

# Annexure C

## OPENCOLLAB Master Value Added Canvas Services Terms and Conditions

Feb 4, 2025

### 1. General

- 1.1. These terms and conditions (“General Terms and Conditions”) **apply only to the Value Added Canvas Services** OPENCOLLAB offers relating to the Canvas Services provided to the Customer by Instructure, Inc. (“Instructure”) whose Software and Policies are as defined and shared in the Customer’s Services Agreement with OPENCOLLAB.
- 1.2. OPENCOLLAB hereby confirms that as a Certified Instructure Canvas Reseller Partner OPENCOLLAB may offer Value Added Canvas Services to its Customers.
- 1.3. OPENCOLLAB and the Customer are referred to in this Agreement each as a “party” and together as the “parties.”
- 1.4. The Customer’s order (“Order Form”) and submission of same to OPENCOLLAB, constitutes the intent by the Customer to use Service(s).
- 1.5. The following documents/agreements/policies are hereby incorporated by reference into these General Terms and Conditions:
  - 1.5.1. Service Agreement (as selected at time of agreeing to the General Terms and Conditions)
  - 1.5.2. OPENCOLLAB Privacy Policy is the policy that describes who our information officer / data protection officer (for purposes of the GDPR) is, how we process personal data during the use of the Services and the rights of data subjects in terms of any personal data we may have under our control (available at: <https://www.opencollab.co.za/legal/>).

### 2. Definitions

- 2.1. **Agreement** means these General Terms and Conditions, the documents/agreements/policies as reflected above and incorporated by reference and all annexures, appendixes and schedules attached hereto as amended from time to time for any or all Services accepted at a particular point in time between the parties;
- 2.2. **Business Day** means a day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
- 2.3. **Confidential Information** means any information of proprietary and confidential nature which has been or may be obtained by the parties from the other party pursuant to this Agreement, whether in writing or in electronic form or pursuant to discussions between

the Parties or which can be obtained by examination, testing, visual inspection or analysis, including without limitation, scientific, business or financial data, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, Customer lists and details or information, price lists, studies, findings, computer software, inventions or ideas, Personal Information and agreed Fees between the Parties. For the avoidance of doubt, Confidential Information is inclusive of any intellectual property that all Parties may disclose to the other pursuant to this Agreement;

- 2.4. Customer Data** means the data inputted by the Customer, Authorised Users, End Users or OPENCOLLAB on the Customer's behalf for the purpose of using the Software and Services or facilitating the Customer's use of the Software and Services (including but not limited to Personal Information and Content).
- 2.5. Enabling and Implementation Phase** means the period during which the Enabling and Implementation Services take place, prior to the Subscription Start Date;
- 2.6. Enabling and Implementation Services** means the services associated with certain Subscription Services as stated under the relevant Service Agreement and it's related Annexures (for example configuration required) and are required to be executed prior to the Subscription Start Date;
- 2.7. Intellectual Property Rights** or "IPR" means all patents, copyrights, design rights, trade marks, service marks, trade secrets, know-how, database rights (where applicable), look and feel of any service or product (as may be published or not) and other rights in the nature of intellectual property rights (whether registered or not) and all applications for the same which may now or in the future subsist anywhere in the world, including the right to sue for and recover damages for past infringements.
- 2.8. OPENCOLLAB Canvas LMS Support Services Policy** means OPENCOLLAB's policy for providing support in relation to the selected Software Services as made available under the Service Agreement. Such OPENCOLLAB Canvas LMS Support Services Policy document may be amended by OPENCOLLAB at its sole discretion from time to time;
- 2.9. Order Form** means an order form that is presented to the Customer by OPENCOLLAB including, where applicable, the Customer's Enabling and implementation, subscription (new and renewals) and Services preferences, which the Customer will accept and sign off on. The Order Form(s) will be attached as an Annexure to the Service Agreement; The Customer can have multiple Order Forms relating to new Subscriptions or Order Forms for Renewal Terms attached to a Service Agreement;

- 2.10. Project plan** means the agreed plan attached as an Annexure as an Enabling and Implementation Schedule to the Service Agreement relating to a specific Order Form, for Enabling and Implementation Services to be conducted prior to the Subscription Start date, as agreed to between the parties in writing;
- 2.11. “Services” means collectively -**
- 2.11.1. “Canvas Services”** means the service as described in the “Service” clause of Instructure’s Master Terms and Conditions for the Software services as ordered by the Customer from time to time as is described in the Service Agreement and its Annexures;
- 2.11.2. “Value Added Canvas Services”** means services to be provided and performed by OPENCOLLAB in terms of the Service Agreement and its Annexures, including (but not limited to) the Enabling and Implementation Services (where applicable), Support Services or any other agreed associated services relating to the Canvas Services as defined on an Order Form;
- 2.12. Service Levels** means the levels as stated under the OPENCOLLAB Canvas LMS Support Services Policy;
- 2.13. Service Agreement** means the Service Specific Terms and the Service details, including but not limited to the commencement and duration of the Enabling and Implementation Phase, the commencement of the Subscription Services, pricing, support services associated with the Service and other commercial terms, inclusive of Annexures for at least Order Form(s) and Enabling and Implementation schedule(s) relating to the Services;
- 2.14. Service Specific Terms** means those terms and conditions specific to a specific Value Added Canvas Service as selected by the Customer;
- 2.15. Software** means Canvas LMS, Instructure’s proprietary learning management platform, and other system software as a service provided by Instructure and made available through a URL in a hosted environment to enable the Customer to utilise the Services;
- 2.16. Subscription Start Date** means the Subscription Start date as per the Order Form;
- 2.17. Support Services** means those Value Added Canvas Support Services as made available for the Canvas Services by OPENCOLLAB from time to time, where the Customer shall pay OPENCOLLAB fees for the agreed Support Services;
- 2.18. Support Services Term** means the period as agreed in the Order Form;

