



**ARCSERVE (USA) LLC**  
**TERMS OF SERVICE**  
**FOR CLOUD-BASED SERVICES**

These service terms and conditions (the “Agreement”) are between Arcserve (USA) LLC (“Arcserve” “we,” “us,” or “our”) and you (“you,” “your,” or “Customer”). Capitalized terms used in this Agreement have the meanings given to them in the definitions below or where they are first used in this Agreement.

**I. GENERAL**

This Agreement governs any use by you of a Service(s), including: (i) any period during which you can use the Services (as defined below) during a Trial Term, whether or not such use is pursuant to an Order; or (ii) any period during which you pay to use the Services (defined below) during a Standard Term, whether or not such use is pursuant to an Order.

You will only be enrolled in the Standard Term and charged the associated Fees (defined below) if you (or a party acting on your behalf) pay for Services for the Standard Term as specified in the applicable Order.

BY ACCEPTING THESE TERMS, YOU: (I) ACKNOWLEDGE AND AGREE THAT YOU HAVE READ ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN; (II) UNDERSTAND ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN; (III) AGREE TO BE BOUND BY ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN AND THE TERMS AND CONDITIONS OF ALL ASSOCIATED ACCEPTED ORDERS AND/OR ACCEPTED TRIAL ORDERS; AND (IV) ACKNOWLEDGE ON BEHALF OF THE CUSTOMER THAT YOU HAVE THE AUTHORITY TO BIND CUSTOMER TO THESE TERMS.

THESE TERMS TOGETHER WITH ALL ORDERS (AND TRIAL ORDERS) CONSTITUTE AN ENFORCEABLE AGREEMENT BY AND BETWEEN YOU AND ARCSERVE.

The “Effective Date” of this Agreement is the date you click the “ACCEPT” button.

The terms below apply to the Trial Term and Standard Term.

The Services are made available on a subscription basis. Any renewal terms relating hereto shall be set forth in the relevant ordering portal, in the Order or by the generation of a new Order.

**II. PRODUCTS AND SERVICES**

As set forth in an Order, Arcserve or its authorized representatives, may provide one (1) or more of the following services (“**Services**”). These Terms (and any additional terms provided by Arcserve’s authorized representatives to you) and the Order govern your use of the Services.

- a. Arcserve UDP Cloud Hybrid Backup Service or Arcserve UDP Cloud Hybrid Storage - cloud backup service provided by Arcserve to its customers to store & manage backup data in Arcserve’s datacenters.
- b. Arcserve UDP Cloud Hybrid Disaster Recovery Service or Arcserve UDP Cloud Hybrid Compute - disaster recovery as a service provided by Arcserve to its customers to store & manage backup data in Arcserve’s datacenters for specific customer systems and to run such systems within a virtual private cloud in Arcserve’s datacenters in the case of a disaster until such systems and data is restored

in the customer location.

- c. Arcserve UDP Cloud Portal - the portal provided to manage and use the Services.
- d. Arcserve Email Archiving Cloud (formerly Arcserve UDP Cloud Archiving) - Managed Email Archiving Service – email archiving as a service provided by Arcserve to its customers to archive email messages and email attachments in Arcserve’s datacenters.
- e. Arcserve Email Archiving Cloud (formerly Arcserve UDP Cloud Archiving) – Additional Service - optional ‘one-time’ service that offers Import and Export of Customer Data captured as part of Arcserve Email Archiving Cloud. “Import” means an Arcserve assisted migration service that imports email messages (Customer Data) from the customer’s mail system into the Arcserve cloud-based archive store. “Export” means an Arcserve assisted export service of all email messages (Customer Data) from the Arcserve cloud-based archive store.
- f. Arcserve UDP Cloud Direct Backup as a Service or Arcserve UDP Cloud Direct Cloud Storage - cloud backup service provided by Arcserve to its customers to store & manage backup data in Arcserve’s datacenters this Agreement.
- g. Arcserve UDP Cloud Direct Disaster Recovery as a Service or Arcserve UDP Cloud Direct Cloud Compute - disaster recovery as a service provided by Arcserve to its customers to store & manage backup data in Arcserve’s datacenters for specific customer systems and to run such systems within a virtual private cloud in Arcserve’s datacenters in the case of a disaster until such systems and data is restored in the customer location.
- h. Arcserve UDP Cloud Direct Client Software - the software and related technology provided by Arcserve that enables Arcserve UDP Cloud Direct Backup as a Service and Arcserve UDP Cloud Direct Disaster Recovery as a Service Customers to send and/or access their Customer Data to and from Arcserve datacenter. The software includes, but is not limited to, all downloadable software (such as Arcserve UDP Cloud Direct Agent and Arcserve UDP Cloud Direct Virtual Appliance for VMware) and scripts and script interfaces.

