

## Terms of Business

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IBM China/Hong Kong Limited of 10/F PCCW Tower, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong ("IBM") is pleased to set out the Terms of Business that will apply to this engagement. These Terms of Business and the attached statement of work (the "Statement of Work" or "SOW"), once signed by both parties, form the entire agreement ("Agreement") between IBM and the client entity named in the SOW ("you" or the "Client").

In the event of any conflict between these Terms of Business and the SOW or any other document that forms part of this Agreement, the SOW shall prevail.

If at any time you have any query in connection with the Agreement or IBM's work please contact IBM.

### 1. Services

#### 1.1 Type and Scope

IBM will provide the services specified in the SOW as being IBM's responsibilities (the "Services"). Such Services will be performed at the location(s) set out in the SOW.

- Where the SOW refers to Services to 'perform', this means that IBM will provide you with these Services and will be responsible for the management and control of these Services and Deliverable Materials listed or referred to in the SOW.
- Where the SOW refers to Services to 'assist', this means that IBM will assist you with your project, but that you will be responsible for the overall management and control of the Services.

#### 1.2 IBM Personnel

Where individual IBM employees are named in the SOW, IBM will use commercially reasonable efforts to ensure that such named individuals are available to support IBM's work for you during the estimated period stated in the SOW. You agree that IBM may call upon the assistance of other IBM Affiliates (as that term is defined in Clause 8.2 below) in the performance of such Services. If IBM's employees are required to work away from the location where they are permanently assigned, you agree to accept flexibility in the way such IBM employees divide their time between such location and your sites, to the extent consistent with IBM's performance obligations under this Agreement.

#### 1.3 Timetable

IBM will use commercially reasonable efforts to carry out its obligations in accordance with any dates or time periods referred to or specified in the SOW. However, unless otherwise expressly stated in the SOW, the parties agree that any date or time period stated in the SOW is intended for planning and estimating purposes only, and is not contractually binding.

### 2. Deliverable Materials

Deliverable Materials are literary works or other works of authorship (such as programs, program listings, programming tools, documentation, reports, drawings and similar works) that IBM may deliver to you under the SOW. IBM will deliver to you the Deliverable Materials, if any, specified in the SOW as being IBM's responsibility. Deliverable Materials do not include commercially available software or hardware; these are provided under separate agreements.

#### 2.1 Acceptance

Deliverable Materials will be accepted by you when the acceptance criteria or Deliverable Materials acceptance procedure, if any, specified in the SOW, have been met, or when you make productive use of the Deliverable Materials, whichever occurs first. Where no such criteria or procedure are specified in the SOW, Deliverable Materials will be deemed accepted on delivery to you.

#### 2.2 Ownership of Deliverable Materials

IBM will transfer to you IBM's title in the Deliverable Materials subject to the following:

##### 2.2.1 Client Materials

You will own the copyright in all those Deliverable Materials identified in the SOW as "Client Materials", subject to the remainder of this Clause 2.2. You grant to IBM a non-exclusive, royalty-free, world-wide, perpetual right to use, copy, adapt, modify, sub-license and market such Client Materials.

## **2.2.2 Pre-Existing Works**

The copyright and other intellectual property rights in any materials or software (whether written or machine-readable) created by or licensed to IBM or one of its Affiliates prior to this Agreement or outside this engagement and any subsequent modifications to same ("Pre-Existing Works") will remain vested in IBM or one of its Affiliates or a third party. To the extent that Pre-Existing Works are embedded in any Deliverable Materials, you will have a license to use them in accordance with Clause 2.2.3 below.

## **2.2.3 Other Deliverable Materials**

IBM or third parties will own the copyright in all Deliverable Materials which are not identified in the SOW as Client Materials and in all other materials or software created under this Agreement whether by or on behalf of IBM solely or both parties jointly ("Other Deliverable Materials"). Subject to Clause 2.2.6 below, you will have a perpetual non-exclusive, non-transferable license to use these Other Deliverable Materials (and any Pre-Existing Works to the extent that these are embedded in the Client Materials) for your own internal use and only for the purposes for which they were delivered, but you must not provide any Other Deliverable Materials (or any Pre-Existing Works, to the extent that these are embedded in the Client Materials), or copies of them, to any third party. Any Deliverable Materials that are not expressly specified in the SOW as "Client Materials" or "Other Deliverable Materials" will be considered "Other Deliverable Materials".