**2.19. Value Added Canvas Service Fees** means the fees payable by the Customer to OPENCOLLAB for the OPENCOLLAB Value Added Canvas Services as set out under the relevant Order Form;

**2.20. "User"** means a student ("end user") or an employee ("authorised user") of the Customer who is authorized by the Customer to use the Services, and the Customer has paid a Subscription Fee for such licence types for the subscription category as defined in the Order Form.

### **3. GENERAL**

**3.1.** References to "Days" are references to normal calendar days unless specifically stipulated as being Business Days.

**3.2.** Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.

**3.3.** Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

**3.4.** A reference to a statute or statutory provision is a reference to it as it is in force as at the date of the Contract and subsequent amendments.

**3.5.** A reference to a statute or statutory provision shall include all subordinate legislation made as at the date of this agreement under that statute or statutory provision.

**3.6.** The rule of construction that the agreement shall be interpreted against the Party responsible for the drafting or preparation of the agreement shall not apply.

### **4. STATUS AND PRECEDENCE**

**4.1.** Except where specifically provided to the contrary in a Service Agreement and then only to the extent so specified, each Service Agreement shall be a separate and legally binding contract ("Contract") under which the Customer Contracting Party agrees to acquire, and OPENCOLLAB agrees to supply certain Value Added Canvas Services on the terms set out in these Terms and Conditions and the Service Agreement. Insofar as any term and condition in a Service Agreement conflicts with these General Terms and Conditions in respect of-

**4.1.1.** the description of Services (including but not limited to pricing, invoicing and payment terms, specifications), the description in the Service Agreement and its Annexures shall prevail;

**4.1.2.** the Term and/or Termination Notice period of a Support Service, the Term and Termination Notice period in the Service Agreement shall prevail;

**4.1.3.** any other matter, the General Terms and Conditions shall prevail.

**4.2.** Conflicts with body of Service Agreement: Unless otherwise stated in a Service Agreement, insofar as the meaning of any term or condition in a schedule or annexure to a Service Agreement or any other document referred to in a Service Agreement, conflicts with the meaning of the body of the relevant Service Agreement, the meaning of the terms and conditions in the body of the relevant Service Agreement shall prevail.

**4.3.** Service Agreement amendment: The terms of one Service Agreement will only apply to another Service Agreement to the extent specifically and expressly stated therein but to the extent that any Service Agreement expressly overrides the provisions of these General Terms and Conditions, such amendment will be effective only in respect of that Service Agreement and not any other Service General Terms and Conditions.

## **5. TERM**

**5.1.** The Agreement shall commence on the date as agreed in the Service Agreement and shall remain in force until the Agreement is terminated or until all Services under the Agreement have been terminated, cancelled or have expired.

**5.2.** Each Annexure representing an Enabling and Implementation Schedule (if applicable) attached to a Service Agreement will confirm the applicable Enabling and Implementation Phase commencement date and duration for a specific Order Form.

**5.3.** Support Services shall commence on the Subscription Start Date and endure the Term as defined under each Service Agreement.

**5.4.** The Customer will notify OPENCOLLAB 60 days prior to the end of the then current Subscription Term as per the applicable Order form if the Customer wishes to continue with OPENCOLLAB's Software Support Services for a Renewal term.

**5.4.1.** IMPORTANT: the then current General Terms and Conditions and Service Specific Terms utilised by OPENCOLLAB on date of renewal of a Value Added Canvas Services will apply to each Renewal term. It is the Customer's responsibility to ensure that it familiarise itself with the General Terms and Conditions and applicable Service Specific Terms prior to the commencement of a subsequent contract;

- 5.5.** Any termination of an Agreement however caused, shall not affect the coming into force or the continuance in force of any provision of an existing Agreement which is expressly or by implication intended to come into or continue in force on or after such termination.
- 5.6.** Once an Order Form has been signed by the Customer for the Services in the Service Agreement and related Order Form, the Customer will be liable for the fees as detailed in the Service Agreement and Order Form.
- 5.7.** OPENCOLLAB shall promptly notify the Customer in writing as soon as it becomes aware that a deliverable may not be delivered or implemented in accordance with any Contract, at which time alternative temporary Value Added Canvas Service arrangements may be considered.

## **6. GRANT OF RIGHTS**

- 6.1.** For Instructure's Software, it will be according to their policies as is provided to the Customer in the Service Agreement.

