	Supplier's obligations	7
9.	Customer's obligations	7
10.	Charges and payment	8
11.	Proprietary rights	9
12.	Confidentiality	10
13.	Indemnity	10
14.	Limitation of liability	11
15.	Term and termination	12
16.	Force majeure	14
17.	Conflict	14
18.	Variation	14
19.	Waiver	14
20.	Rights and remedies	14
21.	Severance	15
22.	Entire agreement	15
23.	Assignment	15
24.	No partnership or agency	15
25.	Third party rights	15
26.	Notices	15
27.	Governing law	16
28.	Jurisdiction	16

Schedule

Schedule 1	Subscription Fees	Error! Bookmark not defined.
1.	Subscription Fees	Error! Bookmark not defined.
2.	Additional User Subscription Fees	Error! Bookmark not defined.
3.	Excess Storage Fees	Error! Bookmark not defined.
Schedule 2	Services	Error! Bookmark not defined.
Schedule 3	Subscription Term	Error! Bookmark not defined.
Schedule 4	Customer Order Form	Error! Bookmark not defined.

THIS AGREEMENT is made between Smartway2 Limited (incorporated and registered in England and Wales with company number 8853435) whose registered office is at Corner Cottage, Hempstead, Norwich, Norfolk NR12 0SH (**Smartway2 Ltd**) and the party having signed the Customer Order Form (defined below) or, as the case may be, having read and accepted a copy of these terms on the website www.smartway2.com (**Customer**).

Background

- (A) Smartway2 Ltd has developed certain software applications and platforms which it makes available to customers on a subscription basis.
- (B) The Customer wishes to use Smartway2 Ltd's service in its business operations.
- (C) Smartway2 Ltd has agreed to provide and the Customer has agreed to take and pay for Smartway2 Ltd's service subject to the terms and conditions of this agreement.

Agreed terms

1. Interpretation

- 1.1 The definitions and rules of interpretation in this clause apply in this agreement.

Authorised Users: those employees, agents and independent contractors of the Customer who are authorised by the Customer to use the Services and the Documentation, as further described in clause 3.2(d).

Business Day: a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

Confidential Information: information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in clause 12.5.

Customer Data: the data inputted by the Customer, Authorised Users, or Smartway2 Ltd on the Customer's behalf for the purpose of using the Services or facilitating the Customer's use of the Services.

Customer Order Forms: the customer order form set out at **Error! Reference source not found.** setting out the fees for the services.

Documentation: the document made available to the Customer by Smartway2 Ltd online via such web address notified to the Customer from time to time which sets out a description of the Services and the user instructions for the Services.

Effective Date: the date of this agreement.

Evaluation Period: the period of 30 days commencing on the date of this agreement.

Initial Subscription Term: the initial term of this agreement as set out in **Error! Reference source not found.**

Normal Business Hours: 9.00am to 5:30pm local UK time, each Business Day.

Renewal Period: the period described in clause 15.1.

Services: the subscription services provided by Smartway2 Ltd to the Customer under this agreement, as more particularly described in **Error! Reference source not found.**

Software: the online software applications provided by Smartway2 Ltd as part of the Services and associated mobile application software available for download through third party application stores.

Subscription Fees: the subscription fees payable by the Customer to Smartway2 Ltd for the User Subscriptions, as set out in paragraph **Error! Reference source not found.** of **Error! Reference source not found.** and/ or the Customer Order Form

Subscription Term: has the meaning given in clause 15.1 (being the Initial Subscription Term together with any subsequent Renewal Periods).

User Subscriptions: the user subscriptions purchased by the Customer pursuant to clause 10.1 which entitle Authorised Users to access and use the Services and the Documentation in accordance with this agreement.

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

- 1.2 Clause, schedule and paragraph headings shall not affect the interpretation of this agreement.
- 1.3 A person includes an individual, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.6 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 1.7 A reference to a statute or statutory provision is a reference to it as it is in force as at the date of this agreement.
- 1.8 A reference to a statute or statutory provision shall include all subordinate legislation made as at the date of this agreement under that statute or statutory provision.
- 1.9 A reference to writing or written includes faxes but not e-mail.
- 1.10 References to clauses and schedules are to the clauses and schedules of this agreement; references to paragraphs are to paragraphs of the relevant schedule to this agreement.

