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**10. LICENSEE INDEMNITY.** Licensee shall, to the fullest extent permitted by law and at Licensee's own cost and expense, defend, indemnify and hold harmless Arcserve including its parent, subsidiaries, affiliates or associated companies, and its and their directors, officers, employees and agents from and against any and all actions, suits, judgments, claims, proceedings, orders, losses, liabilities, damages, penalties, fines, costs, expenses (including attorneys' fees and court costs) and any incidental or consequential damage, loss, cost or expense flowing from any of the foregoing, that in any way is connected to, arises out of, or relates directly or indirectly to (i) Licensee's unauthorized use or misuse of the Product, Product Support or Portal provided by Arcserve, (ii) Licensee's use of the Product, Portal or any data that it stores, backs up, replicates, manages, manipulates or transfers through the use of the Products or Portal in violation of any applicable law or third-party intellectual property rights, (iii) Licensee uses the Software Product in violation of Third Party Terms (defined below), or (iv) Licensee's breach of any Sanctions and Export Control Laws (defined below).

## **11. LIMITATION OF LIABILITY.**

- A. IN NO EVENT WILL ARCSERVE OR ANY OF ITS THIRD PARTY LICENSORS AND SUPPLIERS OR THE CONTRIBUTORS OF INCLUDED SOFTWARE BE LIABLE TO LICENSEE OR ANY OTHER PARTY FOR ANY (I) USE, DELAY, OR INABILITY TO USE THE SOFTWARE, (II) LOST REVENUES OR PROFITS, (III) DELAYS, INTERRUPTION, OR LOSS OF SERVICES, BUSINESS, OR GOODWILL, (IV) LOSS, DISCLOSURE OR CORRUPTION OF DATA OR LOSS RESULTING FROM SYSTEM OR SYSTEM SERVICE FAILURE, MALFUNCTION, OR SHUTDOWN, (V) FAILURE TO ACCURATELY TRANSFER, READ, OR TRANSMIT INFORMATION OR FAILURE TO UPDATE OR PROVIDE CORRECT INFORMATION, (VI) SYSTEM INCOMPATIBILITY OR PROVISION OF INCORRECT COMPATIBILITY INFORMATION OR BREACHES IN SYSTEM SECURITY, (VII) ANY LOSS OR DAMAGE RELATED TO ANY THIRD PARTY SOFTWARE, OR (VIII) FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, OR PUNITIVE DAMAGES, WHICH MAY ARISE FROM THE USE, OPERATION OR MODIFICATION OF THE PRODUCT AND WHETHER ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER CAUSE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT ARCSERVE WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
- B. IN ADDITION TO THE FOREGOING, IF ARCSERVE IS LIABLE TO LICENSEE HEREUNDER OR OTHERWISE IN CONNECTION WITH THE PRODUCT, THEN IN SUCH

EVENT ARCSERVE SHALL ONLY BE LIABLE FOR DIRECT DAMAGES AND SUCH LIABILITY SHALL BE LIMITED, IN THE AGGREGATE, TO THE AMOUNT OF THE LICENSE FEE ACTUALLY PAID FOR THE PRODUCT BY LICENSEE OR IN THE CASE OF PRODUCT LICENSED ON A SUBSCRIPTION BASIS, THE AMOUNT PAID BY LICENSEE TO ARCSERVE FOR SUCH USE IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING WRITTEN NOTICE OF THE FIRST CLAIM.