### III. DEFINITIONS

The capitalized terms used in this Agreement have the respective meanings specified in in this section III or in the provision where the term is first used and defined.

“**Acceptable Use Policy**” or “**AUP**” means the Arcserve Acceptable Use Policy located at <https://www.arcserve.com/CloudServices> which is hereby incorporated into this Agreement by this reference.

“**BAA**” means the Business Associate Agreement located at <https://Arcserve.com/CloudServices> which is hereby incorporated into this Agreement by reference, the terms of which shall only apply to Customer Data that constitutes protected health information as defined in the Health Insurance Portability and Accountability Act found at 45 CFR §160.103.

“**Customer Data**” means any and all data provided by you to Arcserve pursuant to Customer’s use of the Services, including but not limited to third party data, email messages, email attachments, PII and associated metadata.

“**Data Protection Agreement**” or “**DPA**” means the agreement located at <https://Arcserve.com/CloudServices>, which is hereby incorporated into this Agreement by reference, under the circumstances set forth below.

“**Fees**” means the charges for the Services as set forth in an Order (including, but not limited to, any additional usage charges as described in the Order).

**“Hosted System”** means an information system (including, software, hardware and networking elements) maintained by Arcserve for certain of Arcserve’s customers (including, but not limited to, you).

**“Intellectual Property Rights”** means all patents, copyrights, moral rights, trademarks, trade secrets and any other form of intellectual property rights recognized in any jurisdiction, including applications and registrations for any of the foregoing.

**“Laws”** means federal, national, state, provincial, municipal and local laws, regulations, rules, judicial decrees, decisions and judgments in each and every jurisdiction applicable to Customer, Arcserve, the subject matter of this Agreement and/or the Services contemplated hereunder.

**“Order”** means the documentation between you and Arcserve and/or Arcserve’s authorized representatives definitively establishing (i) the Service/s which you are permitted to use, (ii) the Fee (including the manner and timing of payment of the Fee) for such Services, and (iii) the Standard Term. An Order must be accepted by Arcserve. The Order may consist of one or more documents, and the documents may be in printed or electronic format.

**“Personally Identifiable Information”** or **“PII”** means: (i) a combination of any information that identifies an individual with that individual’s sensitive and non-public financial, health or other data or attribute, such as a combination of the individual’s name, address or phone number with the individual’s social security number or other government issued number, financial account number, date of birth, address, biometric data, mother’s maiden name, or other personally identifiable information; (ii) any “non-public personal information” as that term is defined in the Gramm-Leach-Bliley Act found at 15 USC Subchapter 1, § 6809(4); or (iii) “protected health information” as defined in the Health Insurance Portability and Accountability Act found at 45 CFR §160.103.

**“Privacy Policy”** means the Arcserve Privacy Policy available at <https://www.arcserve.com/about/privacy/>, which is hereby incorporated into this Agreement by reference.

**“Security Obligations”** means: (i) providing unique access credentials for each customer; (ii) encrypting all Customer Data transmitted between the Customer and the Services; and (iii) controlling and monitoring physical access to the sensitive areas of Arcserve’s facility where Customer Data is stored.

**“Service Level Standards”** means the service levels (applicable only during the Standard Term and solely with respect to the Services) located at <https://Arcserve.com/CloudServices>, which are hereby incorporated into this Agreement by this reference.

**“Site”** means the Internet website located at [www.arcserve.com](http://www.arcserve.com) (or any successor or replacement thereto).

**“Standard Term”** means the period during which you are authorized to use the Services as specified in an Order.

**“Support Terms”** means the support terms for the Services applicable during the Standard Term located at <https://support.arcserve.com> which are hereby incorporated into this Agreement by this reference.

**“Support”** means the support services provided by Arcserve for the Services during the Standard Term the pursuant to the Support Terms.

**“Trial Term”** means the period during which Arcserve may allow you to use certain Services without charge which may be specified in an Order or may be as otherwise determined by Arcserve in its sole discretion.