## **7. ENABLING AND IMPLEMENTATION**

- 7.1.** OPENCOLLAB shall perform the Enabling and Implementation Services against the agreed fee stated in the relevant Order Form(s) attached to the Service Agreement;
- 7.2.** The commencement date of the Enabling and Implementation Services and the duration of the Enabling and Implementation Phase shall be as agreed to between the Parties in the Annexure(s) relating to Enabling and Implementation schedules of the Service Agreement and its related Order Form(s). The Customer understands and agrees that, where Enabling and Implementation Services are required, a Subscription Service shall commence on the Subscription Start Date as per the Order Form;
- 7.3.** Where the Customer requires migration services, Instructure provides required formats for the Customer to use;
- 7.4.** Exact dates and time frames for the Enabling and Implementation Phase will be jointly agreed upon by OPENCOLLAB and the Customer as per the Project Plan and are dependent on the resource availability of both parties. Project role players, from OPENCOLLAB, its affiliates and the Customer, will perform tasks within the timeframes specified in the Project Plan as per Enabling and Implementation Schedule Annexure as is attached to the Service Agreement for its related Order Form.

- 7.5.** It is noted and agreed that the Project Plan and timelines are dependent upon the receipt of the required base information and data in the correct digital format as well as timeous Customer feedback;
- 7.6.** The Subscription Start Date will be as indicated on the applicable and related Order Form;
- 7.7.** No Service Levels shall apply during the Enabling and Implementation Phase.

## **8. THIRD PARTY SERVICE PROVIDER INTERACTION**

- 8.1.** OPENCOLLAB will only act on written instructions / consent from the Customer where OPENCOLLAB is required by the Customer to engage with a third party service provider ("Third Party Service Provider") to i) enable the Services for the Customer, and/or ii) to enable the Third Party Service Provider to integrate with the Software to provide new or value added services or new data/information or share information for the benefit of the Customer and the Customer's Authorised User and/or End Users;
  - 8.1.1.** Where the third party service provider will be accessing Software APIs, Instructure's API policy, as listed in their Master Terms and Conditions, will apply.
- 8.2.** Where the request as per clause 8.1 involves a Third Party Service Provider that has an existing contract with the Customer, the following will apply:-
  - 8.2.1.** OPENCOLLAB will not be required to ensure or be responsible for ensuring the Customer's compliance with the terms and conditions of such supplier contracts, but OPENCOLLAB agrees to use reasonable endeavours to advise the Customer of any approvals or licences required pursuant to OPENCOLLAB contracts to the extent that OPENCOLLAB becomes aware thereof.
  - 8.2.2.** OPENCOLLAB shall not be liable for any act or omission of a Third Party Service Provider or contractor or should OPENCOLLAB perform any services in the fulfilment of the Customer's request, which do not relate directly to the Services, the performance of such services will not be measured against or form part of any measurement of OPENCOLLAB's meeting of any Service Levels set out in this Agreement or any subsequent Contract;
  - 8.2.3.** OPENCOLLAB shall not be liable for any damages or claims from any third party or any act or omission of a Third Party Service Provider in terms of any Customer Data being submitted by the Software to the Third Party Service Provider and processed by the Third Party Service Provider.

- 8.2.4.** OPENCOLLAB shall not be liable for any non-performances of Third Party Service Provider's services or inaccurate data made available by Third Party Service Provider via any integration with the Software;
- 8.2.5.** It shall be the responsibility of the Third-Party Service Provider to ensure that all required updates and upgrades take place to ensure continuous provision of Third Party Service Provider services; and
- 8.2.6.** OPENCOLLAB shall be compensated for such services in line with its then prevailing rates for the provision of the same Services on a time and materials basis.

## **9. SERVICES**

- 9.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.
- 9.2.** Between OPENCOLLAB and the Customer for OPENCOLLAB's Value Added Canvas Services, the Parties agree -
  - 9.2.1.** OPENCOLLAB shall, during the Term as specified in the Service Agreement, provide the Value Added Canvas Services to the Customer subject to the terms of this Agreement.
  - 9.2.2.** Nothing contained in the clause 9.2.1 above shall affect OPENCOLLAB's right to exercise its own judgement and to utilise its skills as it considers most appropriate in order to achieve compliance with the said resolutions and directions or otherwise to comply with its obligations under any Contract.
- 9.3.** OPENCOLLAB will provide the Customer with OPENCOLLAB's standard customer support services for the Value Added Canvas Services in accordance with OPENCOLLAB's Canvas LMS Support Services Policy in effect at the time that the Support Services are provided and such other additional support services that may be agreed to under a Service Agreement and a related Order Form(s). OPENCOLLAB may amend OPENCOLLAB's Canvas LMS Support Services Policy in its sole and absolute discretion from time to time. Where any such amendments may affect the rights of the Customer, OPENCOLLAB will notify the customer in writing 30 (thirty) days in advance of said amendments.
- 9.4.** The Customer may purchase enhanced Canvas support services separately at OPENCOLLAB's then current rates.

- 9.5.** Incremental Services. From time to time, additional OPENCOLLAB or third-party functionality (such functionality being deemed not to be part of the existing Services) may be made available by OPENCOLLAB to Customer (in the case of third-party functionality, such functionality being made available on a pass-through basis pursuant to terms specified by the third-party provider of such functionality), and which additional functionality may be purchased by Customer for additional fees in accordance with any additional terms and conditions specified by OPENCOLLAB.
- 9.6. Changes to the Software or related Software related technology is bound by Instructure's Terms and Conditions and Policies as is shared in the Service Agreement.**
- 9.7.** The Customer acknowledges that it is the Customer's obligation to operate, manage, run and control its business and business processes. The Customer shall check and verify that the Software (or any relevant part thereof) is performing according to its specifications in order to prevent or at least minimise configuration errors and/or omissions and shall alert OPENCOLLAB of any problems the Customer may experience.
- 9.8.** OPENCOLLAB shall carry out its obligations under any Contract in compliance with all relevant statutes, regulations, orders, directions, statutory instruments, and codes of practice identified in any Service Agreement as applying to provision of the Value Added Canvas Services, and it shall obtain, effect and keep effective all relevant permissions, licenses and permits required in respect of its obligations and duties to be performed under any Contract.
- 9.9.** In the performance of the Value Added Canvas Services OPENCOLLAB shall rely on information and materials as received from Instructure, the Customer or Third Party Service providers (as directed by the Customer). Unless agreed to otherwise under a Service Agreement, OPENCOLLAB has no editorial rights to the information and will rely on the information as-is received from Instructure, the Customer or any third party service provider as directed by the Customer in the execution of the Services; there is no obligation on OPENCOLLAB to verify or investigate the accuracy of such information or materials.