- C. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY. CONSUMERS IN CERTAIN COUNTRIES MAY BE SUBJECT TO CERTAIN CONSUMER PROTECTION LAWS UNIQUE TO THEIR LOCALE AND WHICH MAY LIMIT THE ABILITY TO MODIFY OR EXCLUDE LIABILITY. IF LICENSEE ACQUIRED THE PRODUCT FOR BUSINESS PURPOSES, LICENSEE CONFIRMS THAT ANY APPLICABLE CONSUMER PROTECTION LAWS DO NOT APPLY TO LICENSEE OR LICENSEE'S USE OF THE PRODUCT. IF ARCSERVE BREACHES A CONDITION OR WARRANTY IMPLIED BY APPLICABLE LAW AND WHICH CANNOT LAWFULLY BE MODIFIED OR EXCLUDED BY THIS AGREEMENT THEN, TO THE MAXIMUM EXTENT PERMITTED BY LAW, ARCSERVE'S LIABILITY TO LICENSEE IS LIMITED, AT ARCSERVE'S OPTION, TO: (I) REPLACEMENT OR REPAIR OF THE SOFTWARE PRODUCT AND/OR RE-SUPPLY OF PRODUCT SUPPORT; OR (II) REFUND THE FEES PAID BY LICENSEE IN ACCORDANCE WITH THE FOLLOWING: (1) FOR A PERPETUAL LICENSE, REFUND THE FEES LICENSEE PAID FOR THE PRODUCT, DEPRECIATED ON A STRAIGHT LINE FIVE (5) YEARS BASIS, COMMENCING ON THE DATE OF PURCHASE, ONLY WHEN LICENSEE RETURNS THE PRODUCT TO ARCSERVE OR ITS AUTHORIZED RESELLER FROM WHOM IT OBTAINED THE PRODUCT, WITH THE PURCHASE RECEIPT INCLUDED OR (2) FOR A SUBSCRIPTION LICENSE, REFUND ANY PRE-PAID AND UNUSED FEES LICENSEE PAID ARCSERVE FOR THE PRODUCT.

## **12. COMPLIANCE WITH APPLICABLE LAWS; EXPORT CONTROL; ANTI-BRIBERY.**

- A. Licensee warrants that its use and possession of the Product is and will continue to be in accordance with all international, national, state, regional, and local laws and regulations.
- B. Licensee agrees that Arcserve, its employees, and its agents are subject to U.S. export control laws that prohibit or restrict: (i) transactions with certain parties and (ii) the type and level of technologies and services that may be exported from the U.S. Licensee shall comply fully with all Sanctions and Export Control Laws to assure that neither the Product, nor any direct products thereof are: (1) exported, directly or indirectly, in violation of the Sanctions and Export Control Laws or (2) used for any purpose prohibited by Sanctions and Export Control Laws, including without limitation, nuclear, chemical, or biological weapons proliferation. Licensee shall comply with all relevant import and export regulations, including those adopted by the Office of Export Administration of the US Department of Commerce and those applicable to Arcserve and/or Licensee.
- C. Each party warrants that in entering into this Agreement, neither party nor any of its officers, employees, agents, representatives, contractors, intermediaries, or any other person or entity acting on its behalf has taken or will take any action, directly or indirectly, that contravenes (i) the United Kingdom Bribery Act 2010, or (ii) the United States Foreign Corrupt Practices Act 1977, or (iii) any other applicable anti-bribery laws or regulations in any part of the world.
- D. Licensee acknowledges and agrees that neither the Product nor any of its underlying information or technology may be downloaded or otherwise exported or re-exported: (i) into (or to a national or resident of) Cuba, North Korea, Iran, Sudan, Syria, the Crimea region of Ukraine, or any other

country subject to U.S. sanctions applicable to the export or re-export of goods; or (ii) to anyone ordinarily resident in, located in, or organized under the laws of any country or region subject to economic or financial sanctions or trade embargoes imposed, administered, or enforced by the European Union, the United Kingdom, or the United States; (iii) an individual or entity on the Consolidated List of Persons, Groups, and Entities Subject to European Union Financial Sanctions; the U.S. Department of the Treasury's List of Specially Designated Nationals and Blocked Persons or Foreign Sanctions Evaders List; the U.S. Department of Commerce's Denied Persons List or Entity List; or any other sanctions or restricted persons lists maintained by the European Union, the United Kingdom, or the United States; or (iv) otherwise the target or subject of any Sanctions and Export Control Laws. Licensee further certifies that it will not, directly or indirectly, export, re-export, transfer, or otherwise make available the Products, or any data, information, software programs and/or materials resulting from the Products (or direct product thereof) to any country, region, or person described in this Section or in violation of, or for purposes prohibited by, Sanctions and Export Control Laws, including for proliferation-related end uses. By downloading or using the Product, Licensee agrees to the foregoing and represents and warrants that neither Licensee nor any party that owns or controls or is owed or controlled by Licensee is located in, under the control of, or a national or resident of any such country or on any such list, and Licensee acknowledges that it is responsible to obtain any necessary U.S. Government authorization to ensure compliance with Sanctions and Export Control Laws.