## IV. OBLIGATIONS AND GRANTS

Subject to an Order for Services, the following obligations and grants will apply:

- a. During any Trial Term, Arcserve will use commercially reasonable efforts to provide the Services.
- b. During any Standard Term, Arcserve will use commercially reasonable efforts to: (i) provide the Services and the Support; and (ii) meet the Service Level Standards.

Subject to the terms and conditions of this Agreement and during the Standard Term and/or Trial Term, Arcserve grants to you a non-exclusive, non-sublicensable, revocable and limited right to: (i) use the Services solely for your internal purposes; (ii) make one copy of any materials provided by Arcserve relating to the Services for backup purposes; and (iii) download (from the Site) and use the Arcserve UDP Cloud Direct Client Software solely for use with the Services. You agree that you shall not: (i) make or permit the making of any modifications, additions or enhancements to Arcserve UDP Cloud Direct Client Software, or (ii) cause or permit the disassembly, de-compilation or reverse engineering of Arcserve UDP Cloud Direct Client Software.

## V. GENERAL

- a. You must use reasonable security precautions in connection with your use of the Services. You must comply with the Laws with respect to your use of the Services and with the Acceptable Use Policy. You must cooperate with Arcserve's reasonable investigation of Service downtime/outages, security problems and any suspected breach of this Agreement.
- b. If (i) your use of any Service requires any license to use Arcserve's proprietary software, and (ii) you have not otherwise agreed to Arcserve's form of EULA, your acceptance of this Agreement is also acceptance of the EULA.

## VI. CUSTOMER DATA

Customer hereby grants Arcserve a license to use, operate, copy, transmit, distribute, store and cache Customer Data solely to provide the Services to Customer. You represent and warrant that: (i) Customer has all necessary rights to grant the foregoing license to Customer Data and that Arcserve's exercise of such rights shall not violate the rights of any third party or any applicable Laws; (ii) all Customer Data about individuals has been collected in accordance with Customer's privacy guidelines and applicable Laws and that Customer's privacy guidelines comply with all applicable Laws; (iii) Customer has obtained all consents required by the applicable Laws to transfer all of the Customer Data to Arcserve for storage ; (iv) all of your registration and account information is true, accurate and complete; and (v) you will maintain the security of your password.

Notwithstanding any terms to the contrary in this Agreement, Arcserve may disclose Customer Data: (i) as required by any applicable Laws; or (ii) in response to a subpoena or other compulsory legal process.

## VII. HIPAA

You and Arcserve each represents and warrants that it is compliant with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and Customer represents and warrants that neither its acts nor omissions will adversely affect Arcserve's compliance with HIPAA. Each party is bound by the terms and conditions of the BAA as to Customer Data that is Protected Health Information, as such term is defined by HIPAA and in the BAA.

## VIII. GDPR; DATA PROTECTION REGULATIONS

If any of the Services, in whole or in part, are or may be (i) subject to the requirements of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons

with regard to the processing of personal data and on the free movement of such data (“GDPR”) or (ii) subject to data protection laws applicable to the local jurisdiction where such Customer Data may be stored or processed, Arcserve and Customer agree: (i) to be governed by the terms of Arcserve Privacy Policy; and (ii) the Data Protection Agreement.

## **IX. OWNERSHIP**

As between the parties, you own all right, title and interest in and to the Customer Data and any and all Intellectual Property Rights embodied therein. As between the parties and subject to the grants in this Agreement, Arcserve owns all right, title and interest in and to: (i) the Services, the Arcserve UDP Cloud Direct Client Software, and any other software provided by Arcserve for your use of the Services; (ii) the Hosted System; (iii) any work product developed by Arcserve as a result of the performance of the Services and/or the Support; and (iv) any and all Intellectual Property Rights embodied therein.