2. Evaluation period

- 2.1 Smartway2 Ltd grants the Customer a personal, non-transferable, non-exclusive licence to use the Software and the Services during the Evaluation Period solely for the purposes of evaluating the Software for use in the Customer's business.
- 2.2 The Customer may not make any back-up or archival copies during the Evaluation Period and may not load all or any part of the Software on any computers or devices other than those authorised by Smartway2 Ltd without prior written agreement from Smartway2 Ltd.
- 2.3 During the Evaluation Period this licence may be terminated immediately by Smartway2 Ltd giving written notice if the Customer is in breach of any of its obligations under this agreement. The licence may be terminated by the Customer during the Evaluation Period upon seven days' written notice or upon acceptance by the Recipient of a full licence for the Software. Upon expiry of the Evaluation Period or termination not followed by a full licence, the Recipient shall within two working days return to Smartway2 Ltd all copies of all or part of the Software on any tangible medium and any documents containing any item of information owned by Smartway2 Ltd and relating to the Software and shall completely delete all electronic copies of all or any part of the Software in its possession or control.
- 2.4 Save for death and personal injury caused by Smartway2 Ltd's negligence, Smartway2 Ltd shall have no liability of any kind in any circumstances whatever to the Customer during the Evaluation Period in respect of the Software greater than the limit set out in clause 2.6. In particular, Smartway2 Ltd shall have no liability in any circumstances whatever during the Evaluation Period for any data loss or corruption greater than that limit and the Customer agrees that it has sole responsibility for protecting its data during evaluation of the Software.
- 2.5 No representations, conditions, warranties or other terms of any kind are given in respect of the Software during the Evaluation Period, and all statutory warranties and conditions are excluded to the fullest extent possible.
- 2.6 In the event that Smartway2 Ltd shall be found liable to the Customer for any reason other than death or personal injury caused by Smartway2 Ltd's negligence during the Evaluation Period, the sums payable to the Customer in respect of such liability shall not in any circumstances exceed the sum of £250.
- 2.7 The Customer acknowledges that Smartway2 Ltd owns the Software and all related documentation. The Customer acknowledges that it has no intellectual property or other rights in relation to the Software during the Evaluation Period other than its right to use under clause 2.1.
- 2.8 Ownership of all complete or partial copies of the Software and related documentation shall at all times remain with Smartway2 Ltd. The Customer agrees to mark any copies of the Software which it may make in any tangible medium with a notice that such copy belongs to Smartway2 Ltd.

3. User subscriptions

- 3.1 Subject to the Customer purchasing the User Subscriptions in accordance with clause 4.3 and clause 10.1, the restrictions set out in this clause 2 and the other terms and conditions of this agreement,

theSmartway2 Ltd hereby grants to the Customer a non-exclusive, non-transferable right to permit the Authorised Users to use the Services and the Documentation during the Subscription Term solely for the Customer's internal business operations.

3.2 In relation to the Authorised Users, the Customer undertakes that:

- (a) the maximum number of Authorised Users that it authorises to access and use the Services and the Documentation shall not exceed the number of User Subscriptions it has purchased from time to time;
- (b) it will not allow or suffer any User Subscription to be used by more than one individual Authorised User unless it has been reassigned in its entirety to another individual Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Services and/or Documentation;
- (c) each Authorised User shall keep a secure password for his use of the Services and that each Authorised User shall keep his password confidential;
- (d) it shall maintain a written, up to date list of current Authorised Users and provide such list to Smartway2 Ltd within 5 Business Days of Smartway2 Ltd's written request at any time or times;
- (e) it shall permit Smartway2 Ltd to audit the Services in order to establish the name and password of each Authorised User. Such audit shall be conducted at Smartway2 Ltd's expense, and this right shall be exercised in such a manner as not to substantially interfere with the Customer's normal conduct of business;
- (f) if any of the audits referred to in clause 3.2(e) reveal that any password has been provided to any individual who is not an Authorised User, then without prejudice to Smartway2 Ltd's other rights, the Customer shall promptly disable such passwords and Smartway2 Ltd shall not issue any new passwords to any such individual; and
- (g) if any of the audits referred to in clause 3.2(e) reveal that the Customer has underpaid Subscription Fees to Smartway2 Ltd, then without prejudice to Smartway2 Ltd's other rights, the Customer shall pay to Smartway2 Ltd an amount equal to such underpayment as calculated in accordance with the prices set out in paragraph **Error! Reference source not found.** of **Error! Reference source not found.** within 10 Business Days of the date of the relevant audit.