### 13. GOVERNMENT USE.

- A. This Section 13 applies if Licensee is a Government End User, or a prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement, or other activity with the U.S. Federal Government. In such case, the terms and conditions of this Section shall pertain to the Government End User's use and disclosure of the Product and Documentation and shall supersede any conflicting terms or conditions.
- B. If Licensee is a Government End User purchasing a Product pursuant to a U.S. Government Contract, Licensee accepts the terms of this Agreement by placing an order for the Product under the applicable U.S. Government Contract, effective as of the date of such order.
- C. Notwithstanding any language in this Agreement to the contrary, disputes with the U.S. Federal Government shall be subject to resolution pursuant to the Contract Disputes Act of 1978, as amended. This Agreement does not limit or disclaim any of the warranties specified in a valid Government Contract under Federal Acquisition Regulation 52.212-4(o). In the event of a breach of warranty, the U.S. Federal Government reserves all rights and remedies under the: (i) Government Contract under which it placed an order for the Software, (ii) Federal Acquisition Regulations, and (iii) Contract Disputes Act, 41 USC 7101-7109.
- D. The Product and any accompanying Documentation have been developed entirely at private expense and are commercial in nature. The Software Products and Documentation are "Commercial Items", as that term is defined in 48 C.F.R. § 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation", as such terms are defined in 48 C.F.R. § 252.227-7014(a)(1), (4)-(5), and used in 48 C.F.R. § 12.212 and 48 C.F.R. § 227.7202, as applicable. Government End Users acknowledge that the Software Product and Documentation are licensed only as Commercial Items with only those rights that are granted to all other end users of the Software Product, according to the terms and conditions contained in this Agreement.
- E. Sections 20.I (Governing Law), and 20.K (Dispute Resolution) of this Agreement shall not apply to Government End Users but shall continue to apply to prime contractors and subcontractors of the U.S. Federal Government. All other provisions of this Agreement remain in effect as written.

**14. THIRD PARTY SOFTWARE.** Licensee acknowledges that the Software Product may be distributed alongside certain third-party software ("Third Party Software") or open source software licenses of third parties ("Open Source Components"), which both are provided under separate license terms (the "Third Party Terms"). Information regarding Third Party Software and Open Source Components provided to Licensee by Arcserve is set forth in more detail at <https://www.arcserve.com/third-party-terms>. Licensee further acknowledges that the provisions of the Third Party Terms will apply to such Third Party Software and Open Source Components in lieu of the terms of this Agreement. No provision of the Third Party Terms gives Licensee any right, title or interest in the Software Product. To the extent the provisions of the Third Party Terms applicable to an Open Source Component prohibit any of the restrictions in this Agreement with respect to such Open Source Component, such restrictions will not apply to the Open Source Component affected by such prohibition. To the extent the provisions of the Third Party Terms applicable to the Open Source Components require Arcserve to make an offer to provide source code or related information in connection with Open Source Components, such offer is hereby made. Any request for source code or related information should be directed only to [opensource@arcserve.com](mailto:opensource@arcserve.com). Licensee acknowledges receipt of notices for the Open Source Components for the initial delivery of the Software Product.

**15. ALPHA/BETA VERSIONS; NO CHARGE EDITION; INTERNAL USE/NOT-FOR-REALE; TRIAL/EVALUATION VERSIONS; UDP COMMUNITY EDITION.**

