

## **DELTAXML LIMITED**

### **SOFTWARE SUPPORT AND MAINTENANCE TERMS AND CONDITIONS**

**DeltaXML Limited** (Registered number 2528681) whose registered office is Malvern Hills Science Park, Geraldine Road, Malvern, Worcestershire, WR14 3SZ, UK ("**DeltaXML**")

#### **1. DEFINITIONS**

<b>Agreement</b>	means an Order that is accepted by DeltaXML and which incorporates these terms and conditions;
<b>Client</b>	means the person to whom the Licence is granted as specified in the Order;
<b>Critical Fault</b>	means a Fault which substantially hinders or prevents the Client from using a material part of the functionality of the software in question;
<b>Documentation</b>	means the documentation provided by DeltaXML for the Software, in either printed text or machine readable form, including but not limited to the technical documentation, program specification and user manual;
<b>Fault</b>	means any documented verifiable and repeatable failure of the Supported Software to conform with the Documentation;
<b>Fees</b>	means the fees and charges for the relevant Services set out in the Licence Agreement and, if applicable, any Order for Optional Services, as the same as may be amended from time to time in accordance with the provisions of Clause 7.4;
<b>Intellectual Property Rights</b>	means all patents, patent applications, rights to inventions, copyrights, design rights, trade marks, service marks, unfair competition rights, trade secrets, know-how, database rights, and any other intellectual property rights (whether registered or unregistered) and all applications for, and renewals or extensions for, the same, anywhere in the world;
<b>Licence</b>	means the licence granted by DeltaXML to the Client to use the Software in accordance with the Licence Agreement;
<b>Licence Agreement</b>	means the agreement for the Licence of the Software as set out in the relevant agreement entered into between the Client and DeltaXML;
<b>Maintenance Release</b>	means a release of the Software, issued by DeltaXML as part of the Standard Support Service, which fixes Faults in the Software;
<b>Minor Release</b>	means a release of the Software which corrects Faults, adds functionality or otherwise amends or upgrades the Software but which does not constitute a New Version;
<b>New Version</b>	means any new version of the Software issued by DeltaXML which incorporates major functional improvements and features and which may be incompatible with previous releases of the Software;
<b>Order</b>	means an order from the Client for Services which is accepted by DeltaXML and incorporates these terms and conditions;
<b>Optional Service</b>	means any of the consultancy or bespoke development work services or other services which are outside the scope of Standard Support Service;
<b>Services</b>	means the Standard Support Services, the Updating Service and the Optional Services (if any);
<b>Software</b>	means the software specified in the applicable Licence Agreement;
<b>Standard Support Service</b>	means the support service more particularly described in Clause 3.2;
<b>Supported Software</b>	means the most recent New Version of the Software and any Minor Release issued by DeltaXML in the preceding 24 months;
<b>Third Party Software</b>	means an operating system or other software that is required in order to run the Software as specified in the Documentation; and
<b>Updating Service</b>	means the service to be supplied by DeltaXML to the Client pursuant to Clause 3.3.

1.2 In these terms and conditions, unless the context shall otherwise require or permit;

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- 1.2.1 reference to any statute or statutory provision includes a reference to that statute or statutory provision as from time to time amended, extended or re-enacted and includes any subordinate legislation made there under;
  - 1.2.2 words importing the singular include the plural, words importing any gender include every gender and words importing persons include bodies corporate and unincorporated, and each case vice versa;
  - 1.2.3 the headings or captions to the clauses are for ease of reference only and shall not affect the interpretation or construction of these terms and conditions.
  - 1.2.4 references to "**including**" and "**includes**" shall be deemed to have the words "**without limitation**" inserted after them.
- 1.3 In the event of any conflict between these terms and conditions and any provision of any Order these terms and conditions shall prevail. In the event of any conflict between these terms and conditions and the Licence Agreement, the terms of the Licence Agreement shall prevail.
- 1.4 These terms and conditions shall:
- 1.4.1 apply to and shall be incorporated into all contracts for the provision of Services to the Client unless expressly excluded in writing and signed by a director or DeltaXML;
  - 1.4.2 prevail over any inconsistent terms contained in or referred to in the Client's purchase order, confirmation of order or specification.

## 2. SUPPORTED SOFTWARE

DeltaXML will provide Services only in respect of the Supported Software.