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

- (a) is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;
- (b) facilitates illegal activity;
- (c) promotes unlawful violence;
- (d) is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or
- (e) in a manner that is otherwise illegal or causes damage or injury to any person or property;

and Smartway2 Ltd reserves the right, without liability or prejudice to its other rights to the Customer, to disable the Customer's access to any material that breaches the provisions of this clause.

3.4 The Customer shall not:

- (a) except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties:
 - (i) and except to the extent expressly permitted under this agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or
 - (ii) attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
- (b) access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or
- (c) use the Services and/or Documentation to provide services to third parties; or
- (d) subject to clause 23.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Authorised Users, or
- (e) attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this clause 2; and

3.5 The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify Smartway2 Ltd.

3.6 The rights provided under this clause 2 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

4. Additional user subscriptions

4.1 Subject to clause 4.2 and clause 4.3, the Customer may, from time to time during any Subscription Term, purchase additional User Subscriptions in excess of the number set out in paragraph **Error! Reference source not found.** of **Error! Reference source not found.** and Smartway2 Ltd shall grant access to the Services and the Documentation to such additional Authorised Users in accordance with the provisions of this agreement.

4.2 If the Customer wishes to purchase additional User Subscriptions, the Customer shall notify Smartway2 Ltd in writing. Smartway2 Ltd shall evaluate such request for additional User Subscriptions and respond to the Customer with approval or rejection of the request.

4.3 If Smartway2 Ltd approves the Customer's request to purchase additional User Subscriptions, the Customer shall, within 30 days of the date of Smartway2 Ltd's invoice, pay to Smartway2 Ltd the relevant fees for such additional User Subscriptions as set out in **Error! Reference source not found.** and/or the Customer Order Form and, if such additional User Subscriptions are purchased by

the Customer part way through the Initial Subscription Term or any Renewal Period (as applicable), such fees shall be pro-rated for the remainder of the Initial Subscription Term or then current Renewal Period (as applicable).

5. Services

- 5.1 Smartway2 Ltd shall, during the Subscription Term, provide the Services and make available the Software and the Documentation to the Customer on and subject to the terms of this agreement.
- 5.2 Smartway2 Ltd shall use reasonable commercial endeavours to make the Services available 24 hours a day, seven days a week, except for:
- (a) planned maintenance provided that Smartway2 Ltd has used reasonable endeavours to give the Customer at least 6 hours' notice in advance; and
 - (b) unscheduled maintenance performed outside Normal Business Hours.
- 5.3 Smartway2 Ltd will, as part of the Services and at no additional cost to the Customer, provide the Customer with Smartway2 Ltd's standard customer support services during Normal Business Hours. The Customer may purchase enhanced support and professional services separately at Smartway2 Ltd's then current rates.

6. Customer data

- 6.1 The Customer shall own all right, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.
- 6.2 Smartway2 Ltd shall follow its archiving procedures for Customer Data as may be notified to the Customer from time to time. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for Smartway2 Ltd to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by Smartway2 Ltd. For the avoidance of doubt, back-up procedures do not form part of the Services and are offered to the Customer with no warranty or guarantee of their date, accuracy or integrity. Smartway2 Ltd shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party.
- 6.3 The Customer grants to the Supplier a non-exclusive, non-transferable licence to access and view the Customer Data for the purposes assessing and improving the Services during the Subscription Term. Smartway2 Ltd shall not modify the Customer Data and shall, in providing the Services, comply with commercially prudent practices relating to the privacy and security of the Customer Data.
- 6.4 If Smartway2 Ltd processes any personal data on the Customer's behalf when performing its obligations under this agreement, the parties record their intention that the Customer shall be the data controller and Smartway2 Ltd shall be a data processor and in any such case:
- (a) the Customer acknowledges and agrees that the personal data may be transferred or stored outside the EEA or the country where the Customer and the Authorised Users are located in order to carry out the Services and Smartway2 Ltd's other obligations under this agreement;

- (b) the Customer shall ensure it is entitled to transfer the relevant personal data to Smartway2 Ltd so that Smartway2 Ltd may lawfully use, process and transfer the personal data in accordance with this agreement on the Customer's behalf;
- (c) the Customer shall ensure that the relevant third parties have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable data protection legislation; and
- (d) each party shall take appropriate technical and organisational measures against unauthorised or unlawful processing of the personal data or its accidental loss, destruction or damage.