## **10. OTHER SERVICES**

- 10.1.** The Customer may request, in writing, other services ("Other Services") from OPENCOLLAB. Other Services may include extended consulting services, new tool development, additional integration services or development outside the scope of the generic Value Added Canvas Services as defined, training, business analysis and additional professional services. Other Services are subject to OPENCOLLAB's prevailing

terms, conditions and prices for such Other Service at that time. All Other Services shall be confirmed under a separate Service Agreement and/or Annexures to an existing Service Agreement depending on the nature of the Other Services requested.

## **11. Customer data**

- 11.1. The Customer shall own all right, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.
- 11.2. The Customer hereby grants OPENCOLLAB a worldwide, royalty-free, and non-exclusive license during the term of its subscription to access Customer Data in order to provide the Value Added Canvas Services.
- 11.3. Where the use of the Customer Data involves the Processing of any Personal Information, the Processing shall be performed in accordance with the OPENCOLLAB Privacy Policy.
- 11.4. The accuracy and maintenance of the Customer Data (Customer and/or Authorised User data or End User data) in the Services is the responsibility of the Customer and/or Authorised – or End Users. OPENCOLLAB will however provide (where reasonably possible) advice and assistance wherever possible, within the limits of this Agreement, to improve the accuracy of the information at all times.

## **12. Instructure's OBLIGATIONS**

- 12.1. For Instructure's Software, it will be according to Instructure's policies as provided to the Customer in the Service Agreement.

## **13. OPENCOLLAB'S OBLIGATIONS FOR ITS VALUE ADDED CANVAS SERVICES**

- 13.1. OPENCOLLAB undertakes that the Canvas Value Added Services will be performed with due and proper care, and in accordance with good and generally accepted industry practice.
- 13.2. In addition to the specific responsibilities and obligations of OPENCOLLAB set out elsewhere in the Agreement, OPENCOLLAB shall:
  - 13.2.1. keep abreast and comply with Applicable Law and shall ensure that it complies fully with Applicable Law that is applicable to the Services;

- 13.2.2.** maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this agreement.
  - 13.2.3.** promptly advise the Customer representative should (i) the Customer fail to provide information that is necessary for the fulfilment of the Value Added Canvas Services; or (ii) the non-compliance by the Customer with its duties and responsibilities which is likely to result in a situation where the Fees payable by the Customer may need to be increased;
  - 13.2.4.** employ suitably qualified and competent persons in the execution of any Contract;
- 13.3.** The undertakings under clauses 13.1 and 13.2 above will not apply to the extent of any non-conformance which is caused by use of the Software contrary to OPENCOLLAB's and/or Instructure's instructions, nor will it apply to the modification or alteration of the Software or Services by any party other than Instructure or OPENCOLLAB. If the Software does not meet the Customer's desired performance , OPENCOLLAB will, at the Customer's expense, as will be agreed in writing, use all reasonable endeavours to provide the Customer with an alternative means of accomplishing the desired performance.
- 13.4.** Notwithstanding the undertakings in clauses 13.1 and 13.2, OPENCOLLAB:
- 13.4.1.** is not responsible for Software availability, quality of Software documentation which is subject to Instructure's terms and conditions as is shared with the Customer in the Service Agreement; and
  - 13.4.2.** is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 13.5.** This Agreement shall not prevent OPENCOLLAB from entering into similar agreements with third parties, or from independently developing, using, products and/or services which are similar to those provided under this agreement.

#### **14. CUSTOMER'S OBLIGATIONS**

- 14.1.** For OPENCOLLAB's Value Added Canvas Services provide OPENCOLLAB with:

- 14.1.1.** all necessary co-operation in relation to this Agreement or any Service Agreement(s) and its Annexures;
- 14.1.2.** all necessary access to such information as may be required by OPENCOLLAB;  
in order to provide the Value Added Canvas Services;
- 14.2.** without affecting its other obligations under this Agreement or any Contract, comply with all Applicable Laws with respect to its activities;
- 14.3.** carry out all other Customer responsibilities as set out in this Agreement and any subsequent Contract in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, OPENCOLLAB may adjust any agreed timetable or delivery schedule as reasonably necessary;
- 14.4.** ensure that the Users use the Software in accordance with the terms and conditions as is stipulated in Instructure's Master Terms and Conditions as is shared with the Customer in the Service Agreement;
- 14.5.** obtain and shall maintain all necessary licences, consents, and permissions necessary for OPENCOLLAB and its contractors to perform their obligations under any Contract, including without limitation the Value Added Canvas Services;
- 14.6.** promptly report any incident or fault in the delivery of the Services and promptly respond to any queries or requests from OPENCOLLAB and provide its full cooperation in the troubleshooting and resolution of any incident.
- 14.7.** not do anything that may bring OPENCOLLAB into disrepute or reflect adversely on the business and integrity of OPENCOLLAB.