- A. Alpha/Beta License. If the Software Product is an alpha or beta version of the program, hereinafter referred to as the "beta program" or "beta version" and not generally available to date, Arcserve does not guarantee that the generally available release will be identical to the beta program or that the generally available release will not require reinstallation. Licensee agrees that if required by Arcserve, Licensee shall provide Arcserve with specific information concerning Licensee's experiences with the operation of the Software Product. Licensee agrees and acknowledges that the beta version of the Software Product (i) is to be used only for testing purposes and not to perform any production activities unless Arcserve shall have otherwise approved in writing and (ii) has not been tested or debugged and is experimental and that the documentation may be in draft form and will, in many cases, be incomplete. Licensee agrees that Arcserve makes no representations regarding the completeness, accuracy or Licensee's use or operation of the beta version of the Software Product. If Licensee is also a Tester of the beta version of the Software Product (as "Tester" is defined by the Beta Testing Agreement that was agreed to by Licensee during the registration process before obtaining the beta version of the Software Product), Licensee agrees that the terms of this Agreement are in addition to, and do not supersede, the terms of the Beta Testing Agreement.
- B. No Charge Edition. If the Software Product is a No Charge Edition, then this edition runs in a limited capability mode, with limited Product Support for some languages that the Software Product presently supports. It is possible to upgrade to a paid version of the Software Product to enable functions that are disabled in the No Charge Edition. Support options and languages supported for the No Charge Edition are subject to change without notice.
- C. Internal Use/Not-For-Resale ("NFR") License. If the Software Product is an Internal Use/NFR License, the Software Product may be used solely for internal use, may not be sold, resold, transferred or leased, and is subject to suspension, deactivation, and/or termination at Arcserve's sole discretion.
- D. Trial/Evaluation License. If the Software Product is being licensed on a trial or evaluation basis, Licensee agrees to use the Software Product solely for evaluation purposes such as testing and/or assessing the Software Product's features, functionality, and interoperability, in accordance with the usage restrictions set forth in Section 3, for a thirty (30) day evaluation period unless a different period is otherwise noted (the "Trial Period"). At the end of the Trial Period, Licensee's right to

use the Software Product automatically expires and Licensee agrees to de-install the Software Product and return to Arcserve all copies or partial copies of the Software Product or certify to Arcserve in writing that all copies or partial copies of the Software Product have been deleted from Licensee's computer libraries and/or storage devices and destroyed. If Licensee desires to continue its use of the Software Product beyond the Trial Period, Licensee may contact Arcserve to acquire a license to the Software Product for the applicable fee.

- E. Community Edition. If the Software Product is being licensed as a Community Edition as defined below, in addition to the usage restrictions set forth in Section 3, above, the following shall apply: (i) Licensee shall only have up to 1 TB of protected source data. Licensee's ability to backup data will stop once 1 TB of protected source data is reached and Licensee will be required to license a paid for version of UDP for the total storage capacity needed; (ii) Licensee may only download one copy of the Community Edition per customer; (iii) Licensee may not combine the Community Edition with a paid for version of UDP (i.e. combine 1 TB community edition with 9 TB of paid for license to have 10 TB of storage). For purposes herein, "Community Edition" shall mean a fully functional, premium edition of UDP minus Arcserve Backup, license of the Software Product at no cost to Licensee. Arcserve shall provide Licensee with access to its UDP Community Forum but has no further obligation to provide Licensee Product Support or assistance. Licensee agrees that Arcserve makes no representations regarding the completeness, accuracy or Licensee's use or operation of the UDP Community Edition.
- F. With respect to the Software Products and licenses set forth in subsections A through E of this Section 15, such Software Products and licenses shall be PROVIDED ON AN "AS IS" BASIS, WITHOUT WARRANTIES OR REPRESENTATIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, UNINTERRUPTED USE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE AS WELL AS ANY EXPRESS WARRANTIES PROVIDED ELSEWHERE IN THIS AGREEMENT. ADDITIONALLY, ARCSERVE DOES NOT WARRANT THAT THE SOFTWARE PRODUCTS OR LICENSES WILL MEET LICENSEE'S REQUIREMENTS OR THAT USE THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

## **16. SOFTWARE DEVELOPMENT KIT; APIs.**

- A. If the Software Product includes a Software Development Kit ("SDK") or one or more application programming interfaces, scripts, and/or associated tools ("APIs"), the terms and conditions of this paragraph apply. The SDK may include software, APIs and associated documentation. The SDK and APIs are provided solely for Licensee's internal use (except in the case of an MSP delivering managed services to third parties, who may use the API to benefit their customer) to develop software that enables the integration of third-party software or hardware with the Software Product, or to develop software that functions with the Software Product, such as an agent. Licensee's use of the SDK and APIs are restricted solely to enhance Licensee's (or its customer's) internal use of the Software Product. Furthermore, Licensee agrees that the SDK and APIs shall be used solely in conjunction with the particular Software Product licensed to Licensee; only used with the user interface delivered with the Software Product or with an approved third-party user interface, service, agent, or module; not be used in conjunction with or to develop products or services competitive to the particular Software Product licensed; and shall not be used in a manner that suggests ownership by Licensee or anyone other than Arcserve. No distribution rights of any kind are granted to Licensee regarding the Software Product or SDK/APIs. In addition to the limitations on use set forth in Section 3(A), above, Licensee may not reproduce, disclose, market, or distribute the SDK/APIs or the documentation or any applications containing any executable versions of the SDK/APIs to third parties, on the internet, or use such executables in excess of the Authorized Use. If there is a