7. Third party providers

The Customer acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. Smartway2 Ltd makes no representation or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by the Customer, with any such third party. Any contract entered into and any transaction completed via any third-party website is between the Customer and the relevant third party, and not Smartway2 Ltd. Smartway2 Ltd recommends that the Customer refers to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. Smartway2 Ltd does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

8. Supplier's obligations

8.1 Smartway2 Ltd undertakes that the Services will be performed with reasonable skill and care.

8.2 The undertaking at clause 8.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Smartway2 Ltd's instructions, or modification or alteration of the Services by any party other than Smartway2 Ltd or Smartway2 Ltd's duly authorised contractors or agents. If the Services do not conform to the foregoing undertaking, Smartway2 Ltd will, at its expense, use reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in clause 8.1. Notwithstanding the foregoing, Smartway2 Ltd:

- (a) does not warrant that the Customer's use of the Services will be uninterrupted or error-free; or that the Services, Documentation and/or the information obtained by the Customer through the Services will meet the Customer's requirements; and
- (b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

- 8.3 This agreement shall not prevent Smartway2 Ltd from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this agreement.
- 8.4 Smartway2 Ltd warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this agreement.

9. Customer's obligations

The Customer shall:

- (a) provide Smartway2 Ltd with:
 - (i) all necessary co-operation in relation to this agreement; and
 - (ii) all necessary access to such information as may be required by Smartway2 Ltd; in order to provide the Services, including but not limited to Customer Data, security access information and configuration services;
- (b) comply with all applicable laws and regulations with respect to its activities under this agreement;
- (c) carry out all other Customer responsibilities set out in this agreement in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, Smartway2 Ltd may adjust any agreed timetable or delivery schedule as reasonably necessary;
- (d) ensure that the Authorised Users use the Services and the Documentation in accordance with the terms and conditions of this agreement and shall be responsible for any Authorised User's breach of this agreement;
- (e) obtain and shall maintain all necessary licences, consents, and permissions necessary for Smartway2 Ltd, its contractors and agents to perform their obligations under this agreement, including without limitation the Services;
- (f) ensure that its network and systems comply with the relevant specifications provided by Smartway2 Ltd from time to time; and
- (g) be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to Smartway2 Ltd's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.

10. Charges and payment

- 10.1 The Customer shall pay the Subscription Fees to Smartway2 Ltd for the User Subscriptions in accordance with this clause 10, **Error! Reference source not found.** and/or the Customer Order Form.
- 10.2 The Customer shall on the Effective Date provide to Smartway2 Ltd valid, up-to-date and complete bank account or credit card details or approved purchase order information acceptable to Smartway2

Ltd and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides:

- (a) its credit card details or bank account details to Smartway2 Ltd, the Customer hereby authorises Smartway2 Ltd to bill such credit card or obtain payment by way of standing order or direct debit:
 - (i) on the Effective Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
 - (ii) subject to clause 15.1, on each anniversary of the Effective Date for the Subscription Fees payable in respect of the next Renewal Period;
- (b) its approved purchase order information to Smartway2 Ltd, Smartway2 Ltd shall invoice the Customer:
 - (i) on the Effective Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
 - (ii) subject to clause 15.1, at least 30 days prior to each anniversary of the Effective Date for the Subscription Fees payable in respect of the next Renewal Period,and the Customer shall pay each invoice within 30 days after the date of such invoice.

10.3 If Smartway2 Ltd has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of Smartway2 Ltd:

- (a) Smartway2 Ltd may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and Smartway2 Ltd shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
- (b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 3% over the then current base lending rate of Barclays Bank Plc from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.