## **15. CHARGES AND PAYMENT**

- 15.1.** The Customer to pay the Fees to OPENCOLLAB as set out in the Service Agreement(s) and its Annexure(s).
- 15.2.** The Customer shall prior to provision of the Services provide to OPENCOLLAB valid, up-to-date and complete contact and billing details;
- 15.3.** OPENCOLLAB shall issue the Customer an invoice in accordance with the requirements under the Value Added Tax Act of 1991 and South African Revenue Services guidelines;

- 15.4.** Unless otherwise agreed to in a Service Agreement, all Fees shall be due and payable within 30 (thirty) days of date of invoice into the designated account of OPENCOLLAB as made available from time to time.
- 15.5.** The Customer shall be liable to OPENCOLLAB in respect of any travelling, accommodation and any expenses incurred as a result of services to be delivered outside the scope of the Value Added Canvas Services on instructions from the Customer, which expenses shall only be incurred subsequent to written consent from the Customer.
- 15.6.** If OPENCOLLAB has not received payment by due date OPENCOLLAB shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
- 15.7.** Interest shall accrue on a daily basis, compounding monthly, on such due amounts at an annual rate equal to 2 (two) % over the then current prime lending rate as published by the South African Reserve Bank, commencing on the due date and continuing until fully paid, whether before or after judgement.
- 15.8.** All amounts and fees stated or referred to in this Agreement:
- 15.8.1.** shall be payable in the currency as agreed to between the parties;
- 15.8.2.** are non-cancellable and non-refundable;
- 15.9.** It is agreed that should there be a subsequent price increase the Value Added Canvas Services, beyond the control of OPENCOLLAB, including but not limited to foreign exchange fluctuations, increased third party products or services, surcharges, taxes, rates or levies, delay caused by any instruction of Customer, OPENCOLLAB shall be entitled to increase the affected Value Added Canvas Services Fees accordingly but no more than 10% (ten percent) above the official South African CPI inflation rate, by the exact value of the increase but in proportion to the Canvas Value Added Services provided after written notification to Customer.
- 15.10.** Unless specifically agreed to otherwise in a Service Agreement, the Value Added Canvas Service Fees for each Term (current and subsequent) shall be as per the OPENCOLLAB then current Fee rate, which shall take into consideration the prevailing inflation rate as well as possible external costs applicable for the Value Added Canvas Services on an annual basis, which shall take effect on the each anniversary of the Subscription Start Date.

## **16. PROPRIETARY RIGHTS**

**16.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**16.2.** For OPENCOLLAB and Customer Trademarks:

**16.2.1.** OPENCOLLAB acknowledges the Customer and its Affiliates' rights, title and interest in and to its Trade Marks and will never in the future do anything, or assist, directly or indirectly, anyone to do anything to impair any part of that right, title and or interest, or attack or interfere in any way with the Customer's and or its Affiliates' Trade Marks.

**16.2.2.** The Customer agrees that OPENCOLLAB may make use of the Customer's Trade Marks and/or business names to present on OPENCOLLAB's website or such other channel or document to confirm the Customer as a customer of OPENCOLLAB, in accordance with the Customer branding guidelines as presented by the Customer to OPENCOLLAB;

**16.2.3.** Except for clause 16.2.2. above, OPENCOLLAB undertakes never to use or register a corporate name, trading style, trade mark or domain name that incorporates the Customer's Trade Marks, or any confusingly or deceptively similar mark, in the specific Trade Mark class, unless otherwise agreed to under the Service Agreement.

**16.2.4.** The Parties' obligations in respect of the Intellectual Property under this Agreement will survive the termination of this Agreement.

## **17. CONFIDENTIALITY**

**17.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**17.2.** Between the Parties for OPENCOLLAB's Value Added Canvas Services -

**17.2.1.** Each party may be given access to Confidential Information from the other party in order to perform its obligations under this agreement. A party's Confidential Information shall not be deemed to include information that:

**17.2.1.1.** is or becomes publicly known other than through any act or omission of the receiving party;

**17.2.1.2.** was in the other party's lawful possession before the disclosure;

- 17.2.1.3.** is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
  - 17.2.1.4.** is independently developed by the receiving party, which independent development can be shown by written evidence; or
  - 17.2.1.5.** is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.
- 17.2.2.** Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this agreement.
- 17.2.3.** Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 17.2.4.** Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.
- 17.2.5.** The Customer acknowledges that details of the Value Added Canvas Services constitute OPENCOLLAB's Confidential Information.
- 17.2.6.** OPENCOLLAB acknowledges that the Customer Data is the Confidential Information of the Customer.
- 17.2.7.** This clause 15 shall survive termination of this agreement, however arising.
- 17.2.8.** No party shall make, or permit any person to make, any public announcement concerning this agreement without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.