conflict between the terms of this section and the terms of any other section in this Agreement, the terms of this section will prevail solely with respect to the use of the SDK/APIs.

- B. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, SDKs AND APIs ARE PROVIDED ON AN "AS IS" BASIS WITHOUT ANY WARRANTIES OR REPRESENTATIONS OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, UNINTERRUPTED USE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE AS WELL AS ANY EXPRESS WARRANTIES PROVIDED ELSEWHERE IN THIS AGREEMENT. ADDITIONALLY, ARCSERVE DOES NOT WARRANT THAT THE PRODUCTS OR LICENSES WILL MEET LICENSEE'S REQUIREMENTS OR THAT USE THEREOF WILL BE UNINTERRUPTED OR ERROR FREE.

## 17. FEES.

- A. Payment of the Fees specified on the Order Form or as agreed between Licensee and an authorized reseller of Arcserve, shall entitle Licensee to use the Product for the Term, which use may include the right to receive Product Support therefore for the period set forth on the Order Form. All Fees payable hereunder shall be payable in advance unless otherwise set forth in Your executed agreement with Arcserve. Licensee will install each new release of the Software Product delivered to Licensee. After the Term, continued usage and/or Product Support as provided herein shall be subject to the payment by Licensee of the Fees. Notwithstanding the foregoing, if the Software Product was licensed under this Agreement without an Order Form, Licensee shall be entitled to use the Software Product for an indefinite period, but the license does not include the right to receive Product Support; provided however, with respect to any Software Product that relies on continuous content updates, such as signature files and security updates, Licensee shall be entitled to such content updates for a period of one (1) year from the effective date of the license.
- B. All Fees are net of applicable taxes. Licensee agrees to pay any tariffs, duties or taxes imposed or levied by any government or governmental agency including, without limitation, federal, state and local, sales, use, value added and personal property taxes, (other than franchise and income taxes for which Arcserve is responsible) upon a presentation of invoices by Arcserve. Any claimed exemption from such tariffs, duties or taxes must be supported by proper documentary evidence delivered to Arcserve.
- C. Any invoice which is unpaid by Licensee when due shall be subject to an interest charge equal to the lower of 1.5% per month or the highest applicable legal rate.

## 18. TERMINATION AND SUSPENSION.

- A. Arcserve shall have the right to terminate this Agreement immediately and, in addition to all other rights of Arcserve, demand all amounts due or that will become due hereunder immediately payable to Arcserve if: (i) Licensee fails to pay the Fees to Arcserve in accordance with the agreed payment terms, (ii) if Licensee breaches any term of this Agreement or any other agreement Licensee has entered into with Arcserve or (iii) if Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee ("Events of Default").
- B. If this Agreement or Licensee's license terminates for any reason, Licensee shall cease all use of the Software Product and Documentation and shall within one (1) month after the date of termination, certify to Arcserve in writing that all copies and partial copies of the Software Product



have been deleted from all computers and storage devices and are returned to Arcserve or destroyed and are no longer in use. Notwithstanding the foregoing, Licensee's continued use of the Software Products will at all times be subject to and governed by this Agreement. This Section 18.B shall survive termination or expiration of the Agreement indefinitely.