## **X. PAYMENT OBLIGATIONS**

- a. You agree to pay the Fees set forth in the Order(s) or otherwise agreed upon by Arcserve in accordance with the terms set forth herein, in such Order(s) or as otherwise agreed upon by Arcserve (the “Fees”). The provision of each Service (and the Support) may be suspended or discontinued by Arcserve in its discretion for non-payment of the Fees in full, when due.
- b. For auto-renewal Orders, to cancel your subscription to prevent automatic renewal, you must send a cancellation notice by email [cancel@arcserve.com](mailto:cancel@arcserve.com). Cancellation will become effective at the end of the then-current Standard Term.
- c. Unless an Order provides otherwise, all payments must be made in U.S. Dollars and are due upon demand. Interest on any late payments will accrue at the rate of 1.5% per month, or the highest rate permitted by law, whichever is lower, from the date such amount is due until finally paid. Further, Arcserve may collect Fees owed using other collection mechanisms (including, but not limited to, charging other payment methods on file with Arcserve or retaining collection agencies and legal counsel).
- d. All Fees required by this Agreement are exclusive of federal, state, local and foreign taxes, duties, tariffs, levies, withholdings and similar assessments (including without limitation, sales taxes, use taxes and value added taxes), and Customer agrees to bear and be responsible for the payment of all such charges, excluding taxes based upon Arcserve’s net income. All amounts due hereunder shall be grossed-up for any withholding taxes imposed by any foreign government. If any federal, state, local or foreign government applies taxes to the Services that Arcserve is required to remit to the applicable taxing authority, Customer shall remit payment therefor to Arcserve promptly following receipt of Arcserve’s invoice for the same.

## **XI. CONFIDENTIALITY AND PUBLICITY**

- a. “Confidential Information” means all information disclosed (whether in oral, written, or other tangible or intangible form) by one party (the “Disclosing Party”) to the other party (the “Receiving Party”) concerning or related to this Agreement or the Disclosing Party (whether before, on or after the Effective Date) which the Receiving Party knows or should know, given the facts and circumstances surrounding the disclosure of the information by the Disclosing Party, is confidential information of the Disclosing Party. Confidential Information includes, but is not limited to, the Services, the components of the business plans, financial plans, know-how, customer information, strategies and other similar information. The Receiving Party will, during the term of this Agreement, and thereafter maintain in confidence the Confidential Information of the Disclosing Party and will not use such Confidential Information except as expressly permitted herein. The Receiving Party will use the same degree of care in protecting the Disclosing Party’s Confidential Information as the

Receiving Party uses to protect its own Confidential Information from unauthorized use or disclosure, but in no event less than reasonable care. Any Confidential Information of the Disclosing Party will be used by the Receiving Party solely for the purpose of carrying out the Receiving Party's obligations under this Agreement. Subject to the terms and conditions of this Agreement, the Receiving Party (i) will not reproduce Confidential Information disclosed by the Disclosing Party, in any form, except as required to accomplish the Receiving Party's obligations under this Agreement and (ii) will only disclose Confidential Information disclosed by the Disclosing Party to its directors, officers, employees and/or contractors who have a need to know such Confidential Information in order to perform their duties under this Agreement and if such directors, officers, employees and/or consultants have executed a non-disclosure agreement with the Receiving Party with terms no less restrictive than the non-disclosure obligations contained in this Section. Confidential Information will not include information that: (a) is in or enters the public domain without breach of this Agreement through no fault of the Receiving Party; (b) the Receiving Party can reasonably demonstrate was in its possession prior to first receiving it from the Disclosing Party; (c) the Receiving Party can demonstrate was developed by the Receiving Party independently and without use of or reference to the Disclosing Party's Confidential Information; or (d) the Receiving Party receives from a third-party without restriction on disclosure and without breach of a nondisclosure obligation.

## **XII. PUBLICITY**

Customer acknowledges and agrees that Arcserve may use, publish and display Customer's name and logo on the Site and publicly-available printed materials identifying Customer as a customer of Arcserve.

## **XIII. DISCLAIMER**

Arcserve is not responsible to you for unauthorized access to Customer Data or the unauthorized use of the Services (unless the unauthorized access or use results from Arcserve's material failure to meet the Security Obligations (which solely apply to Services)). You are responsible for: (i) the use of the Services by any employee of yours or any person to whom you have given access to the Services; and (ii) any person who gains access to Customer Data or the Services as a result of your failure to use reasonable security precautions (even if such use was not authorized by you).