## **18. WARRANTIES**

- 18.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.
- 18.2.** For OPENCOLLAB's Value Added Services, the Parties represent and warrant that:

- 18.2.1.** by agreeing to these Terms and Conditions it is acting as principal and not as agent for an undisclosed principal;
- 18.2.2.** the execution and performance under this Contract has been duly authorised by the requisite corporate action on the part of such Party; and
- 18.2.3.** it has not violated any Applicable Law or policies of the other Party of which it has been given written notice, regarding the offering of unlawful inducements in connection with these Terms and Conditions.
- 18.2.4.** OPENCOLLAB warrants that:
  - 18.2.4.1.** the provision of the Value Added Canvas Services by OPENCOLLAB shall not as at the date of performance of the Value Added Canvas Services constitute an infringement or misappropriation of any Intellectual Property Rights of any third party.
  - 18.2.4.2.** the Services shall be rendered in accordance with Applicable Laws;
  - 18.2.4.3.** the Value Added Canvas Services shall be rendered in a professional manner with due care, skill and diligence.

## **19. INDEMNITY**

- 19.1.** For Instructure's Software, the maximum liability claim will be according to Instructure's policies as is provided to the Customer in the Service Agreement. The Customer is to claim directly from Instructure and indemnifies OPENCOLLAB from any loss or damages whatsoever, including but not limited to loss of profit, punitive, exemplary, special or indirect or consequential loss suffered by the Customer relating to and as a result of the use of the Software and Canvas Services.
- 19.2.** Between OPENCOLLAB and the Customer for the Value Added Canvas Services, the Parties agree that -
  - 19.2.1.** Neither Party shall be liable to the other Party for any loss or damages whatsoever, including but not limited to loss of profits, punitive, exemplary, special or indirect or consequential loss suffered by the other Party or any third party, howsoever arising.
  - 19.2.2.** Notwithstanding the foregoing, should a court of competent jurisdiction find that a Party is liable to the other Party for whatever reason and howsoever arising, the Parties expressly record and agree that any such liability shall not

exceed 30% of amount paid by the Customer for OPENCOLLAB's Value Added Canvas Services under the particular Contract, with respect to any single incident (including incidents related to the 'single' incident), for OPENCOLLAB's Value Added Canvas Services in the 6 (six) months preceding the incident.

- 19.2.3.** The client agrees to indemnify OPENCOLLAB, its directors, employees and agents from any claim arising from this agreement and the Service Agreement hereunder.

## **20. BREACH AND TERMINATION**

- 20.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

- 20.2.** Between OPENCOLLAB and the Customer for OPENCOLLAB's Value Added Services -

- 20.2.1.** Without affecting any other right or remedy available to it, either party ("Aggrieved Party") may terminate the Agreement with immediate effect by giving written notice to the other party if ("Defaulting Party"):

**20.2.1.1.** the other party ("Defaulting Party") fails to pay any amount due under this agreement or Service Agreement on the due date for payment and remains in default not less than 20 (twenty) days after being notified in writing to make such payment;

**20.2.1.2.** the other party commits a material breach of any other term of this agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 7 (seven) days after being notified in writing to do so;

**20.2.1.3.** the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts or commit any act of insolvency within the meaning of section Insolvency Act 1936;

**20.2.1.4.** an application is made to court, or an order is made, for the business rescue of a party or the other party is placed, provisionally or finally, in voluntary or compulsory liquidation or is "financially distressed" as contemplated in the Companies Act 71 of 2008, as amended;

**20.2.1.5.** a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such

process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 (fourteen) days;

**20.2.1.6.** the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business; or

**20.2.2.** The Parties agree that, without prejudice to any other right it may have in law, the termination of any particular Agreement shall not affect the operations of any other Service under another agreement between the Customer and OPENCOLLAB, unless the performances under said Contract relies on the Agreement to be terminated, which will result in the automatic termination of said other agreement.

**20.2.3.** OPENCOLLAB shall be entitled to terminate all Agreements between the Customer and OPENCOLLAB where the Customer commits any material breach (including but not limited to infringement of OPENCOLLAB Intellectual property Rights) of any Contract.

## **21. CONSEQUENCES OF TERMINATION OF SERVICES**

**21.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**21.2.** Between OPENCOLLAB and The Customer, in the event of:

**21.2.1.** the termination of this Agreement by the Customer as the Aggrieved Party under clauses 20.2.1.1, 20.2.1.2, 20.2.1.5 or 20.2.1.6 above; or

**21.2.2.** termination, cancellation or expiry of any of the Services,

the Parties undertake to comply with an Exit Management Plan that will be agreed to between the Parties at the time of termination

**21.2.3.** the termination of this Agreement by OPENCOLLAB as the Aggrieved Party in terms of clause 20 or

**21.2.4.** OPENCOLLAB being the Defaulting Party contemplated in clauses 20.2.1.3 and 20.2.1.4 above the following shall apply:

**21.2.4.1.** The provision of all OPENCOLLAB Value Added Canvas Services shall forthwith cease;

**21.2.4.2.** OPENCOLLAB shall deliver to the Customer all of the Customer's Confidential Information in the possession of OPENCOLLAB and, at the Customer's request, destroy all copies thereof not delivered to the Customer, no later than 10 (ten) days after such termination. Actual costs incurred in such delivery and/or destruction shall be for the Customer's account.