- 2.2.4** Notwithstanding any other provisions of these Terms of Business, the use of any Deliverable Materials consisting of computer software which is not identified as Client Materials will be subject to the terms of the license agreement provided with the software or (if no such license is provided) the license terms referred to in the SOW. Where no such license terms are referenced, you may use the software in accordance with the license granted by Clause 2.2.3 above.
- 2.2.5** Each of us grants the other only the licenses and rights specified. No other licenses or rights (including licenses or rights under patents) are granted.
- 2.2.6** The rights provided to you by IBM in the Deliverable Materials (including your ownership of copyright in Client Materials) as specified above, and the rights granted to you under Clause 2.2.3 above, are subject to payment by you of amounts due under this Agreement.
- 2.2.7** Notwithstanding any other provision of this Agreement, IBM and its Affiliates will not be prevented or restricted by this Agreement from using any technique, idea, concepts or know-how relating to IBM's or its Affiliates' business activities.

## **3. Your Responsibilities**

IBM's performance is dependent on you cooperating with IBM and carrying out your responsibilities as set out in this Agreement.

## **4. Fees and Payment**

### **4.1 Taxes**

Charges and expenses will be stated exclusive of any taxes. If any authority imposes a duty, tax, levy, or fee, excluding those based on IBM's net income, upon any transaction under this Agreement, then you agree to pay that amount as specified in an invoice or supply exemption documentation.

### **4.2 Payment of Invoices**

IBM will invoice in accordance with the terms of the SOW. Unless the SOW states otherwise, all amounts: (i) will be specified in Hong Kong dollars (ii) will be due upon receipt of the invoice by you; and (iii) will be payable as IBM specifies in the invoice. If any payment is not received by IBM within thirty (30) days after the invoice date, you will also pay a late fee equal to the lesser of: (1) two percent of such payment per 30-day period or portion thereof; or (2) the maximum amount permissible by applicable law. In the event of late payment, IBM reserves the right to suspend the provision of Services and to charge interest on amounts overdue.

## **5. Term and Termination**

### **5.1 Duration of Agreement**

This Agreement will apply from the Commencement Date stated in the SOW, if any, or where no Commencement Date is specified, from the date of signature of the SOW by both parties. This

Agreement will continue until the Services have been provided as stated in the SOW, or the Agreement is terminated earlier in accordance with the terms set out below.

## **5.2 Termination on Notice**

Unless the SOW states otherwise, this Agreement may be terminated by either party at any time by giving the other party not less than 30 days' written notice.

## **5.3 Termination for Breach**

This Agreement may be terminated by either party on written notice with immediate effect if the other commits a material breach of any term of this Agreement which is not remedied within 30 days of a written request to remedy the same (or if it is not practical to remedy the breach within such period, if reasonable steps have not been taken within the 30 days towards remedying the breach).

## **5.4 Effect of Termination**

On the termination of this Agreement, you will pay IBM for all Services provided up to the date of termination, and where you terminate on notice or IBM terminates for breach for additional costs IBM reasonably incurs as a result of the early termination of the Services, such as costs relating to sub-contracts or relocation costs. IBM will take reasonable steps to mitigate any such additional costs. Unless specified otherwise in the SOW, where the Services have been provided on a fixed price fees basis, you will pay IBM all sums due at the date of termination in accordance with the payment plan set out in the SOW, plus any related payments withheld, together with fees on a time and materials basis for Services provided after the date of the last applicable payment under the payment plan.

## **6. Confidentiality**

**6.1** IBM agrees that information labelled as confidential by you and all financial, statistical, customer, marketing and personnel data relating to your business, in each case as disclosed to IBM in connection with this Agreement, are your confidential information ("Client Confidential Information"). You agree that information labelled as confidential by IBM and IBM's methodologies (including without limitation, ascendant™), products, tools and proprietary software, training materials, industry templates and data, and any updates, changes and additions to the foregoing, in each case as disclosed to you in connection with this Agreement, are confidential information of IBM ("IBM Confidential Information"). Client Confidential Information and IBM Confidential Information are collectively referred to as "Confidential Information". Neither party will, without the prior written consent of the other, disclose to any third party any Confidential Information which is received from the other party for the purposes of providing or receiving Services. Each party agrees that any such Confidential Information received by it from the other may be used by its (and its respective Affiliates') personnel only for the purposes of providing or receiving Services under this or any other contract between the parties. These restrictions will not apply to any information which: (i) is or becomes generally available to the public other than as a result of a breach of an obligation under this Clause 6; (ii) is acquired from a third party without an obligation of confidentiality; (iii) is or has been independently developed by the recipient (or one of its Affiliates) or was known to it or them prior to receipt; or (iv) is generally known or easily ascertainable by non-parties of ordinary skill in computer or process design or programming or in the business of Client. Neither party will be liable to the other for inadvertent or accidental disclosure of Confidential Information if the disclosure occurs notwithstanding the party's exercise of the same level of protection and care that such party customarily uses in safeguarding its own confidential information. Confidential Information disclosed under this Agreement will be subject to this Clause 6 for 2 years following the initial date of disclosure.