## 3. SERVICES

- 3.1 Subject to payment of the Fees, DeltaXML will supply and the Client will take the following services:
- 3.1.1 the Standard Support Service; and
  - 3.1.2 the Updating Service.
- 3.2 Standard Support Service
- 3.2.1 The Standard Support Service will be provided 9 am to 5.30 pm, UK local time, Monday to Friday, except on days which are bank holidays in England and will comprise a telephone and email help-desk to provide first line technical support to users of the Supported Software;
  - 3.2.2 Fault Corrections: DeltaXML shall use reasonable efforts to correct Faults in the Supported Software which prevent the Software functioning in accordance with the applicable Documentation. If a reported Fault causes the Software to be inoperable or if the Client's notice to DeltaXML states that such Fault is a Critical Fault with respect to Client's use of the Software, DeltaXML shall, as expeditiously as practicable, use its reasonable endeavours to correct such Fault or to provide a software patch or by-pass around such Fault. However, under no circumstances does DeltaXML warrant or represent that all Faults can or will be corrected. DeltaXML cannot guarantee that corrections will be provided within a specified time-scale but where DeltaXML estimates that any correction will take more than 3 business days, it will provide, where practicable, a workaround or patch. DeltaXML is under no obligation to provide an update to the Software if a Fault can be corrected by using an updated version of any Third Party Software. While DeltaXML has a range of hardware platforms and operating systems available in order to reproduce a Fault, it is unable to have access to all types and versions of hardware and operating system. If it is not possible to reproduce a Fault on an available hardware platform or operating system, DeltaXML support is limited to providing advice and reasonable assistance to Client to correct a Fault.
  - 3.2.3 On-site support services are not included as a standard feature of the Standard Support Services and DeltaXML is not obliged to provide support services or any other services at the Client's premises. In the event that DeltaXML agrees to provide on-site services, DeltaXML shall be entitled to charge the Client at DeltaXML's prevailing consultancy rate and for travelling, subsistence and accommodation expenses incurred by DeltaXML in providing such services.
  - 3.2.4 DeltaXML shall be under no obligation to provide support services where, in DeltaXML's reasonable opinion, these are required because of any error in the Third Party Software or where due to the use of software not supplied by or approved in writing by DeltaXML or where due to the use of the Software for purposes for which it is not designed.
- 3.3 Updating Service
- 3.3.1 DeltaXML shall issue to the Client at no additional charge Maintenance Releases, Minor Releases and New Versions of the Software as and when required in the absolute discretion of DeltaXML.
  - 3.3.2 The Updating Service shall include the supply to the Client of all revisions of the Documentation which are necessary in order to reflect any Maintenance Releases, Minor Releases or New Versions acquired by the Client.

## 4. ORDERS FOR OPTIONAL SERVICES

- 4.1 The Client may from time to time request DeltaXML and DeltaXML may, in its sole discretion, agree to supply Optional Services. DeltaXML will use all reasonable endeavours to comply with the Client's request for Optional Services but the Client acknowledges that DeltaXML's ability to supply any Optional Services will depend upon the availability of appropriate resources at the time in question.
- 4.2 Where DeltaXML agrees to provide Optional Services, unless the same is subject to separate agreement between the parties, the scope of the services to be provided will be set out in the Order for Optional Services. Each Order for Optional Services shall be made under, and shall incorporate, the terms of this Agreement.

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- 4.3 Where DeltaXML agrees to provide the Optional Services, the Client shall pay the Fees in accordance with Clause 7.
- 4.4 Client may at any time request DeltaXML to deposit Software with Intellect Enterprises Ltd or NCC Group escrow agent at Client's expense. DeltaXML fees shall be as quoted in an Order for Optional Services.

## **5 INTELLECTUAL PROPERTY RIGHTS**

- 5.1 As between DeltaXML and the Client, all Intellectual Property Rights in the Software and Documentation and in any modifications to the Software created during or as a result of the Services, or any part of them, shall vest in DeltaXML.

## **6 FEES**

### **6.1 Fees for Standard Support Services and Updating Service**

In consideration of the Standard Support Services and Updating Service the Client shall pay the Fees as set out in the Order. Such Fees shall be paid annually in advance by the Client to DeltaXML within 30 days of receipt of DeltaXML's invoice.

### **6.2 Fees for Optional Services**

Where DeltaXML agrees to provide Optional Services, the Client shall pay the Fees for Optional Services within 30 days of DeltaXML's invoice for such services. Where the Fees for Optional Services are not specified in the Order, DeltaXML shall be entitled to invoice the Client for the Optional Services at a rate that is reasonable for the level of expertise provided.

