



Master Services Agreement

This Novell Master Services Agreement (the “MSA”) is entered into as of the date of signing (the “Effective Date”) of the Premium Service Order Form (“Form”) by the “Customer” detailed on page one (1) of the Form and NOVELL NEW ZEALAND LIMITED, a company with its principal place of business at Level 1, 39 Market Place, Auckland, New Zealand (“Novell”). This MSA governs the provision of the services described in each Form or Statement of Work entered into hereunder.

Terms and Conditions

This MSA consists of these terms and conditions and each Statement of Work entered into hereunder. Any reference to this MSA will be a reference to these terms and conditions and/or any such Statement(s) of Work, as applicable.

A. Terms and Conditions/Statement of Work. These terms and conditions will govern each party's rights and obligations relating to Novell's provision of Novell Consulting (“**Consulting Services**”) or Novell Technical Support (“**Technical Support Services**”) services hereunder. These terms and conditions, by themselves, do not implement any transaction; Novell and Customer intend that all services provided by Novell to Customer hereunder be implemented through individual Statements of Work (“**SOW**”) or Form under this MSA, which SOW/Forms will be deemed to incorporate the terms and conditions of this MSA unless the SOW/Form explicitly states otherwise. A *pro forma* SOW/Form is available from Novell.

B. Administration of SOW/Forms. Customer may request services at any time. If Customer requests services and Novell agrees to provide such services, the parties will enter into a SOW/Form. Nothing in this MSA will require either party to enter into any particular SOW/Form; either party may, in its sole discretion, elect not to enter into any SOW/Form. An individual SOW/Form will become effective and binding between parties only upon execution by authorized representatives of both parties. Each individual SOW/Form will reference this MSA and contain such additional information and provisions as the parties deem necessary, including, as appropriate, the following:

- i. a description of the services, together with a schedule;
- ii. identification of deliverables (“Deliverables”);
- iii. names, addresses, e-mail addresses, telephone and fax numbers of the parties' project managers;
- iv. a description of the parties' responsibilities;
- v. a description of payments, including amount, method of calculation, schedule of payments, and address to which such payments are to be made.

C. Order of Precedence. If there is any conflict between this MSA and a SOW/Form, the terms of the

SOW/Form will control, but only with respect to that particular SOW/Form.

1. SERVICES

- a. Performance. Novell agrees to provide the Consulting Services and/or Technical Support Services described in each SOW/Form entered into under this MSA (such services are collectively referred to as “**Services**”).
- b. Assumptions. The description of the Services in each SOW/Form, including, without limitation, the schedule, Deliverables and the compensation amount set forth herein, will be based upon information Customer provides to Novell and upon any assumptions set forth in the SOW/Form. Customer acknowledges that if the information provided by Customer is incomplete or inaccurate, or if the stated assumptions are not correct, then the parties may modify the SOW/Form pursuant to subsection c., below. Alternatively, at Novell's option, Novell may terminate the SOW/Form for cause, or Customer may terminate the SOW/Form for convenience.
- c. Changes to SOW/Form. Customer and/or Novell may, at any time, request changes within any particular SOW/Form. To be effective, any requested change or adjustment must be agreed to in writing by both parties via a Change Order Request Form available from Novell. Novell will continue performing the Services in accordance with such SOW/Form until the parties agree in writing on any such change or adjustment. If the parties are unable to agree to a mutually acceptable change or adjustment, either party may terminate the relevant SOW/Form upon 10 days written notice to the other.
- d. Acceptance. Unless otherwise agreed, upon final completion and delivery of the Consulting Services, Customer will have 14 days in which to notify Novell in writing whether the Services fail to comply with the relevant SOW/Form and the reasons for such failure. If Novell is not notified of any problems within this time period, the Services will be deemed to be accepted by Customer.