**6.2** Notwithstanding Clause 6.1 above, each party will be entitled to disclose Confidential Information of the other: (i) to its respective insurers or legal advisors; and (ii) to a third party, to the extent that this is required by any court of competent jurisdiction, by a governmental or regulatory authority, or where there is a legal right, duty or requirement so to disclose, provided that in the case of sub-Clause 6.2 (ii), where reasonably practicable (and without breaching any legal or regulatory requirement) not less than 2 business days' notice in writing is first given to the other party. Notwithstanding anything to the contrary, IBM may disclose Confidential Information referred to in this Clause 6 to (i) IBM's Affiliates or (ii) a third party as may be necessary for the delivery of the Services, subject to such third party agreeing, in writing, to be bound by similar terms and conditions. IBM may similarly retain the engagement work papers in 'hard copy' or electronic format for IBM's or its Affiliates' internal use.

**6.3** Notwithstanding Clause 6.1 and Clause 6.2 above, IBM may cite the performance of the Services to its clients and prospective clients as an indication of IBM's experience, unless you and IBM specifically agree otherwise in writing.

## **7. Liability**

### **7.1 Limitation**

Circumstances may arise where, because of a default on IBM's part or other liability, you are entitled to recover damages from IBM. Regardless of the basis on which you are entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable for no more than:

- (1) payments referred to in the Patents and Copyrights clause below;
- (2) damages for bodily injury (including death), and damage to real property and tangible personal property for which IBM is legally liable; and
- (3) the amount of any other actual direct damages up to the greater of HK\$780,000 or the charges or the amounts paid or due and payable to IBM (if recurring, 12 months' charges apply) under the Statement of Work.

This limit also applies to any of IBM's subcontractors and Affiliates. It is the maximum for which IBM, its Affiliates, and its subcontractors are collectively responsible.

### **7.2 Items for Which IBM is Not Liable**

Under no circumstances is IBM, its Affiliates, or its subcontractors liable for any of the following, even if informed of their possibility:

- (1) loss of, or damage to, data;
- (2) special, incidental, or indirect damages or for any economic consequential damages; or
- (3) lost profits, business, revenue, goodwill, or anticipated savings.

## **8. General**

### **8.1 Subcontracting**

IBM may subcontract any part of the Services to one or more subcontractors selected by IBM. However, this will not affect IBM's obligations to you for Services provided under this Agreement, subject to the other provisions of this Agreement. Any reference to IBM's personnel in this Agreement includes IBM's agents and subcontractor staff.

### **8.2 Affiliates**

In this Agreement, "Affiliate" means any entity which from time to time Controls, is Controlled by or is under common Control with the relevant party or entity, where "Control" means having the ability (including, without limitation, by means of a majority of voting rights or the right to appoint or remove a majority of the board of directors) to control the management and policies of an entity.

### **8.3 Force Majeure**

Neither party will be liable to the other for any failure to fulfill obligations caused by circumstances outside its reasonable control. This clause does not apply to any of your obligations to pay charges for Services provided.

### **8.4 Export and Import**

Each party will comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users.

### **8.5 Assignment**

Neither party may assign, transfer, charge or otherwise seek to deal in any of its respective rights or obligations under this Agreement without the prior written consent of the other party, except that IBM may, without consent, assign or transfer its rights and obligations to a person or persons whose identity IBM may provide to you in writing, to whom all or part of its business is transferred. IBM is also permitted to assign its rights to receive payments under this Agreement without obtaining your consent.

References in this Agreement (including without limitation in Clause 7) to a "party" or the "parties" will include their respective assignees and transferees under this Clause 8.5, unless the context reasonably requires otherwise.

## **8.6 Waiver**

Subject to Clause 8.10, no delay by either party in enforcing any of the terms or conditions of this Agreement will affect or restrict such party's rights and powers arising under this Agreement. No waiver of any term or condition of this Agreement will be effective unless made in writing.

## **8.7 Notices**

Notices must be in writing and served either personally, sent by prepaid registered post or faxed to the address of the other party given in this Agreement or to any other address as the relevant party may have notified to the other during the period of this Agreement. Any notice sent by post will be deemed to have been delivered 48 hours after sending. Any notice sent by fax or served personally will be deemed to have been delivered on the first working day following its delivery.

## **8.8 Electronic Communications**

To the extent permitted under applicable law, each of us may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

## **8.9 Amendment**

Any amendment to this Agreement will not be effective unless agreed in writing and signed by both parties. Additional or different terms in any written communication from you (such as an order) are void.