10.4 All amounts and fees stated or referred to in this agreement:

- (a) shall be payable in pounds sterling;
- (b) are, subject to clause 14.4(b), non-cancellable and non-refundable;
- (c) are exclusive of value added tax, which shall be added to Smartway2 Ltd's invoice(s) at the appropriate rate.

10.5 If, at any time whilst using the Services, the Customer exceeds 50 gigabytes of disk storage space, Smartway2 Ltd shall charge the Customer, and the Customer shall pay, Smartway2 Ltd's then current excess data storage fees. Smartway2 Ltd's excess data storage fees current as at the Effective Date are set out in **Error! Reference source not found.**

10.6 Smartway2 Ltd shall be entitled to increase the Subscription Fees, the fees payable in respect of the additional User Subscriptions purchased pursuant to clause 4.3 and/or the excess storage fees payable pursuant to clause 10.5 at the start of each Renewal Period upon 60 days' prior notice to the

Customer and **Error! Reference source not found.** shall be deemed to have been amended accordingly.

11. Proprietary rights

- 11.1 The Customer acknowledges and agrees that Smartway2 Ltd and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, this agreement does not grant the Customer any rights to, or in, patents, copyright, database right, trade secrets, trade names, trade marks (whether registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.
- 11.2 Smartway2 Ltd confirms that it has all the rights in relation to the Services and the Documentation that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this agreement.

12. Confidentiality

- 12.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under this agreement. A party's Confidential Information shall not be deemed to include information that:
- (a) is or becomes publicly known other than through any act or omission of the receiving party;
 - (b) was in the other party's lawful possession before the disclosure;
 - (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
 - (d) is independently developed by the receiving party, which independent development can be shown by written evidence; or
 - (e) is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.
- 12.2 Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this agreement.
- 12.3 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 12.4 Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.
- 12.5 The Customer acknowledges that details of the Services, and the results of any performance tests of the Services, constitute Smartway2 Ltd's Confidential Information.
- 12.6 Smartway2 Ltd acknowledges that the Customer Data is the Confidential Information of the Customer.

- 12.7 This clause 12 shall survive termination of this agreement, however arising.
- 12.8 No party shall make, or permit any person to make, any public announcement concerning this agreement without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.
- 13. Indemnity**
- 13.1 The Customer shall defend, indemnify and hold harmless Smartway2 Ltd against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's use of the Services and/or Documentation, provided that:
- (a) the Customer is given prompt notice of any such claim;
 - (b) Smartway2 Ltd provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and
 - (c) the Customer is given sole authority to defend or settle the claim.
- 13.2 Smartway2 Ltd shall defend the Customer, its officers, directors and employees against any claim that the Services or Documentation infringes any patent effective as of the Effective Date, copyright, trade mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:
- (a) Smartway2 Ltd is given prompt notice of any such claim;
 - (b) the Customer provides reasonable co-operation to Smartway2 Ltd in the defence and settlement of such claim, at Smartway2 Ltd's expense; and
 - (c) Smartway2 Ltd is given sole authority to defend or settle the claim.
- 13.3 In the defence or settlement of any claim, Smartway2 Ltd may procure the right for the Customer to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this agreement on 2 Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.
- 13.4 In no event shall Smartway2 Ltd, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:
- (a) a modification of the Services or Documentation by anyone other than Smartway2 Ltd; or
 - (b) the Customer's use of the Services or Documentation in a manner contrary to the instructions given to the Customer by Smartway2 Ltd; or
 - (c) the Customer's use of the Services or Documentation after notice of the alleged or actual infringement from Smartway2 Ltd or any appropriate authority.
- 13.5 The foregoing and clause 14.4(b) state the Customer's sole and exclusive rights and remedies, and Smartway2 Ltd's (including Smartway2 Ltd's employees', agents' and sub-contractors') entire

obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

14. Limitation of liability

14.1 This clause 14 sets out the entire financial liability of Smartway2 Ltd (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer:

- (a) arising under or in connection with this agreement;
- (b) in respect of any use made by the Customer of the Services and Documentation or any part of them; and
- (c) in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with this agreement.