2. COMPENSATION & PAYMENT TERMS

- a. Compensation for Services; Expenses. Customer will pay all the amounts specified in the relevant SOW/Form, including, without limitation, compensation for Services. Additionally, Customer will reimburse Novell for all reasonable out-of-pocket expenses incurred with the prior written approval of Customer in the performance of the Services, and for any non-standard expenses incurred at the written request of Customer.
- b. Invoices. Novell will invoice Customer in accordance with the payment schedule set forth in the relevant SOW/Form or, if a SOW/Form does not specify a payment schedule, Novell will invoice Customer on a monthly basis. All payments will be due 30 days after receipt of invoice. The provision of the Services to Customer is subject to Customer's payment of invoiced amounts when due. In addition, if any payment is not made when due, Novell will be entitled to suspend the performance of the Services immediately and, at its option, to terminate the relevant SOW/Form in accordance with its terms. All monetary amounts will be due in the currency specified in the SOW/Form.
- c. Taxes. All Payments required under this MSA will be non-refundable and non-cancelable. All Payments will be exclusive of any federal, state, municipal or other government taxes, duties, excises or tariffs now or hereinafter imposed on the production, storage, sale, transportation, import or export, or use of Novell Software, including sales, use, excise, goods and services, and value added taxes, but excluding any taxes or fees based on Novell's net income. All payments under this MSA are exclusive of all applicable taxes, which will be paid by Customer (other than taxes on Novell's income). If Customer is required by law to withhold taxes, Customer agrees to furnish Novell all required receipts and documentation substantiating such payment. If Novell is required by law to remit any tax or duty on behalf of or for the account of Customer, Customer agrees to reimburse Novell within 30 days after Novell notifies Customer in writing of such remittance. Customer agrees to provide Novell with valid tax exemption certificates in advance of any remittance otherwise required to be made by Novell on behalf, or for the account, of Customer where such certificates are applicable.

3. CUSTOMER OBLIGATIONS

- a. Customer Assistance. Customer agrees that it will cooperate with and assist Novell in the performance of the Services, and will provide the resources necessary for Novell's performance hereunder as specified in the relevant SOW/Form or as otherwise required in the performance of the Services.
- b. Information Transfer. As described in the appropriate SOW/Form, Customer may access electronic on-line services to transfer data electronically ("**Online Services**"). Customer may also choose to authorize Novell to access Customer's network via a remote connection to work directly on line with Customer to assist the delivery of Services. Customer will not submit via the Online Services or otherwise give Novell access to any documents, files, programs, or other data (collectively, "Customer Data") that are or are alleged to be confidential or proprietary to, or defamatory of, any third party, unless Customer first obtains all necessary licenses, consents, and permissions to do so.

- c. PROTECTION OF CUSTOMER SYSTEM. **ALTHOUGH NOVELL WILL USE REASONABLE ENDEAVOURS TO PREVENT ANY DAMAGE OR ALTERATION OF CUSTOMER DATA IN THE COURSE OF PROVIDING THE SERVICES, CUSTOMER UNDERSTANDS THAT IT IS SOLELY RESPONSIBLE TO TAKE APPROPRIATE MEASURES TO ISOLATE AND BACK UP ITS COMPUTER SYSTEM, INCLUDING ITS COMPUTER PROGRAMS, DATA AND FILES, AND TO TAKE OTHER ACTIONS NECESSARY TO PROTECT ITS SYSTEM AND DATA. CUSTOMER ACKNOWLEDGES THAT CUSTOMER DATA MAY BE ALTERED OR DAMAGED IN THE COURSE OF PROVIDING TECHNICAL SERVICES, WHETHER ON-SITE OR VIA REMOTE CONNECTION OR OTHERWISE.**

- d. Safe Work Environment. Customer will be responsible for and will ensure that while Novell employees, agents or contractors are on Customer premises, all proper and legal health and safety precautions are in place and fully operational to protect such persons. Novell warrants that while Novell employees, agents or contractors are on Customer's premises, they will comply with all reasonable workplace policies of the Customer, as notified by Customer to Novell. Each party (in this clause the "Indemnifying Party") will indemnify the other party (in this clause "Indemnified Party") for any and all liability, direct damages, costs and expenses caused by the negligence or willful misconduct of Indemnifying Party and/or the Indemnifying Party's employees, agents and subcontractors, other than to the extent that the liability, direct damages, costs or expenses were caused by the Indemnifying Party's (or its agents, employees and/or sub-contractors) negligence or willful misconduct.