EXCEPT FOR THE SERVICE LEVEL STANDARDS (WHICH ONLY APPLY DURING THE STANDARD TERM AND SOLELY WITH RESPECT TO (i) ARCSERVE UDP CLOUD DIRECT BACKUP AS A SERVICES AND DISASTER RECOVERY AS A SERVICE, (ii) ARCSERVE UDP CLOUD HYBRID BACKUP AS A SERVICE AND DISASTER RECOVERY AS A SERVICE, AND (iii) ARCSERVE EMAIL ARCHIVING CLOUD. ARCSERVE AND ITS SUPPLIERS PROVIDE EACH SERVICE AND THE SUPPORT "AS IS" ON AN "AS AVAILABLE" BASIS WITHOUT ANY REPRESENTATIONS, WARRANTIES, COVENANTS OR CONDITIONS OF ANY KIND. ARCSERVE AND ITS SUPPLIERS DO NOT WARRANT THAT ANY OF THE SERVICES OR THE SUPPORT WILL BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE. CUSTOMER ACKNOWLEDGES AND AGREES THAT: (I) THE SERVICES MAY INCLUDE ACCESS TO AND USE OF THE ARCSERVE UDP CLOUD PORTAL MADE AVAILABLE TO CUSTOMER BY ARCSERVE FOR USE DURING THE TERM OF THESE TERMS; (II) THE SERVICES MAY REQUIRE ACCESS TO AND USE OF THE INTERNET; (III) ARCSERVE DOES NOT HAVE RESPONSIBILITY FOR OPERATING OR MAINTAINING CUSTOMER SERVERS AND CUSTOMER'S CONNECTION TO THE INTERNET TO ACCESS AND UTILIZE THE SERVICES; AND (IV) THERE ARE RISKS INHERENT IN INTERNET CONNECTIVITY THAT COULD RESULT IN THE LOSS OF CUSTOMER DATA. ARCSERVE AND ITS SUPPLIERS DISCLAIM ANY AND ALL OTHER WARRANTIES AND REPRESENTATIONS (EXPRESS OR IMPLIED, ORAL OR WRITTEN) WITH RESPECT TO THE SERVICES AND THE SUPPORT WHETHER ALLEGED TO ARISE BY OPERATION OF LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, BY COURSE OF DEALING OR OTHERWISE, INCLUDING ANY AND ALL: (A) WARRANTIES OF MERCHANTABILITY; (B) WARRANTIES OF FITNESS OR

SUITABILITY FOR ANY PURPOSE (WHETHER OR NOT ARCSERVE KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED OR IS OTHERWISE AWARE OF ANY SUCH PURPOSE); AND (C) WARRANTIES OF NON-INFRINGEMENT OR CONDITION OF TITLE. CUSTOMER ACKNOWLEDGES AND AGREES THAT IT HAS RELIED ON NO WARRANTIES. THIS DISCLAIMER AND EXCLUSION WILL APPLY EVEN IF THE EXPRESS WARRANTY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE

#### **XIV. CHANGES TO ACCEPTABLE USE POLICY**

We may change the Acceptable Use Policy to add restrictions on use of the Services, provided that the changes are reasonable and consistent with hosting industry norms. If a change materially impacts Customer's existing use of the Services (in an adverse manner), Customer may terminate this Agreement without penalty in accordance with the terms of the Term and Termination provision. If we make a change to the Acceptable Use Policy, we will publish a revised version of the Acceptable Use Policy on the Site and Customer agrees that publishing such revised Acceptable Use Policy shall constitute sufficient notice.

#### **XV. EXPORT MATTERS**

You represent and warrant that you are not on the United States Department of Treasury, Office of Foreign Asset Controls list of Specially Designated National and Blocked Persons and are not otherwise a person to whom Arcserve is legally prohibited to provide the Services. You may not use the Services for the development, design, manufacture, production, stockpiling, or use of nuclear, chemical or biological weapons, weapons of mass destruction, or missiles, in a country listed in Country Groups D: 4 and D: 3, as set forth in Supplement No. 1 to the Part 740 of the United States Export Administration Regulations, nor may you provide administrative access to the Service to any person (including any natural person or government or private entity) that is located in or is a national of any country that is embargoed or highly restricted under United States export regulations.