### **6.3 VAT**

All amounts payable for the Services (or any of them) shall be exclusive of value added tax (if any) which shall be paid at the rate and in the manner for the time being prescribed by law.

### **6.4 Review of Fees**

DeltaXML shall be entitled to increase the Fees and charges set out in clause 6.2 as from each anniversary of the date of Order. Any such increase shall be notified by DeltaXML to the Client at least three (3) months prior to such anniversary and shall in no circumstances amount to more than four (4) percentage points above the percentage change in the UK Services Wages Section Index published by the Office of National Statistics that may have occurred since the last increase or the date of the Order if no increases have been made.

## **7 DELTAXML'S WARRANTIES**

- 7.1 DeltaXML hereby represents and warrants to the Client that the Services will be performed with reasonable care and skill.
- 7.2 If during the term of this Agreement, the DeltaXML receives written notice from the Client of any breach by DeltaXML of the representation and warranties contained in sub-clause 7.1 DeltaXML shall, at its own option and expense, remedy any such breach within 30 days following receipt of such notice or terminate this Agreement immediately on written notice to the Client and repay to the Client all sums which the Client has paid to DeltaXML under this Agreement during the year in which the termination occurs, less a charge for the Services performed up to the date of termination. The Client shall provide all information reasonably necessary to enable DeltaXML to comply with its obligations under this clause 7.2. This clause sets out the Client's sole remedy and DeltaXML's entire liability for breach of clause 7.1.
- 7.3 No representation or warranty is given by DeltaXML that all Faults will be fixed, or will be fixed within a specified period of time.
- 7.4 All other conditions, warranties or other terms which might have effect between the parties or be implied or incorporated into this Agreement or any collateral contract, whether by statute, common law or otherwise, are hereby excluded, including the implied conditions, warranties or other terms as to satisfactory quality or fitness for purpose.

## **8 THE CLIENT'S RESPONSIBILITIES**

- 8.1 The Client shall:
- (a) co-operate with DeltaXML in performing the Services and provide DeltaXML with any information and assistance as DeltaXML may reasonably require to enable it to perform the Services (including in relation to the diagnosis of any Faults);
  - (b) report Faults promptly to DeltaXML; and
  - (c) keep full backup copies of all of its data.

## **9 MEDIATION**

- 9.1 The parties shall use all reasonable endeavours and attempt in good faith to resolve any dispute or claim arising out of or relating to any Order promptly through negotiations between the respective authorised representatives or other senior executives of the parties who have authority to settle the same. Any dispute, difference or claim which is not settled in fourteen (14) days of such dispute, difference or claim having been made or provided in writing by one party to the other (the "**Relevant Event**") shall be referred, with the agreement of the parties, to an independent third party (the "**Third Party**") as DeltaXML and the Client shall jointly nominate.

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- 9.2 If, where the parties have agreed to use a Third Party to settle the Relevant Event, and the parties fail to nominate a Third Party within twenty-one (21) days of occurrence of the Relevant Event, then the Third Party shall be nominated at the request of either DeltaXML or the Client by the President for the time being of the Institute of Electrical Engineers.
- 9.3 If the parties fail to reach agreement or resolve the dispute, such failure shall be without prejudice to the right of any party subsequently to refer any difference or dispute to litigation and nothing contained in the sub-clause shall restrict either party's freedom to commence legal proceedings to preserve any legal right or remedy or protect any proprietary or trade secret right.
- 9.4 For the avoidance of doubt, this Clause 9 shall not prevent either party from seeking injunctive relief in the case of any breach or threatened breach by the other of any obligation of confidentiality or any infringement by the other of the first-named party's Intellectual Property Rights.

## 10 NON-SOLICITATION

Each of the parties agrees with the other that, for the duration of the Agreement and for a period of six months following termination, it shall not directly or indirectly induce or attempt to induce any employee of the other party who has been engaged in the provision, receipt, review or management of the Services or otherwise in connection with the Agreement to leave the employment of that other party.