4. INTELLECTUAL PROPERTY

- a. License. Subject to Customer's payment of all amounts due under this MSA (including each SOW/Form), and subject further to the provisions of this MSA, Novell will procure the granting of a licence by Novell, Inc. to Customer of, a nonexclusive, nontransferable, nonassignable, worldwide, perpetual (subject to other provisions of this MSA), royalty-free (other than payments identified in the relevant SOW/Form) license under copyright to use, execute, perform, reproduce, display and distribute copies internally within Customer of the Deliverables or other support materials delivered to Customer pursuant to this MSA.
- b. Ownership. Except as otherwise expressly provided in this Section 4, Novell, Inc. (and/or its licensors) retains on an exclusive basis for itself all right, title and interest in and to any intellectual property developed, delivered and/or used by Novell in the performance of this MSA.
- c. Protection of Deliverables. Customer agrees to take all reasonable steps to protect Deliverables under this MSA, and any related documentation, from unauthorized copying or use. If a Deliverable consists of software, the source code of such Deliverable will be deemed to include trade secrets of Novell and/or its licensors. The source code and embodied trade secrets are not licensed to Customer. Customer agrees not to modify, disassemble or decompile any such Deliverable in order to discover the trade secrets contained in the source code or for any other reason.
- d. Modifications and Adaptations. Except as otherwise provided in this MSA or a relevant SOW/Form,

Customer may not make or authorize the making of modifications or adaptations of any Deliverables. All proprietary rights notices must be faithfully reproduced and included on all copies, modifications and adaptations.

- e. Restrictions. Except as expressly authorized in this MSA, Customer agrees not to rent, lease, sublicense, distribute, transfer, copy, reproduce, display, modify or time share any Deliverable or any related documentation.
- f. Indemnification. Subject always to the limitations in Section 6, Novell agrees to indemnify, defend and hold Customer harmless from any final judgment awarded against Customer, or settlement to which Novell agrees, which provides that any Deliverable supplied by Novell under this MSA, and appropriately used by Customer, infringes any copyright or patent of any third party in the country in which Novell performs the Services, provided: (i) Customer promptly notifies Novell in writing of the initial claim; and (ii) Novell will have the sole control of the defense of any action and all negotiations for settlement and compromise. Should any Deliverable provided by Novell under this MSA, or the operation of any such Deliverable, become, or in Novell's opinion is likely to become, the subject of infringement of any copyright or patent, Novell's sole obligation and Customer's exclusive remedy under this section will be, at Novell's option and expense, either to procure for Customer the right to continue using the Deliverable, to replace or modify the Deliverable so that it becomes non-infringing, or to grant Customer a refund of the amounts paid by Customer under this MSA for the Deliverable as depreciated on a straight-line method, using a useful life of 3 years, and accept its return. The above represents Customer's exclusive remedy for any intellectual property infringement claim relating to Deliverables.

5. LIMITED WARRANTY

- a. Warranty for Services. Novell warrants that the Services will be done in a workmanlike manner and according to industry standards. This warranty will be effective for a period of 30 days (the "Warranty Period") following Customer's acceptance of the Services in accordance with Section 1.d. Customer must notify Novell in writing during the Warranty Period if Customer believes the Services do not meet the above standards. If, after notice from Customer, the Services are determined not to meet the above standards, Novell's sole obligation, and Customer's sole remedy, is for Novell to use reasonable commercial standards to attempt to correct any defects in the Services. If Novell is unable to correct any such defects after a reasonable period of time, Customer's sole and entire remedy is termination of the relevant SOW/Form in accordance with Section 8 in exchange for a refund of the amount paid by Customer to Novell for the portion of the Services which Novell is unable to correct. This warranty specifically excludes non-performance issues caused as a result of a non-Novell hardware or firmware malfunction or defect, software not developed by Novell under this MSA, or by incorrect data or incorrect procedures used or provided by Customer or a third party, or defects which are outside the reasonable control of Novell. Customer agrees to reimburse Novell for time and materials for any Services provided by Novell at Customer's request to remedy excluded non-performance problems where

Customer has approved such work. This warranty will immediately cease if Customer or any third party modifies any portion of a Deliverable and/or modifies its system so that a Deliverable is no longer functional or appropriate.