- C. Licensee's right to use and access the Software Products that are licensed on a subscription basis will automatically terminate on expiry of the applicable Term unless and until Licensee renews Licensee's subscription license for the Software Products.
- D. Except as expressly set forth herein, all Fees paid or payable are non-cancellable and non-refundable to the maximum extent permitted by law.
- E. Arcserve shall have the right to withhold its own performance hereunder including suspending or withholding Licensee's access to certain functionality of the Product, Product Support or any access to the Portal until the breach is cured if: (i) Licensee fails to pay the Fees to Arcserve in accordance with the agreed payment terms, (ii) Arcserve reasonably believes Licensee has used the Product in violation of Sections 2 – 5; (iii) Licensee breaches any term of this Agreement or any other agreement Licensee has entered into with Arcserve or (iv) Licensee becomes insolvent or if bankruptcy or receivership proceedings are initiated by or against Licensee. Arcserve's decision to suspend functionality or access is without prejudice to its right to terminate the Agreement for the same cause(s) underlying the suspension.
- F. The provisions of Sections 2-5, 10-12, 18, 19, 20, 21 and other provisions that by their nature survive termination, shall survive any termination or expiration of this Agreement.

**19. CONFIDENTIALITY.** By virtue of the Agreement, Licensee will have access to information that is confidential to Arcserve ("Confidential Information"). Confidential Information includes non-public information that is designated "confidential" or that a reasonable person should understand is confidential. Licensee will protect Arcserve's Confidential Information from unauthorized dissemination and use with the same degree of care that it uses to protect its own Confidential Information, but in no event less than a reasonable amount of care. Licensee shall only use Arcserve's Confidential Information in performance of this Agreement. Furthermore, Licensee agrees not to disclose Arcserve's Confidential Information to any third party other than those set forth in the following sentence. Licensee may disclose Arcserve Confidential Information only to those employees or agents or subcontractors who are required to protect it against unauthorized disclosure in a manner no less protective than under this Agreement and who have a genuine need to know. Nothing shall prevent Licensee from disclosing Confidential Information to a governmental entity as required by law, provided however that Licensee shall provide Arcserve with notice (unless otherwise directed by law enforcement authorities) with the intent that Arcserve has an opportunity to seek a protective order, and where no protective order is granted, Licensee shall disclose only the Confidential Information as necessary to comply with the law, rule, regulation, summons, subpoena or order, and will advise the party seeking such Confidential Information of the confidential nature of such information.

## **20. GENERAL.**

- A. Shipping. All Software Products are provided FOB shipping point or electronic delivery. Acceptance is deemed to have occurred at the earliest of point of physical shipment or delivery of keys/access codes for electronic delivery.
- B. Feedback. Any suggestions, feedback or proposed modifications to the Product (in any form) provided by Licensee to Arcserve may be freely used by Arcserve without limitation, and any modifications to the Product resulting from such suggestions, feedback or proposed modifications

shall be exclusively owned by Arcserve.