#### **XVI. INDEMNIFICATION**

Customer, at its sole expense, will defend, indemnify and hold Arcserve and its directors, officers, employees, contractors, agents, distributors, resellers, successors and assigns ("Arcserve Indemnitees") harmless from and against any and all actual or threatened suits, actions, proceedings (at law or in equity), claims (groundless or otherwise), damages, payments, deficiencies, fines, judgments, settlements, liabilities, losses, costs and expenses (including, but not limited to, reasonable attorney fees, costs, penalties, interest and disbursements) resulting from any third party claim, suit, action, or proceeding ("Claim") against an Arcserve Indemnitee, whether successful or not, resulting from or arising in connection with: (i) any gross negligence or willful misconduct by Customer; (ii) any breach by Customer of this Agreement (including, but not limited to, any breach by Customer of its representation or warranties); or (iii) Customer Data (or any portion thereof). Arcserve, at its sole expense, will defend Customer and its directors, officers, employees, contractors, agents, successors and assigns ("Customer Indemnitees") harmless from and against any and all Claims, and indemnify and hold Customer harmless from damages awarded or paid in settlement of such Claims, (including, but not limited to, reasonable attorney fees, costs, penalties, interest and disbursements incurred in defense thereof) resulting from any Claim against a Customer Indemnitee, whether successful or not, resulting from or arising in connection with: (a) any gross negligence or willful misconduct by Arcserve; or (b) any material failure by Arcserve to maintain the Security Obligations. The indemnifying party's indemnification obligations under this section are conditioned upon the indemnified party: (x) giving prompt notice of the Claim to the indemnifying party once the indemnified party becomes aware of the Claim; (y) granting sole control of the defense and settlement of the Claim to the indemnifying party (except that the indemnified party's prior written approval will be required for any settlement that reasonably can be expected to require an affirmative obligation of or result in any ongoing liability to the indemnified party); and (z) providing reasonable cooperation to the indemnifying party and, at the indemnifying party's request and expense, assistance in the defense or settlement of the Claim. Notwithstanding any terms to the contrary in

this Agreement, the failure to give notice to the indemnifying party within a reasonable time of the commencement of any Claim under this section will relieve the indemnifying party of any liability to the indemnified party under this section, only to the extent that such failure materially prejudices the indemnifying party's ability to defend such Claim.

## **XVII. LIMITATION OF LIABILITY**

EXCEPT FOR ANY ACTS OF FRAUD, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, CUSTOMER'S INDEMNIFICATION OBLIGATIONS OR CUSTOMER'S PAYMENT OBLIGATIONS, IN NO EVENT WILL: (I) EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY LOSS OF PROFITS, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, ANY INTERRUPTION OF BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH THESE TERMS, THE SERVICES OR THE SUPPORT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAS BEEN ADVISED OR IS OTHERWISE AWARE OF THE POSSIBILITY OF SUCH DAMAGES; AND (II) EITHER PARTY'S TOTAL LIABILITY ARISING OUT OF OR RELATED TO THESE TERMS, THE SERVICES OR THE SUPPORT SHALL NOT EXCEED IN THE AGGREGATE REGARDLESS OF THE NUMBER OF CLAIMS MADE DURING THE TERM THE AMOUNTS PAID AND PAYABLE BY CUSTOMER TO ARCSERVE OR ARCSERVE'S AUTHORIZED REPRESENTATIVE WITH RESPECT TO THE SERVICE INVOLVED IN THE CLAIM DURING THE SIX (6) MONTH PERIOD PRIOR TO THE DATE THE CLAIM AROSE. THIS SECTION WILL BE GIVEN FULL EFFECT EVEN IF ANY REMEDY SPECIFIED IN THESE TERMS IS DEEMED TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

NOTWITHSTANDING ANY TERMS TO THE CONTRARY IN THESE TERMS: (A) THE SOLE AND EXCLUSIVE REMEDY FOR ANY INABILITY TO ACCESS THE SERVICES OR OTHER FAILURE TO MEET ANY SERVICE LEVEL STANDARDS ARE THE SERVICE CREDITS PROVIDED UNDER THE SERVICE LEVEL AGREEMENT UNLESS SUCH FAILURE IS DUE TO ARCSERVE'S WILLFUL MISCONDUCT; (B) ARCSERVE WILL NOT BE LIABLE FOR ANY LOSS OF CUSTOMER DATA; AND (C) THE LIMITATIONS IN THIS LIMITATION OF LIABILITY PROVISION WILL NOT APPLY TO A PARTY'S INDEMNIFICATION OBLIGATIONS PROVIDED, HOWEVER, THAT A PARTY'S AGGREGATE LIABILITY WITH RESPECT TO SUCH INDEMNIFICATION OBLIGATIONS WILL NOT EXCEED THREE TIMES THE AMOUNT PAID BY CUSTOMER TO ARCSERVE DURING THE 12 MONTH PERIOD PRIOR TO THE ACCRUAL OF THE FIRST CLAIM. MULTIPLE CLAIMS OF A SIMILAR NATURE INVOLVING THE SAME SERVICE WILL NOT EXPAND THIS LIMITATION.