- b. DISCLAIMER OF WARRANTIES. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 5, NOVELL MAKES NO WARRANTY OR REPRESENTATIONS REGARDING ANY SOFTWARE, INFORMATION OR SERVICES PROVIDED UNDER THIS MSA. NOVELL DISCLAIMS AND EXCLUDES ANY AND ALL OTHER EXPRESS, IMPLIED AND STATUTORY WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF GOOD TITLE, WARRANTIES AGAINST INFRINGEMENT, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NOVELL DOES NOT WARRANT THAT ANY SERVICES, SOFTWARE OR OTHER DELIVERABLES PROVIDED WILL SATISFY CUSTOMER'S REQUIREMENTS OR ARE WITHOUT DEFECT OR ERROR OR THAT THE OPERATION OF ANY SOFTWARE PROVIDED UNDER THIS MSA WILL BE UNINTERRUPTED. NOVELL DOES NOT ASSUME ANY LIABILITY WHATSOEVER WITH RESPECT TO ANY THIRD PARTY HARDWARE, FIRMWARE, SOFTWARE OR SERVICES.

6. LIMITATION OF LIABILITY

- a. TO THE EXTENT ALLOWED BY APPLICABLE LAW, NOVELL WILL NOT BE LIABLE TO CUSTOMER FOR DAMAGES IN THE NATURE OF EXPECTATION LOSSES, INDIRECT, SPECIAL, RELIANCE, INCIDENTAL OR CONSEQUENTIAL LOSSES, OR ANY LIABILITY FOR THE LOSSES OF ANY KIND OF ANY THIRD PARTY, INCLUDING BUT NOT LIMITED TO THE LOSS OF BUSINESS PROFITS, DATA OR OTHER EXPECTED BENEFIT OF CUSTOMER OR ANY THIRD PARTY, WHETHER ARISING UNDER OR OUTSIDE THIS MSA. NO ACTION ARISING OUT OF THIS MSA, REGARDLESS OF THE FORM OF ACTION, MAY BE BROUGHT BY CUSTOMER MORE THAN ONE YEAR AFTER THE ACTION ACCRUED.
- b. Novell's Liability. EXCEPT UNDER SECTION 6.f HEREIN, IN NO EVENT WILL NOVELL'S LIABILITY FOR ANY CAUSE OF ACTION ARISING UNDER THIS MSA EXCEED THREE (3) TIMES THE AMOUNT OF TOTAL FEES ACTUALLY PAID BY CUSTOMER UNDER THIS MSA.
- c. WHERE IN ACCORDANCE WITH SECTION 9.d THIS MSA IS GOVERNED BY THE LAWS OF A STATE OF AUSTRALIA, THEN THIS SECTION 6.c APPLIES. Trade Practices Act. WHERE ANY LEGISLATION, SUCH AS THE *TRADE PRACTICES ACT*, IMPLIES INTO THIS MSA ANY CONDITION OR WARRANTY AND THAT LEGISLATION AVOIDS OR PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING THE APPLICATION OF THE CONDITION OR WARRANTY, THE LIABILITY OF NOVELL FOR ANY BREACH OF THE CONDITION OR WARRANTY IS LIMITED AT THE OPTION OF NOVELL TO ANY ONE OR MORE OF THE FOLLOWING: A) IF THE BREACH RELATES TO GOODS, REPLACING THE GOODS OR THE PAYMENT OF THE COST OF ACQUIRING EQUIVALENT GOODS OR REPAIRING THE GOODS OR PAYMENT OF THE COST OF REPAIRING THE GOODS; B) IF THE BREACH RELATES TO SERVICES, THE SUPPLYING OF THE SERVICES AGAIN OR THE PAYMENT OF THE COST OF

HAVING THE SERVICES SUPPLIED AGAIN. NOTHING HEREIN IS INTENDED TO RESTRICT OR EXCLUDE ANY LIABILITY OF NOVELL UNDER PART VA OF THE AUSTRALIAN *TRADE PRACTICES ACT 1974*. SECTION 6.a IS SUBJECT TO THE TERMS OF THIS SECTION 6.c.