## 11 LIABILITY

- 11.1 Except as expressly stated in clause 11.4, DeltaXML shall not in any circumstances have any liability for any losses or damages which may be suffered by the Client (or any person claiming under or through the Client), whether the same are suffered directly or indirectly or are immediate or consequential, and whether the same arise in contract, tort (including negligence) or otherwise howsoever, which fall within any of the following categories:
- (i) special damage even if DeltaXML was aware of the circumstances in which such special damage could arise;
  - (ii) loss of profits;
  - (iii) loss of revenue;
  - (iv) loss of production;
  - (v) loss of anticipated savings;
  - (vi) loss of business opportunity;
  - (vii) loss of goodwill;
  - (viii) loss or corruption of data;
  - (ix) indirect and consequential loss.
- 11.2 Subject to clause 11.4, the total liability of DeltaXML in contract, tort (including negligence), or otherwise arising out of or in connection with this Agreement, shall be limited to the lesser of \$50,000 or three (3) times the Fees paid by the Client in the preceding year in respect of any one incident or any series of incidents arising from a common cause.
- 11.3 The Client agrees that, in entering into this Agreement, either it did not rely on any representations (whether written or oral) of any kind or of any person other than those expressly set out in this Agreement or (if it did rely on any representations, whether written or oral, not expressly set out in this Agreement) that it shall have no remedy in respect of such representations and (in either case) DeltaXML shall have no liability in any circumstances otherwise than in accordance with the express terms of this Agreement.
- 11.4 Nothing in the Agreement shall exclude or restrict DeltaXML's liability for death or personal injury resulting from the negligence of DeltaXML or its officers, employees, contractor or agents; fraud or fraudulent misrepresentation; or any other liability which cannot be excluded by law.
- 11.5 The Client acknowledges that:
- (a) it is exclusively responsible for:
    - (i) reviewing any new Maintenance Releases, Minor Releases or New Versions;
    - (ii) ensuring that the staff of the Client are trained in the proper use and operation of the Software;
    - (iii) ensuring the security, completeness and accuracy of all inputs and outputs;
    - (iv) making regular backup copies of its data to ensure recovery of its data if the Software malfunctions; and
    - (v) the selection, use of and results obtained from any other programs, equipment, materials or services used in conjunction with the Software;
  - (b) the level of the Fees reflects the allocation of risk between the parties set out in clause 7 and clause 12; and
  - (c) it is in a better position than DeltaXML to assess and manage its risk in relation to use of the Software.
- 11.6 All dates supplied by DeltaXML for the delivery of Maintenance Releases, Minor Releases or New Versions or the provision of Services shall be treated as approximate only. DeltaXML shall not in any circumstances be liable for any loss or damage arising from any delay in delivery beyond such approximate dates.

## 12. FORCE MAJEURE

- 12.1 Neither party shall in any circumstances be in breach of this Agreement, nor liable for delay in performing, or failure to perform, any of its obligations under this Agreement if such delay or failure results from events, circumstances or causes beyond its reasonable control.

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12.2 In such circumstances, the affected party shall be entitled to a reasonable extension of time for performing such obligations. If any force majeure event shall continue for more than 12 weeks then the party not in default shall be entitled to terminate the Agreement. Neither party shall have any liability to the other in respect of termination of the Agreement as a result of an event of force majeure.

## **13 TERM**

13.1 The supply of the relevant Services by DeltaXML to the Client shall commence on the commencement date specified in the applicable Order or Licence Agreement and, subject to termination in accordance with the provisions of these terms and conditions, shall continue for a fixed term of 1 (one) year. Following expiry of such fixed term the supply of the relevant Services shall (subject as aforesaid) continue under the Agreement from year to year until terminated by either DeltaXML or the Client on two months prior written notice to the other.

13.2 DeltaXML's obligation to provide maintenance and support shall automatically terminate in the event that the licence granted by DeltaXML to use the Software under the Licence Agreement expires or terminates.

## **14 TERMINATION**

14.1 Either party may (without prejudice to any rights that have accrued under this Agreement or any of its rights or remedies) terminate the Agreement with immediate effect by notice in writing to the other if:

- (a) a voluntary arrangement is approved, or an administration order is made, or receiver or administrative receiver is appointed over any of the other parties' assets or undertaking or resolution or petition to wind up the other party is passed or presented (other than for the purposes of amalgamation or reconstruction) or if any circumstances arise which entitle the Court or a creditor to appoint a receiver, administrative receiver or administrator or to present a winding up petition or make a winding up order or if similar proceedings are threatened or instituted against the Client in any other jurisdiction or the other party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business; or
- (b) the other party defaults in due performance or observance of any of its material obligations under an Agreement and (in the case a remedial breach) fails to remedy the breach within 30 days of receipt of the written notice to do so.