## **8.10 Survival and Validity of Agreement Provisions**

The provisions of this Agreement which expressly or by implication are intended to survive its termination or expiry will survive and continue to bind both parties. If any provision of this Agreement is held to be invalid, in whole or in part, such provision (or relevant part, as the case may be) shall be deemed not to form part of this Agreement. In any event, the enforceability of the remainder of this Agreement will not be affected. Neither party will bring a legal action arising out of or related to this Agreement more than two years after the cause of action arose.

## **8.11 Working for other clients**

IBM and its Affiliates will not be prevented or restricted by anything in this Agreement from providing services for other clients.

## **8.12 Relationship of Parties**

IBM is an independent contractor, and is responsible for the payment of all employer contributions and taxes measured by the remuneration paid to IBM employees as required by all applicable federal, state and local laws. IBM is not a fiduciary of Client, and does not undertake to perform any regulatory obligation of Client or to assume any responsibility for Client's business or operations. You are responsible for the results obtained from the use of the Services.

## **8.13 Patents and Copyrights**

**8.13.1** If a third party claims that Deliverable Materials IBM provides to you infringe that third party's patent or copyright, IBM will defend you against that claim at its expense and pay all costs, damages, and attorney's fees that a court finally awards or that are included in a settlement approved by IBM, provided that you:

- (1) promptly notify IBM in writing of the claim; and
- (2) allow IBM to control, and cooperate with IBM in, the defense and any related settlement negotiations.

### **8.13.2 Remedies**

If such a claim is made or appears likely to be made, you agree to permit IBM to enable you to continue to use the Deliverable Materials, or to modify them, or replace them with Deliverable Materials that are at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, you agree to return the Deliverable Materials to IBM on its written request. IBM will then give you a credit equal to the amount you paid IBM for the creation of the Deliverable Materials.

This is IBM's entire obligation to you regarding any claim of infringement.

### **8.13.3 Claims for Which IBM is Not Responsible**

IBM has no obligation regarding any claim based on any of the following:

- (1) anything you provide which is incorporated into the Deliverable Materials or IBM's compliance with any designs, specifications, or instructions provided by you or by a third party on your behalf;
- (2) your modification of Deliverable Materials; or
- (3) the combination, operation, or use of the Deliverable Materials with any product, data, apparatus, or business method that IBM did not provide, or the distribution, operation or use of the Deliverable Materials for the benefit of a third party (excluding your Affiliates).

#### **8.14 Third party claims**

You agree that this Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for any third party claims against you except as described in the Patents and Copyrights clause above or as permitted by the Liability clause above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable.

#### **8.15 Business Contact Information**

You agree to allow International Business Machines Corporation and its Affiliates to store and use your business contact information, including names, business phone numbers, and business e-mail addresses, anywhere they do business. Such information will be processed and used in connection with our business relationship, and may be provided to contractors acting on IBM's behalf, IBM business partners who promote, market, and support certain IBM products and services, and assignees of International Business Machines Corporation and its Affiliates for uses consistent with our business relationship.

#### **8.16 Entire Agreement**

This Agreement, including any attachment, invoice, or referenced document, forms the entire agreement between you and IBM relating to the Services. It replaces and supersedes any previous proposal, correspondence, understanding or other communication, whether written or oral. Neither party is liable to the other, in equity or otherwise, for any representation that is not set out in this Agreement. Each party acknowledges that it has not relied on or been induced to enter into this Agreement by a representation other than those expressly set out in this Agreement. The headings and titles in this Agreement are included to make it easier to read, but do not form part of this Agreement.

### **9. Warranties**

IBM warrants that it performs each of the Services using reasonable care and skill and according to its current description (including completion criteria) contained in the SOW. **THESE WARRANTIES ARE YOUR EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

### **10. Geographic Scope, Governing Law and Dispute Resolution**

#### **10.1 Geographic Scope**

The rights, duties, and obligations of each of us are valid only in Hong Kong Special Administrative Region, except that all licenses are valid as specifically granted.

#### **10.2 Applicable Law**

Both you and IBM consent to the application of the laws of Hong Kong Special Administrative Region to govern, interpret, and enforce all of your and IBM's rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles. You and IBM further agree to waive any rights each may have to a trial by jury.

#### **10.3 Resolving Disputes**

Should any dispute arise between you and IBM, the parties will attempt to resolve the dispute in good faith by negotiations in accordance with the Escalation Procedure, if any, described in the SOW. Where both you and IBM agree that it may be beneficial, the parties will seek to resolve the dispute through mediation.