- d. WHERE IN ACCORDANCE WITH SECTION 9.d THIS MSA IS GOVERNED BY THE LAWS OF NEW ZEALAND, THEN THIS SECTION 6.d APPLIES.

Fair Trading Act. WHERE ANY LEGISLATION, SUCH AS THE *FAIR TRADING ACT*, IMPLIES INTO THIS MSA ANY CONDITION OR WARRANTY AND THAT LEGISLATION AVOIDS OR PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING THE APPLICATION OF THE CONDITION OR WARRANTY, CUSTOMER ACKNOWLEDGES THAT, IN ENTERING INTO THIS MSA, SAVE FOR THOSE EXPRESSLY STATED HEREIN, IT HAS NOT RELIED ON ANY STATEMENT, OR REPRESENTATION OR INFORMATION SUPPLIED BY NOVELL. FOR AVOIDANCE OF DOUBT, NOTHING IN THIS MSA (INCLUDING SECTION 6.d ABOVE) EXCLUDES ANY LIABILITY OF A PARTY UNDER, OR LIMIT OR AFFECT THE APPLICATION OF, THE *FAIR TRADING ACT*.

Consumer Guarantees' Act. CUSTOMER ACKNOWLEDGES THAT IT ACQUIRES THE SERVICES FOR ITS BUSINESS PURPOSES AND ACCORDINGLY THE PROVISIONS OF THE CONSUMER GUARANTEES ACT DO NOT APPLY. SECTION 6.a IS SUBJECT TO THE TERMS OF THIS SECTION 6.d.

- e. WHERE IN ACCORDANCE WITH SECTION 9.d THIS MSA IS GOVERNED BY THE LAWS OF SINGAPORE, THEN THIS SECTION 6.e APPLIES.

Contracts (Rights of Third Parties) Act (Cap 53B). A PERSON WHO IS NOT A PARTY TO THIS MSA SHALL HAVE NO RIGHT UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT (CAP 53B) TO ENFORCE ANY OF ITS TERMS.

- f. Personal Injury, Death and Property Damage Indemnification. Novell agrees to indemnify and hold Customer harmless from and against any and all liability, losses, claims, demands, and actions arising out of personal injury, death or property damage which are determined by a court of competent jurisdiction to be caused by the negligent or willful acts or omissions of Novell or its authorized employees, agents or subcontractors while providing the Services on Customer premises. Novell's liability under this section will be reduced proportionally to the extent that any act or omission of Customer, or Customer's employees, agents, or representatives, contributed to such liability. For purposes of this section, "property damage" does not include damage to, or loss of, files, data, or other information. Novell's aggregate liability under this Section 6.f for property damage will not exceed US\$3,000,000.

7. CONFIDENTIAL INFORMATION

- a. Novell and Customer acknowledge that Confidential Information may be disclosed to each other throughout the term of this MSA. For purposes of this MSA, and except as otherwise expressly provided in this MSA, "**Confidential Information**" means all non-public business, technical and financial information of the parties, and all other information clearly marked "confidential," or if disclosed orally, all information that is designated orally as "confidential," or is otherwise treated as confidential, at the time of disclosure or

within a reasonable period of time thereafter. For purposes of this Section, "**Discloser**" means the party disclosing Confidential Information, and "**Recipient**" means the party receiving the Discloser's Confidential Information.