## **15 CONSEQUENCES OF TERMINATION**

15.1 Any termination of an Agreement (howsoever occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provisions of the Agreement which is expressly or by implication intended to come into force or continue in force on or after that termination.

15.2 Any provision of this Agreement which expressly or by implication is intended to come into or continue in force on or after termination of this Agreement including clause 1, clause 5, clause 11, and clause 16, shall remain in full force and effect.

15.3 On termination of this Agreement for any reason, the Client shall immediately pay any outstanding unpaid invoices and interest due to DeltaXML. DeltaXML shall submit invoices for any Services that it has supplied, but for which no invoice has been submitted, and the Client shall pay these invoices immediately on receipt.

## **16 CONFIDENTIALITY**

16.1 Each party shall, during the term of this Agreement and thereafter, treat as confidential all information obtained from the other party under or in connection with an Agreement which is designated as confidential by the other party or which is by its nature clearly confidential. The recipient party will not disclose such confidential information to any person (except only to those employees, agents, sub-contractors, suppliers and other representatives who need to know it) or use such confidential information for purposes other than the support service without the other party's prior written consent. This clause will not extend to information which:-

- (a) was in the possession of the recipient party (with full right to disclose) before receiving it;
- (b) is already or becomes public knowledge (otherwise than as a result of a breach of this clause); or
- (c) is independently developed by the recipient party without access to or use of such information.
- (d) is required to be disclosed by law or regulatory authority.

16.2 Each party will ensure that all persons to whom it discloses any confidential information of the other party are aware, prior to disclosure, of the confidential nature of the information and that they owe a duty of confidence to the other party. These obligations of confidentiality will survive any termination of the Agreement.

16.3 Each party will establish and maintain adequate security measures to safeguard information and data of the other party in its possession from unauthorised access use or copying.

16.4 The terms of this Agreement are confidential and may not be disclosed by the Client without the prior written consent of DeltaXML.

## **17 WAIVER**

No failure or delay by either party in enforcing any right or remedy provided under this Agreement shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that 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.

**18 SEVERABILITY**

18.1 If any court or competent authority finds that any provision of this Agreement (or part of any provision) is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of this Agreement shall not be affected.

18.2 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.

**19 AMENDMENTS**

Any amendment or variation of this Agreement shall not be binding on the parties unless set out in writing, expressed to amend the Agreement and signed by or on behalf of each of the parties.

**20 NOTICES**

Notices shall be in writing, and shall be sent to the other party marked for the attention of the person at the address set out for such party in an Order or Licence Agreement. Notices may be sent by first-class or air mail or e-mail or facsimile transmission provided that facsimile transmissions are confirmed within 24 hours by mailed confirmation of a copy. Correctly addressed notices sent by mail shall be deemed to have been delivered at 9:00am ten (10) business days after posting and correctly directed e-mails or facsimile transmissions shall be deemed to have been received instantaneously on sending or transmission provided that they are confirmed as set out above. The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

**21 ENTIRE AGREEMENT**

The Order incorporating these terms and conditions contain the whole agreement between the parties relating to the subject matter thereof and supersedes and cancels all previous agreements, working arrangements and representations of whatever nature unless expressly incorporated by reference in the Agreement. The Client and DeltaXML each acknowledge that no reliance is placed on, and it shall have no remedy in respect of any representations made but not embodied in these terms and conditions or the Order relating to the matters referred therein. Nothing in this clause attempts to exclude or limit a party's liability for fraud.

**22 THIRD PARTY RIGHTS**

A person who is not a party to the Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term of this Agreement, but this does not affect any right of a third party which exists, or is available, apart from that Act.

**23 ASSIGNMENT**

The Client is not entitled to assign to any third party any of its rights or obligations under the Agreement without DeltaXML's prior written consent which shall not be unreasonably withheld. DeltaXML shall be entitled to assign or sub-contract its rights and obligations under this Agreement to any person, but DeltaXML shall give notice of such assignment or sub-contracting in writing to the Client.

**24 NO PARTNERSHIP OR AGENCY**

Nothing in this Agreement is intended to, or shall be deemed to, establish a partnership or joint venture between any of 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.

**25 GOVERNING LAW AND JURISDICTION**

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. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims). Nothing in this clause shall limit the right of DeltaXML to take proceedings against the Client in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.