- C. **Monitoring.** The Software Product contains technological copy protection or other security features designed to prevent unauthorized use of the Software Product, including features to protect against any use of the Software Product that is prohibited under Sections 2-5. Licensee shall not, and shall not attempt to, remove, disable, circumvent, or otherwise create or implement any workaround to, any such copy protection or security features.
- D. **Audit.** Licensee agrees to perform a self-audit upon ten (10) working days' prior written notice from Arcserve, calculating the number of Authorized Users, computers, servers or other applicable units benefiting from the Software Products. If Licensee's self-audit reveals that Licensee's actual usage exceeds the Authorized Use, Licensee shall procure the additional licenses required from Arcserve or its preferred reseller. If Licensee does not perform a self-audit upon request from Arcserve, or if Arcserve has reason to doubt the results of such self-audit, upon prior written notice to Licensee, Licensee shall permit Arcserve or an independent certified accountant appointed by Arcserve to access Licensee's premises and inspect Licensee's books of account and records at any time during normal business hours for the purpose of inspecting, auditing, verifying or monitoring the manner and performance of Licensee's obligations under this Agreement, including without limitation the payment of all applicable Fees. Any such audit shall minimize the disruption to Licensee's business operations. Arcserve shall not be able to exercise this right more than once in each calendar year. If an audit reveals that Licensee has underpaid Fees to Arcserve, Licensee shall be invoiced for and shall pay to Arcserve or the applicable reseller within thirty (30) days of the date of invoice an amount equal to the shortfall between the Fees due and those paid by Licensee. If the amount of the underpayment exceeds five percent (5%) of the Fees due or the audit reveals a violation of any Authorized Use pursuant to this Agreement then, without prejudice to Arcserve's other rights and remedies, Licensee shall also pay Arcserve's reasonable costs of conducting the audit.
- E. **Notice.** All notices given or served under this Agreement shall be in writing and: (i) personally delivered to the party to be notified, in which instance notice shall be deemed to have been given and received upon actual delivery; (ii) sent by a reputable international overnight commercial courier service (such as FedEx) addressed to the party to be notified, in which instance notice shall be deemed to have been given one (1) business day after deposit with such courier service for delivery; (iii) sent by email, in which instance notice shall be deemed to have been given and received upon actual delivery; or (iv) delivered to the party to be notified by any other means where it can be established that the party to be notified received such notice, in which instance notice shall be deemed to have been given and received upon the date of receipt. Arcserve's notice address is: Arcserve (USA) LLC, Attn: Chief Financial Officer; 8855 Columbine Road, Suite 150, Eden Prairie, Minnesota 55347. Licensee's notice address is the address and/or email address Licensee or its authorized distributor or reseller provided to Arcserve. Either party may change its contact information for notice purposes by giving ten (10) days' prior written notice to the other party in any manner described above.
- F. **Remedies.** Arcserve's remedies set forth in this Agreement are cumulative and are in addition to, and not in lieu of, all other remedies Arcserve may have at law or in equity, whether under this Agreement or otherwise.
- G. **Assignment.** Licensee may not assign this Agreement nor transfer the Software Products to any third party without the prior written consent of Arcserve. If such consent is obtained from Arcserve, Licensee must ensure that (i) the entire Software Product is transferred to a single recipient and is not sub-divided, (ii) the Software Product is deleted by the Licensee at the time of transfer, (iii) the Licensee passes full details of the recipient to Arcserve, and (iv) the recipient agrees to be bound by the terms and conditions of this Agreement. Any attempt by Licensee to transfer the rights or obligations under this Agreement in violation of this Section will be null and void and will constitute a material breach of this Agreement. Arcserve may assign this Agreement to any third party that

succeeds to Arcserve's interests in the Software Product and assumes the obligations of Arcserve hereunder and Arcserve may assign its right to payment hereunder or grant a security interest in this Agreement or such payment right to any third party.

- H. Severability. If a court holds that any provision of this Agreement to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.
- I. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota, without regard to its choice of law provisions. Notwithstanding the foregoing, the laws of the country in which Licensee acquires a license for the Product shall govern this Agreement, except as otherwise provided in the Country Specific Terms set forth in section 21 below.
- J. Jurisdiction. The Parties irrevocably submit to the personal jurisdiction of the state or federal courts of Minnesota. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Any action for provisional relief concerning this Agreement or the Parties' relationship hereunder, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure, shall be brought exclusively in Hennepin County, State of Minnesota, U.S.A. The Parties consent and submit to the exclusive jurisdiction of the state or federal courts in Hennepin County, State of Minnesota, U.S.A., for purposes of any action for such provisional remedy or interim or conservatory measure.
- K. Dispute Resolution. At the election of either party to this Agreement, any dispute, controversy, or claim arising out of, relating to, or in connection with the following may be submitted for final resolution by arbitration: the Product's performance, including without limitation any alleged deficiency or defect; the existence or breach of a contractual, statutory, or common-law warranty associated with this Agreement or a Product; the terms and obligations of this Agreement as they pertain to the foregoing; and the performance, termination, rescission, or alleged breach of this Agreement as they pertain to the foregoing (collectively, "Arbitral Dispute"). In the event arbitration is elected, both parties expressly waive any right to a trial by jury for any claim constituting an Arbitral Dispute. Any claim by Arcserve for infringement, violation of copyright, trademark, or Intellectual Property Rights, or breach of this Agreement arising from facts constituting infringement or violation of Intellectual Property Rights is not an Arbitral Dispute, but shall be brought exclusively before a court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A. If the claimant is the party electing arbitration, they must do so in writing before filing a complaint or otherwise bringing an action in court. If the respondent is the party electing arbitration, they must do so in writing on or before the last day to answer and/or respond to a summons and/or complaint brought by the other party. If Licensee is a resident of or is headquartered in the U.S., the arbitration shall be conducted by the American Arbitration Association (the "AAA") in accordance with the AAA Commercial Arbitration Rules ("Rules") in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the parties. If the Licensee is not a U.S. resident or does not maintain a place of business in the U.S., the arbitration shall be conducted by the International Centre for Dispute Resolution (the "ICDR") in accordance with the ICDR International Arbitration Rules in effect at the time of the arbitration, except as those rules may be modified by this Agreement or stipulation of the Parties. The Commercial Arbitration Rules and International Arbitration Rules are collectively referred to as the "Rules." Copies of the Rules can be obtained, free of charge, at <http://www.adr.org/>. The parties shall be entitled to conduct discovery as follows: twenty (20) interrogatories, twenty (20) requests for production of documents, three (3) subpoenas to third parties, three (3) oral depositions, and one (1) written-question deposition. The parties intend that any arbitration between them shall involve only the claims between the parties and not any claims by a party against a third party. No other dispute between a party and a third party shall be included in the arbitration. Class arbitration shall not be permitted. The arbitration shall be conducted by a