- b. The Recipient agrees that it will hold in confidence the Confidential Information disclosed by the Discloser. The Recipient will exercise reasonable care to protect the other party's Confidential Information from unauthorized disclosure, which care will in no event be less than the Recipient takes to protect its own Confidential Information of a like nature. The Recipient may disclose Confidential Information only to its employees or agents who need to know such information for purposes of this MSA, and will inform such employees and agents, by way of policy and agreement, that they are bound by obligations of confidentiality.
- c. The Recipient's duty to hold confidential information in confidence expires 5 years after its return or destruction. The expiration of the duty of confidentiality will not modify other restrictions on the Recipient, including, for example, any restrictions under patent or copyright laws.
- d. Confidential Information will not include information that:
- was rightfully in the Recipient's possession before receipt from the Discloser;
 - is or becomes a matter of public knowledge through no wrongful act of the Recipient;
 - is disclosed by the Discloser to a third party without a duty of confidentiality on the third party;
 - is independently developed by the Recipient; is disclosed under operation of law (provided, that before disclosing any Confidential Information under a court order or operation of law, the Recipient will provide the Discloser reasonable notice of such order or law and provide the Discloser an opportunity to object to or limit such disclosure); or
 - is disclosed by the Recipient with the Discloser's prior written approval.
- e. Customer agrees not to claim that Novell's delivery or publication of binary, object or executable code is an inherent disclosure of Novell's trade secrets and/or unpublished copyright.
- f. Either party will be free to use the residuals resulting from access to or work with the other party's Confidential Information, provided that such party otherwise complies with the non-disclosure provisions hereof. The term "**residuals**" means general information in non-tangible form that may be retained in memory by individuals who have had access to the Confidential Information. The Recipient will have no obligation to limit or restrict the assignment of such persons. The foregoing residuals rights will not be deemed to grant either party a license, by implication, estoppel or otherwise, under the other party's patents or copyrights.

8. TERM AND TERMINATION

- a. Term. This MSA will become effective upon the Effective Date and will continue in force for a term of 5 years, unless earlier terminated in accordance with one of the following provisions.
- b. Termination for Convenience. Either party may terminate this MSA and/or any SOW/Form, for any or

- no reason, at any time upon 30 days prior written notice (unless otherwise provided in such SOW/Form).
- c. Termination For Cause. Failure by either party to comply with any term or condition under this MSA or any SOW/Form will entitle the other party to give the defaulting party written notice requiring it to cure the default. If the party in default has not cured, or commenced to cure (if a cure cannot be performed within the time period set forth below), the default within 10 business days after receipt of written notice, the notifying party will be entitled, in addition to any other rights it may have under this MSA, an SOW/Form, or otherwise at law or in equity, to immediately terminate this MSA and/or any or all pending SOW/Forms.
 - d. Consequences of Expiration and/or Termination
 - i. Survival of MSA. Unless any pending SOW/Forms are also expressly terminated as permitted by this MSA and/or the relevant SOW/Form, upon expiration or termination of this MSA for any reason, all SOW/Form's then in effect hereunder and all license rights granted pursuant to this MSA and/or any SOW/Form will continue in accordance with their terms, in which case this MSA will continue in effect with respect to such pending SOW/Forms until the completion of such SOW/Forms.
 - ii. Termination Payment. If a SOW(s)/Form(s) is terminated, Customer will pay Novell the amounts specified in the Costs Section of each such SOW/Form relating to work performed by Novell up to and including the date of termination, as well as any additional costs or expenses which Novell has incurred or contracted for with respect to the Services and is unable to avoid. Additionally, all property of each party in possession of the other party relating to such SOW/Form will be returned, including, without limitation, any Deliverable provided to Customer by Novell under such SOW/Form but not yet fully paid for by Customer. Except in case of breach by Customer, Customer may keep completed Deliverables; however, all warranties regarding such Deliverables will cease.
 - iii. Survival of Obligations. Termination of this MSA and/or any SOW/Form will not discharge or otherwise affect any pre-termination obligations of either party existing under the MSA or such SOW/Form at the time of termination.

No action arising out of this MSA, regardless of the form of action, may be brought by Customer more than one year after the action accrued.

9. GENERAL PROVISIONS

- a. Separate Software License. The Services may be in support of Customer's license of Novell software under a separate software license agreement. Such separate software license agreement will govern all use by Customer of such software, and this MSA will relate solely to the Services. This MSA is not intended to modify in any way the licensing or warranty (or any disclaimer thereof) of commercial software products separately purchased by Customer from Novell or any other party, or any other transaction except as expressly provided herein. This MSA will apply only to the Services (including any Custom Software) provided under this MSA.