**21.2.4.3.** the Customer shall deliver to OPENCOLLAB all of OPENCOLLAB's Confidential Information and Documentation in the possession of the Customer and, at OPENCOLLAB's request, destroy all copies thereof not delivered to OPENCOLLAB, no later than 10 (ten) days after such termination. Actual costs incurred in such delivery and/or destruction shall be for OPENCOLLAB's account and

**21.2.4.4.** in addition to the payment of any other fees set out in a Contract, the Customer shall be liable to pay to OPENCOLLAB all fees due to OPENCOLLAB for OPENCOLLAB Services already provided and/or OPENCOLLAB Services rendered prior to termination even if they have not yet been invoiced yet (as may be agreed to under a Service Agreement).

**21.3.** Should OPENCOLLAB be obliged to institute legal action against the Customer to enforce any provisions of an Agreement and / or to collect outstanding monies (undisputed monies) which is in arrears, then the Customer will be responsible for all legal costs on an attorney and own client basis, including such tracing fees and collection commission which such attorneys are entitled to charge, on successful judgement of OPENCOLLAB claim. All other legal costs shall be on an attorney own client scale and the party successful in its claim and has obtained judgement shall be entitled to said costs.

## **22. FORCE MAJEURE**

**22.1.** For Instructure's Software, it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**22.2.** Between OPENCOLLAB and the Customer for OPENCOLLAB's Value Added Services -

**22.2.1.** Neither Party shall have any claim against the other Party ("the Affected Party") for any delay or failure of the Affected Party to carry out any of its obligations under this agreement, other than a payment obligation, arising from or attributable to acts of God, war, terrorism, government, legislation, labour

action, unrest, disease pandemic, failure of third party supplier (i.e. communication operator or utilities provider or infrastructure provider) or any other cause whatsoever beyond the reasonable control of the Affected Party (“force majeure”).

**22.2.2.** The performance of the obligations of the Affected Party shall, subject to clause **22.2.3**, be suspended for the duration of the force majeure, which shall be deemed to commence only upon the date of written notice by the Affected Party to the other Party. Upon cessation of the force majeure, this agreement shall again become fully operative and the Affected Party shall immediately resume its performance.

**22.2.3.** If the suspension of performance continues for more than 20 (twenty) consecutive Days, then either Party may summarily terminate this agreement by written notice to the other Party, prior to the cessation of the force majeure.

### **23. NO PARTNERSHIP OR AGENCY**

**23.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**23.2.** Between OPENCOLLAB and the Customer, the Parties agree -

**23.2.1.** Nothing in this Agreement is intended to or shall operate to create a partnership between the Parties, or authorise either Party to act as agent for the other, and neither Party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

### **24. NON-SOLICITATION**

**24.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**24.2.** Between OPENCOLLAB and the Customer -

**24.2.1.** Except as otherwise agreed in writing, neither Party will directly solicit, offer work to, employ or contract with, whether directly or indirectly as a partner, employee or independent contractor, any of OPENCOLLAB's personnel who are directly and currently involved in the provision of the Value Added Canvas Services, or for a period of 6 (six) months thereafter. If the Customer solicits

OPENCOLLAB's personnel in contravention of this clause, the Customer will pay to the OPENCOLLAB an amount equal to 100% (hundred percent) of the employee's current annual cost to company as liquidated damages.

## **25. THIRD PARTY RIGHTS**

**25.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**25.2.** Between OPENCOLLAB and the Customer -

**25.2.1.** Except as agreed to under this Agreement, this agreement does not confer any rights on any person or party other than the Parties to this Agreement and, where applicable, their successors and permitted assigns.

## **26. GOOD FAITH**

**26.1.** In the implementation of this Agreement, the Parties undertake to observe the utmost good faith and they warrant in their dealings with each other that they shall not do anything which might prejudice or detract from the rights, assets or interests of any other(s) of them.

## **27. DISPUTE RESOLUTION**

Any dispute arising from the agreement shall be subject to the following dispute resolution procedures –

**27.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**27.2.** Between OPENCOLLAB and the Customer for OPENCOLLAB's Value Added Canvas Services, the Parties agree to:

**27.2.1.** Informal dispute resolution: Prior to referring any dispute to arbitration, the Parties shall first attempt to resolve their dispute informally by referring a dispute to its senior management. Senior management of both Parties shall discuss the problem and attempt to resolve the dispute, without the necessity of any formal proceeding, within 14 (fourteen) days of the dispute having been referred.

**27.2.2.** Informal dispute resolution does not reduce Parties' rights: Proceedings in terms of this clause 27.2.1 shall not be construed to prevent a Party from

instituting formal proceedings earlier to obtain urgent or interim relief, avoid the expiration of any applicable limitations period, or preserve a superior position with respect to other creditors.

- 27.2.3.** Institution of Formal Proceedings: Subject to the provisions of clauses 27.2.1 and 27.2.2, the Parties agree that either Party may elect to refer any dispute which may arise to either the High Court of South Africa or to arbitration proceedings as contemplated in clause 27.2.4. Upon election by a Party initiating the relevant dispute proceedings, the other Party will be bound by such election for the purposes of the dispute in question.
- 27.2.4.** Arbitration: If the Parties are unable to resolve any dispute informally and either Party has elected to commence arbitration proceedings to resolve the dispute in terms of clause 27.2.3, then such dispute shall on written demand by the electing Party be submitted to arbitration at Arbitration Foundation of Southern Africa as per the Expedited Rules and arbitration shall be held in Cape Town.
- 27.2.5.** Status of arbitration ruling: The decision of the arbitrator shall be binding on the Parties to the arbitration after the expiry of the period of 20 (twenty) days from the date of the arbitrator's ruling if no appeal has been lodged by any Party or upon the issue of determination by the appeal panel, as the case may be. A decision, which becomes final and binding in terms of this clause 27.2.5 may be made an order of court at the instance of any Party to the arbitration. The parties agree to keep the arbitration confidential and not to disclose it to anyone except for purposes of obtaining an order as contemplated herein.
- 27.2.6.** Continued performance: Each Party agrees to continue performing its obligations under the agreement while any dispute is being resolved.
- 27.2.7.** Rapid resolution of disputes: The Parties shall use commercially reasonable efforts to resolve disputes arising as rapidly as possible.
- 27.2.8.** Confidentiality: All disputes will be dealt with in confidentiality to protect the reputation of the parties;
- 27.2.9.** Excluded relief: This clause 27.2 shall not preclude either Party from seeking urgent or interim relief from the High Court of South Africa or any other competent organs of state created for the specific purpose of regulating the business or industry activities in which the Parties are engaged.