14.2 Except as expressly and specifically provided in this agreement:

- (a) the Customer assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Customer, and for conclusions drawn from such use. Smartway2 Ltd shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Smartway2 Ltd by the Customer in connection with the Services, or any actions taken by Smartway2 Ltd at the Customer's direction;
- (b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this agreement; and
- (c) the Services and the Documentation are provided to the Customer on an "as is" basis.

14.3 Nothing in this agreement excludes the liability of Smartway2 Ltd:

- (a) for death or personal injury caused by Smartway2 Ltd's negligence; or
- (b) for fraud or fraudulent misrepresentation.

14.4 Subject to clause 14.2 and clause 14.3:

- (a) Smartway2 Ltd shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this agreement; and
- (b) Smartway2 Ltd's total aggregate liability in contract (including in respect of the indemnity at clause 13.2), tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement shall be limited to the total Subscription Fees paid for the User Subscriptions during the 12 months immediately preceding the date on which the claim arose.

15. Term and termination

15.1 This agreement shall, unless otherwise terminated as provided in this clause 15, commence on the Effective Date and shall continue for the Initial Subscription Term and, thereafter, this agreement shall be automatically renewed for successive periods of 12 months (each a **Renewal Period**), unless:

- (a) either party notifies the other party of termination, in writing, at least 60 days before the end of the Initial Subscription Term or any Renewal Period, in which case this agreement shall terminate upon the expiry of the applicable Initial Subscription Term or Renewal Period; or
- (b) otherwise terminated in accordance with the provisions of this agreement;

and the Initial Subscription Term together with any subsequent Renewal Periods shall constitute the **Subscription Term**.

15.2 Without affecting any other right or remedy available to it, either party may terminate this agreement with immediate effect by giving written notice to the other party if:

- (a) the other party fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment;
- (b) the other party commits a material breach of any other term of this agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 7 days after being notified in writing to do so;
- (c) the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 ;
- (d) the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (e) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (f) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other party;
- (g) the holder of a qualifying floating charge over the assets of that other party has become entitled to appoint or has appointed an administrative receiver;
- (h) a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
- (i) a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the

whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;

- (j) any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 15.2(c) to clause 15.2(i) (inclusive); or
- (k) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

15.3 On termination of this agreement for any reason:

- (a) all licences granted under this agreement shall immediately terminate;
- (b) each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;
- (c) Smartway2 Ltd may destroy or otherwise dispose of any of the Customer Data in its possession unless Smartway2 Ltd receives, no later than ten days after the effective date of the termination of this agreement, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. Smartway2 Ltd shall use reasonable commercial endeavours to deliver the back-up to the Customer within 30 days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by Smartway2 Ltd in returning or disposing of Customer Data; and
- (d) any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination shall not be affected or prejudiced.

16. Force majeure

Smartway2 Ltd shall have no liability to the Customer under this agreement if it is prevented from or delayed in performing its obligations under this agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of Smartway2 Ltd or any other party), failure of its internet security provider, utility service or transport or telecommunications network, computers or IT infrastructure, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Customer is notified of such an event and its expected duration.

17. Conflict

If there is an inconsistency between any of the provisions in the main body of this agreement and the Schedules, the provisions in the main body of this agreement shall prevail.

18. Variation

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

19. Waiver

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

20. Rights and remedies

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

21. Severance

21.1 If any provision (or part of a provision) of this agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

21.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

22. Entire agreement

22.1 This agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

22.2 Each of the parties acknowledges and agrees that in entering into this agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the subject matter of this agreement, other than as expressly set out in this agreement.

23. Assignment

23.1 The Customer shall not, without the prior written consent of Smartway2 Ltd, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

23.2 Smartway2 Ltd may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

24. No partnership or agency

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

25. Third party rights

This agreement does not confer any rights on any person or party (other than the parties to this agreement and, where applicable, their successors and permitted assigns) pursuant to the Contracts (Rights of Third Parties) Act 1999.

26. Notices

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

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

27. Governing law

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

28. Jurisdiction

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

This agreement has been entered into on the date stated at the beginning of it.

This agreement has been entered into on the date of the Customer having signed the Customer Order Form or, as the case may be, having read an accepted a copy of these terms on the website www.smartway2.com.