- b. High Risk Activities. Customer acknowledges that the Services (including Deliverables) are not intended for configuring, supporting or otherwise servicing on-line control equipment in hazardous environments requiring fail-safe performance, such as, but not limited to, nuclear facilities, aircraft navigation, aircraft communications systems, air traffic control, direct life support machines or weapons systems, in which failure of the products could lead directly to death, personal injury, or severe physical or environmental damage.
- c. Force Majeure. If either party will be prevented from performing any portion of this MSA by causes beyond its control, including labor disputes, civil commotion, war, governmental regulations or controls, casualty, inability to obtain materials or services or acts of God, such defaulting party will be excused from performance for the period of the delay and for a reasonable time thereafter.
- d. Jurisdiction.
 - i. Novell Entity means the Novell subsidiary signing this MSA. Where the Novell Entity's country of principal residence is Thailand, Vietnam, the Philippines, Indonesia or Pakistan, then the MSA will be governed by the laws, excluding the private international law rules, of Singapore. All disputes arising out of or in connection with the MSA will finally be settled under the Rules of Arbitration of the Singapore International Arbitration Centre by a single arbitrator appointed in accordance with the said Rules. The language to be used in the arbitral proceedings will be English and the place of arbitration will be Singapore. The arbitral award made and granted by the arbitrator will be final, binding and incontestable and may be used as a basis for enforcement of the award in the place of residence or business of the parties.
 - ii. Where the Novell Entity is principally resident in China (excluding Hong Kong, S.A.R.), then the MSA will be governed by the laws of Hong Kong, SAR. All disputes arising out of or in connection with the MSA will be settled by arbitration at the Hong Kong International Arbitration Centre ("HKIAC") in Hong Kong under the Hong Kong Arbitration Ordinance. The arbitration will be carried out before 3 arbitrators, each of the parties will appoint one arbitrator and the third will be chosen by HKIAC in accordance with HKIAC Procedures for Arbitration. The arbitration will be conducted in the English language. Any arbitral award will be final and binding on the parties. The expense of the arbitration will be borne between the parties as determined by the arbitrators.
 - iii. For all other countries in Asia Pacific, the MSA will be governed by the substantive law, excluding the private international law rules, of the country of principal residence of the Novell Entity and, where applicable, the state of principal residence in the country of principal residence of the Novell Entity. An action at law hereunder may only be brought before a court of appropriate jurisdiction in the state whose law governs the MSA.

To the extent their exclusion is permissible, the terms of the United Nations Convention on the International Sale of Goods will not apply to this contract, even where they have been adopted as part of the domestic law of the country whose law governs the contract. If either party initiates legal proceedings to enforce a term of the MSA, the prevailing party will be entitled to recover reasonable attorneys' fees.