NOTWITHSTANDING ANY TERMS TO THE CONTRARY IN THESE TERMS, CUSTOMER ACKNOWLEDGES AND AGREES THAT: (I) ARCSERVE MAY PROVIDE TO CUSTOMER THIRD PARTY SOFTWARE AND SERVICES; AND (II) CUSTOMER AGREES TO COMPLY WITH THE THIRD PARTY TERMS AND LICENSES APPLICABLE TO SUCH THIRD PARTY SOFTWARE AND SERVICES. ARCSERVE MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND TO CUSTOMER REGARDING SUCH THIRD PARTY SOFTWARE AND SERVICES OR THAT SUCH TERMS OR CONDITIONS MAY NOT CHANGE OR BE ALTERED BY SUCH THIRD PARTIES AT ANY TIME.

## **XVIII. TERM, TERMINATION & SUSPENSION OF SERVICES**

Trial Term – The term of this Agreement will be for the Trial Term (unless terminated as permitted in this Agreement). During the Trial Term, either party may terminate this Agreement for cause or no cause, with notice to the other party, and such termination will be effective immediately.



Standard Term – The term of this Agreement will be for the period set forth in the Order or as otherwise agreed upon by the parties (unless terminated as permitted in this Agreement). You will be charged for the Services as set forth in the Order or as otherwise agreed upon by the parties. Either party may terminate this Agreement and/or any Order: (i) as set forth in the Order; (ii) if the other party breaches any material provision of this Agreement for any reason, which breach has not been cured within thirty (30) days of written notice (except for Customer’s payment obligations shall be cured promptly, but no more than fifteen (15) days, upon notice); or (iii) the other party becomes subject of a voluntary or involuntary petition in bankruptcy, or any proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors, which is not dismissed within sixty (60) days after commencement. Arcserve may terminate this Agreement for convenience upon thirty (30) days’ advance written notice; provided that if Arcserve terminates this Agreement for convenience, it shall refund a pro rata amount of any prepaid fees for the terminated portion of the then-current Standard Term. Notwithstanding any terms to the contrary in this Agreement: (i) failure to meet any Service Level Standard does not constitute a breach of this Agreement (or any portion thereof); and (ii) Customer will be responsible for all Fees incurred up to the effective date of termination.

During the Trial Term or the Standard Term, Arcserve may suspend Services (or any portion thereof) without liability if: (i) Arcserve reasonably believes that the Services are being used in violation of this Agreement; (ii) there is an attack on the Hosted System or the Hosted System is accessed or manipulated by a third party without Customer’s or Arcserve’s consent; (iii) Arcserve is required by any Law(s) to suspend the Services; or (iv) Arcserve reasonably believes that the suspension of the Services is required.

## **XIX. EFFECTS OF TERMINATION**

Upon any termination or expiration of this Agreement: (i) Customer must immediately pay all Fees (if applicable) accrued up to the effective date of termination or expiration of this Agreement (whichever is applicable); and (ii) all applicable licenses granted to Customer under this Agreement will immediately cease; provided that licenses granted to Arcserve with respect to Customer Data shall survive for the duration as provided below. No refunds will be issued except as otherwise expressly set forth in this Agreement.

Provisions which, by their terms, are to survive expiration or termination of this Agreement, and the following sections will survive any expiration or termination of this Agreement – Products and Services, Additional Definitions, Customer Data (other than the licenses granted to Arcserve), Ownership, Payment Obligations, Confidentiality and Publicity, Disclaimer, Indemnification, Limitation of Liability, Effects of Termination, Transition Services and Miscellaneous.

If you do not elect to use any Service at the end of the Trial Term, Arcserve may (but, is not obligated to) delete all Customer Data after the close of the Trial Term.

## **XX. TRANSITION SERVICES**

In the event of termination of this Agreement for any reason during the Standard Term, Arcserve will: (i) make not less than a commercially reasonable effort to provide Customer access to all Customer Data stored on the Arcserve equipment for up to 30 days (or such longer period as mutually agreed to by the parties, and unless specifically requested to delete Customer Data sooner); and (ii) use commercially reasonable efforts to transfer, at Customer’s sole expense, such Customer Data to Customer or Customer’s designated service provider. Notwithstanding any terms to the contrary in this Agreement, after such period, Arcserve will have the right (but not the obligation) to destroy all such Customer Data.

Notwithstanding any terms to the contrary in this Agreement, if Arcserve receives a notice from Customer requesting the deletion of Customer Data during the Trial Term or the Standard Term, Arcserve will use commercially reasonable efforts to promptly delete such Customer Data.