**27.2.10.** Agreed Jurisdiction: the Parties hereby consent to the jurisdiction of the Western Cape High Court (Cape Town) in respect of proceedings referred to in clause 27.2.3 above

**28. NOTICES**

**29.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**30.** Between OPENCOLLAB and the Customer for OPENCOLLAB's Value Added Services, the Parties agree:

**30.1.** Each Party hereby selects as its domicilium citandi et executandi the physical, postal and email addresses, as stated in the Party Schedule in the Service Agreement or as per the OPENCOLLAB proposal or quotation, at which all notices and legal processes must be delivered to it for the purposes of this Agreement and for the attention of the Managing Director or CEO of a party:

**30.1.1.** In respect of invoices and statements and any other related queries, the Customer agrees that OPENCOLLAB may deliver it via email to an address as confirmed in writing by the Customer;

**30.1.2.** Any termination and or breach notice or other legal notice will be valid and effective only if in writing and delivered by hand, registered post or electronic mail message ("e-mail") to the addresses as set out under the Party Schedule in the Service Agreement by a party authorised to do so.

**30.2.** Any notice to the other Party delivered by hand to its physical address will be deemed, unless the contrary is proved, to have been received on the day of delivery.

**30.3.** Any notice to a Party posted by prepaid registered mail will be deemed, unless the contrary is proved, to have been received by the addressee, on the 5th (fifth) day following the date of such posting.

**30.4.** Any email to a Party, using its chosen e-mail address as per the Party Schedule in the Service Agreement, will be regarded as having been received by the recipient when the complete data message enters the information system designated and used for that purpose by the recipient, and is capable of being retrieved and processed by the recipient, or upon receipt by the sender, of an automated acknowledgement of read by the recipient or any conduct of the recipient reasonably sufficient to indicate to the sender that the email has been received. Any termination notice sent by e-mail to a

Party will be deemed, unless the contrary is proved, to have been received by the recipient, 24 (twenty-four) hours after the e-mail was sent.

**30.5.** If either Party changes its domicilium address, it will notify the other Party in writing of the change.

**30.6.** Notwithstanding anything to the contrary contained in this Agreement, a notice actually received by either Party from the other Party will be adequate written notice or communication to such Party, despite the terms and conditions of this clause 26 were not strictly complied with.

## **31. GENERAL PROVISIONS**

**31.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement.

**31.2.** Between OPENCOLLAB and the Customer, the Parties agree:

### **31.2.1. Entire agreement**

**31.2.1.1.** This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

**31.2.1.2.** Each of the parties acknowledges and agrees that in entering into this agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the subject matter of this agreement, other than as expressly set out in this agreement.

### **31.2.2. Variation / Modifications:**

**31.2.2.1.** The General Terms and Conditions / Service Specific Terms: OPENCOLLAB may change the terms of the General Terms and Conditions and Service Specific Terms from time to time and will post any such changes on <https://www.opencollab.co.za/legal> or notify the Customer in writing. These changes will only take effect at the beginning of Customer's Renewal term, at which time Customer's continued use of the Value Added Canvas Services will constitute its acceptance of the changes.

**31.2.2.2.** Privacy Policy :

**31.2.2.2.1.** For Instructure it will be according to Instructure's policies as is provided to the Customer in the Service Agreement;

**31.2.2.2.2.** OPENCOLLAB may only change the Privacy Policy where such change is required to comply with Applicable Law or where such change:

**31.2.2.2.2.1.** is commercially reasonable;

**31.2.2.2.2.2.** does not result in a degradation of the overall security of the Value Added Canvas Services;

**31.2.2.2.2.3.** does not expand the scope of or remove any restrictions on OPENCOLLAB processing of "Customer Personal Data,"

**31.2.2.3.** Canvas LMS Support Services Policy : OPENCOLLAB may amend the Support Services Policy from time to time, which amended version will be made available to the Customer. Subsequent use of the Services will be subject to those amended Policy/ies, however where any such changes may affect the rights of the Customer, OPENCOLLAB will first notify the Customer in writing prior to implementation of same.

**31.3. Waiver:** No failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

**31.4. Severance:**

**31.4.1.** If any provision (or part of a provision) of this agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

**31.4.2.** If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

**31.5. Assignment:**

**31.5.1.** The Customer shall not, without the prior written consent of OPENCOLLAB, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

**31.5.2.** OPENCOLLAB may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

**31.6. Governing law**

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of the Republic of South Africa.