- e. Survival of Terms. The provisions of this MSA which by their nature extend beyond the termination of the MSA will survive, including, but not limited to, Sections 4, 5, 6, and 7, 9.e, 9.k, 9.q.
- f. Waiver. No waiver of any right or remedy on one occasion by either party will be deemed a waiver of such right or remedy on any other occasion.
- g. Integration. This MSA sets forth the entire agreement and understanding between the parties pertaining to the subject matter and merges all prior discussions between them on the same subject matter. Neither of the parties will be bound by any conditions, definitions, warranties, understandings or representations with respect to the subject matter other than as expressly provided in this MSA. This MSA may only be modified by a written document signed by duly authorized representatives of the parties. This MSA will not be supplemented or modified by any course of dealing or trade usage. Variance from or addition to the terms and conditions of this MSA in any purchase order or other written notification or documentation, from Customer or otherwise, will be of no effect. This MSA will prevail over any conflicting stipulations contained or referenced in any other document.
- h. Assignment. This MSA may not be assigned by Novell or Customer, in whole or in part, without prior written consent of both parties. Notwithstanding, neither party will unreasonably withhold consent to an assignment of this MSA or any part of this MSA to a parent, subsidiary or affiliate, provided that any such parent, subsidiary or affiliate enters into an written agreement to be bound by this MSA and that assigning party remains responsible for any actions or omissions of any such parent, subsidiary or affiliate. Any attempted assignment without written consent will be null and void.
- i. Attorneys' Fees. If one of the parties (the "**Initiating Party**") initiates legal proceedings against the other party (the "**Defending Party**") relating to this MSA, and the Defending Party is finally adjudicated not to have liability, the Initiating Party will pay the Defending Party's reasonable attorneys' fees and costs relating to such legal proceedings.
- j. Notice. Unless otherwise agreed to by the parties, all notices required under this MSA will be deemed effective when received in writing by either (i) registered mail, (ii) certified mail, return receipt requested, or (iii) overnight mail, addressed and sent to the address first above written and to the attention of the party executing this MSA or that person's successor, or to the person designated in the relevant SOW/Form, or (iv) by facsimile transmission appropriately directed to the attention of the party executing this MSA or that person's successor, or to the person designated in the relevant SOW/Form, with a copy following by one of the other methods of notice.
- k. Use of Customer Name. With the prior written consent of Customer (not to be unreasonably withheld), Novell may use and publish Customer's name in its customer lists, lists of referrals for other customers (or potential customers), and in other promotional information, including, but not limited to, press releases, brochures, reports, letters, white papers, and electronic media such as e-mail or Web pages. This provision will survive expiration or termination of this MSA.
- l. Severability. If any term or provision of this MSA is deemed by a court of competent jurisdiction to be overly broad in scope, duration or area of applicability, the court considering the same will have the power and is hereby authorized and directed to limit such scope, duration or area of applicability, or all of them, so that such term or provision is no longer overly broad and to enforce the same as so limited. Subject to the foregoing sentence, in the event any provision of this MSA is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will attach only to such provision and will not affect or render invalid or unenforceable any other provision of this MSA.
- m. Independent Contractor. The parties acknowledge that Novell is an independent contractor and that it will be responsible for its obligations as employer for those individuals providing the Services.
- n. Subcontracting. Novell may subcontract any portion of the Services to a third party contractor without Customer's prior consent, provided that Novell remains fully responsible to Customer for the provision of Services. Any such subcontractor will for all purposes be deemed to be an independent contractor of Novell and not an employee or agent of Novell.
- o. Hold Harmless. Each party (the "**Indemnifying Party**") will indemnify and hold the other party, its officers, directors, employees, and/or shareholders, harmless from and against any and all final court judgment, or settlement to which the Indemnifying Party has agreed, arising out of personal injury or tangible property damage which are determined by a court of competent jurisdiction to be caused by the gross negligence or willful misconduct of the Indemnifying Party or its authorized employees relating to this MSA. The Indemnifying Party's liability under this section will be reduced proportionally to the extent that any act or omission of the other party, or its employees or agents contributed to such liability. THE INDEMNIFYING PARTY'S LIABILITY UNDER THIS SECTION WILL BE LIMITED TO DIRECT DAMAGES ONLY; THE INDEMNIFYING PARTY WILL NOT BE LIABLE FOR LOSS OF PROFITS, REVENUE, DATA, USE, GOODWILL OR OTHER INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES. The term "tangible property damage" will not be construed to include damage to, or loss of, files, data, or other electronic information.
- p. Insurance. Novell will insure against losses and damages which are the result of the fault or negligence of Novell and which relate to this MSA, including workman's compensation, professional liability, general liability, personal injury, and property damage.
- q. Export. Customer agrees to comply with any international and national laws that apply to the products/technologies licensed under this Agreement, including the U.S. Export Administration Regulations, as well as any end-user and country-destination restrictions issued by the U.S. and other governments. Please refer to <http://www.novell.com/corp/exports/matrix.html> for more information on exporting Novell products.
- r. U.S. Government Restricted Rights. Use, duplication, or disclosure of any Deliverables by the U.S. Government is subject to the restrictions in FAR ' 52.227-14 (June 1987) Alternate III (June 1987), FAR ' 52.227-19 (June 1987), or DFARS ' 252.227-7013(b)(3) (Nov 1995), or applicable successor clauses. Contractor/Manufacturer is Novell, Inc., 122 East 1700 South, Provo, Utah 84606.