single arbitrator selected in accordance with the Rules except that the arbitrator must be a retired state or federal judge or foreign equivalent who has previous experience in technology disputes. Filing fees, arbitrator fees, and other fees charged by the arbitral body shall be paid initially by the claimant in the proceeding. Arbitration shall be conducted in the English language. The place of arbitration shall be Hennepin County, State of Minnesota, U.S.A. Any award is final and binding on the parties and may be challenged in a court of competent jurisdiction only upon those grounds allowed under the Minnesota Uniform Arbitration Act. In the absence of challenge, judgment on the award may be entered in any court of competent jurisdiction. Without otherwise limiting the authority conferred on the arbitrator by this Agreement and the Rules, the arbitrator shall not have the authority to exercise equitable principles or award equitable remedies. By agreeing to Arbitration, the parties do not intend to deprive any court of competent jurisdiction in Hennepin County, State of Minnesota, U.S.A., of its ability to hear disputes that are not Arbitral Disputes or to issue any form of provisional remedy, including but not limited to a temporary restraining order, preliminary injunction, attachment in aid of arbitration, or order for any interim or conservatory measure. A request for such provisional remedy or interim or conservatory measure by a party to a court shall not be deemed a waiver of the agreement to arbitrate. In any Arbitral Dispute, the arbitrator may award the successful party all of its costs incurred in the proceeding, including if applicable and without limitation filing, arbitrator, and administrative fees, and other fees imposed by the arbitrator.

- L. Force Majeure. The failure of Arcserve to comply with any provision of this Agreement due to an act of God, hurricane, war, fire, riot, earthquake, terrorism, and act of public enemy, actions of governmental authorities (excepting compliance with applicable codes and regulations) or other force majeure event will not be considered a breach of this Agreement.
- M. Waiver. Failure by either party to enforce any particular term or condition of this License Agreement shall not be construed as a waiver of any of its rights under it. No waiver of any breach of this Agreement shall be a waiver of any other breach and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.
- N. Entire Agreement. This Agreement, the Hardware Product Schedule and all documents and policies referenced herein constitute the entire agreement between the parties relating to the licensing and use of the Products and supersede any other oral or written communications, agreements or representations with respect to the Products.
- O. No Third-Party Beneficiary. No third party is or shall be a beneficiary of this Agreement and no third party shall have the right to enforce this Agreement. This includes, without limitation, a third party from which Licensee purchased the Product, a third party that provides services to Licensee in relation to the Product, or a customer to which Licensee provides services using the Product.
- P. Electronic Transaction; Electronic Communications. The parties agree that this Agreement may be formed, executed, and/or delivered by electronic means, including the use of electronic signatures and/or electronic agents. Arcserve shall be entitled to communicate with Licensee via email or other electronic communications. Licensee consents to these communications and others regarding the Product, new product releases, upgrades, Product Support, and other information that Arcserve believes may be relevant to use of the Products.

**21. COUNTRY SPECIFIC TERMS.** In the event Licensee acquires a Hardware Product, a license for the Software Product and/or Cloud Services outside of the United States, the provisions set forth at <https://www.arcserve.com/country-specific-terms> will apply to the use of the Product and/or Cloud Services.