## XXI. MISCELLANEOUS

- a. **Entire Agreement.** These Terms (together with all Orders and any other documents linked to this Agreement) are the entire agreement of the parties regarding the subject matter hereof, superseding all other agreements between them, whether oral or written, regarding the subject matter hereof. In the event of a conflict between the terms and conditions of an Order and the terms and conditions of this Agreement, the terms and conditions of this Agreement will govern. This Agreement shall not be superseded by any purchase order and the terms of any Customer purchase order or like document shall not have any force or effect.
- b. **Governing Law; Jurisdiction.** This Agreement will be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be entirely performed within the State of New York, without resort to its conflict of law provisions. In the event of any dispute between you and Arcserve, the parties shall first use reasonable efforts to settle the dispute through consultation and negotiation in good faith between you and an authorized member of Arcserve and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. Neither you nor Arcserve shall file or pursue any disputes in any court, administrative, arbitral, or other adjudicative body prior to engaging in such consultations and negotiations. The parties agree that any action at law or in equity arising out of or relating to this Agreement will be filed only in the state and federal courts located in and for New York County, NY, and the parties hereby irrevocably and unconditionally consent and submit to the exclusive jurisdiction of such courts over any suit, action or proceeding arising out of this Agreement.
- c. **Assignment.** Neither this Agreement nor any right or duty under this Agreement may be transferred, assigned or delegated by Customer without the prior written consent of Arcserve, and any attempted transfer, assignment or delegation without such consent will be void and without effect; provided, however, that Customer may assign or transfer this Agreement in their entirety pursuant to a merger or other corporate reorganization or the sale of substantially all of Customer's assets, in which case Customer shall provide notice to Arcserve of such assignment or transfer promptly following the same. Arcserve may freely transfer, assign or delegate this Agreement or its rights and duties under this Agreement. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective representatives, heirs, administrators, successors and permitted assigns.

Neither party will have any right or authority to assume or create any obligations or to make any representations or warranties on behalf of any other party, whether express or implied, or to bind the other party in any respect whatsoever.

- d. **Severability.** If any provision of this Agreement is invalid, illegal, or incapable of being enforced by any rule of law or public policy, all other provisions of this Agreement will nonetheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated by this Agreement is not affected in any manner adverse to any party. Upon such determination that any provision is invalid, illegal, or incapable of being enforced, the parties will negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled.
- e. **Force Majeure.** Except for payments due under this Agreement, neither party will be responsible for any failure to perform or delay attributable in whole or in part to any cause beyond its reasonable control, including but not limited to acts of God (fire, storm, floods, earthquakes, etc.), civil disturbances, disruption of telecommunications, disruption of power or other essential services, interruption or termination of service by any service providers being used by Arcserve to link its servers to the Internet, labor disturbances, vandalism, cable cut, computer viruses or other similar occurrences, or any acts of any third party (each a "Force Majeure Event"). In the event of any such

delay the date of delivery will be deferred for a period equal to the time lost by reason of the delay.

- f. **Electronic Communications.** Notwithstanding any terms to the contrary in this Agreement, Arcserve may choose to electronically deliver all communications with you, which may include: (i) email to your email address indicated in your communications with Arcserve or upon registration with the Site; or (ii) posting messages that are displayed to you when you log in to or access the Site. Arcserve's electronic communications to you may transmit or convey information about action taken on your request, portions of your request that may be incomplete or require additional explanation, any notices required under applicable law and any other notices. You agree to do business electronically with Arcserve, and to receive electronically all current and future notices, disclosures, communications and information, and that the aforementioned provided electronically satisfies any legal requirement that such communications be in writing. An electronic notice will be deemed to have been received the day of receipt as evidenced by such email.
- g. **No Modification.** Other than modifications to the Acceptable Use Policy as provided above and modifications and updates to this Agreement accepted by customer electronically or in writing, no other modification, addition or deletion, or waiver of any rights under this Agreement will be binding on a party unless agreed upon in writing by the parties.
- h. **Waivers.** No failure or delay (in whole or in part) on the part of a party to exercise any right or remedy hereunder will operate as a waiver thereof or effect any other right or remedy. All rights and remedies hereunder are cumulative and are not exclusive of any other rights or remedies provided hereunder or by law. The waiver of one breach or default or any delay in exercising any rights will not constitute a waiver of any subsequent breach or default.