

Society for Computers & Law (SCL) AI Group

Artificial Intelligence Contractual Clauses



Contents

Introduction.....	3
Approach and assumptions	3
Contributors	4
1. Primary Obligations	5
2. Licences / Intellectual Property	21
3. Third Party Software.....	31
4. Supplier Warranties	33
5. Customer Warranties	41
6. Termination.....	43
7. Dispute Resolution.....	45
8. Definitions.....	47

Introduction

The development and use of AI will increase significantly over the next few years. AI systems will therefore increasingly become the subject matter of transactional contracts. AI technologies create new and unique risks which will need to be reflected in those contracts.

The SCL AI Group has created this document to provide guidance to those involved in the drafting and negotiating of such contracts. This document sets out sample clauses (both “pro-supplier” and “pro-customer”), together with drafting notes, for transactions involving AI systems.

These clauses are for illustrative and educational purposes only and are not tailored to any specific AI use cases. The clauses are intended to provide guidance on the types of issues that may be helpful to address in AI contracts; they are not intended to, and do not constitute, legal advice. It is recommended that you obtain independent legal advice on contracts involving AI. This document is not to be relied upon. None of the SCL (including its members), the contributors to this document or anyone else connected with this project assumes any responsibility or liability for this document or the use of its content and/or clauses.

The materials are being made available under a creative commons licence which can be adapted and where full attribution shall be made provided liability is wholly excluded.

Approach and assumptions

In this document:

- ‘AI’ is not defined. It is hoped that the document will provide helpful guidance for a range of AI technologies, but you should take advice where appropriate on your specific use case.
- The transacting parties are commercial entities. The drafting has been approached from the perspective of a contract governed by the laws of England and Wales, but it may provide helpful guidance more generally.
- Two AI transactional arrangements are considered:
 - ‘Pro-Supplier’ – a ‘commercial off the shelf’ (“COTS”) arrangement, involving the supply of a trained AI system with no bespoke customisation for the customer. We use the COTS arrangement to demonstrate a “pro-supplier” negotiating position.
 - ‘Pro-Customer’ – a more bespoke arrangement, where the Supplier trains and customises an AI system for a particular customer. We use this arrangement to demonstrate a “pro-customer” negotiating position.
- Please note that the “Pro-Supplier” and “Pro-Customer” labels and positions are artificial: a customer may have a better negotiating position for a COTS arrangement (and vice versa). We use these arrangements to reflect two common transactional arrangements and to show different negotiating positions.

Please note that the clauses contained in this document do not comprise a complete precedent contract. The clauses also do not address the impact of legislation (present or anticipated), the full impact of which should be considered by the transacting parties.

Contributors

- Alison Rees-Blanchard, LexisNexis
- Anne Todd, Michelmores
- Charlie Lyons-Rothbart, Wayve Technologies Ltd
- Coran Darling, DLA Piper US LLP
- Iain Munro, 4 Pump Court
- Jack Sayle, Basis Technologies
- Minesh Tanna, Simmons & Simmons
- Sara Vero, JP Morgan Chase

1. Primary Obligations

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Supply of AI System			
<p>S1.1 During the Licence Term:</p> <p>S1.1.1 the Supplier shall provide the AI System to the Customer for the [Permitted Purpose] on and subject to the terms of this Agreement in accordance with Schedule [♦] and subject to the limitations set out in Schedule [♦]; and</p> <p>S1.1.2 the Customer shall be entitled to use the AI System on and subject to the terms of this Agreement.</p>	<p><i>The Supplier may also wish to include an obligation on the Customer and its authorised users to comply with an Authorised / Acceptable Use Policy addressing unacceptable behaviours of individuals using the AI System.</i></p>	<p>C1.1 The Supplier shall:</p> <p>C1.1.1 develop, deliver[,] [and] install [and integrate] the AI System [at the Customer's site(s)] by the [initial deployment date] in accordance with the Specification.</p> <p>C1.1.2 comply with all applicable laws relating to the development, delivery[,] [and] installation [and integration] of the AI System, including without limitation [<i>insert list</i>].</p>	<p><i>This will need to reflect the environment within which the bespoke AI System is to be deployed, i.e. on-premises, cloud or other.</i></p>
Training, Acceptance Testing, and Validation			
<p>S1.2 n/a</p>	<p><i>This Pro-Supplier precedent assumes a ready to use model.</i></p>	<p>C1.2 [The Supplier shall provide the Supplier Training Data in accordance with the requirements in Schedule [♦] at [♦].]</p> <p>Alt. C1.2 [The Supplier shall ensure that it has obtained all necessary permissions and licences for the provision and use of the Supplier Training Data to train the model in</p>	<p><i>Consider the Customer's requirements for training data, provenance of the data, necessary rights / permissions to use the data if the data is subject to third party rights / ownership.</i></p> <p><i>If the training data (whether supplier or customer-provided) needs to be cleaned or converted into a specific format this will need to be clearly set out and consider who is responsible for this.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		<p>accordance with the Customer Requirements.]</p> <p>Alt. C1.2 [The Customer shall provide the Customer Training Data to the Supplier in accordance with Schedule [♦].]</p>	<p><i>For training data, parties should consider matters such as: accuracy; completeness; uniqueness; timeliness; validity; sufficiency; relevancy; representativeness; consistency;¹ data consent; and data sensitivity.²</i></p> <p><i>Where the Customer provides some (or all) of the training data consider what restrictions should apply on the Supplier's use of the data, data segregation and confidentiality.</i></p>
S1.3 n/a	<p><i>This Pro-Supplier precedent assumes a ready to use model. If the particular AI System does require Acceptance Testing, consider using C1.3 pro-Customer wording and scoping the tests in the relevant Schedule.</i></p>	<p>C1.3 The Supplier and the Customer shall each conduct training of the AI System, Acceptance Testing and validation in accordance with Schedule [♦].</p>	<p><i>The Schedule should be clear about processes and responsibilities. Consider a process-based governance framework, which includes a table with activities described in the first column and then tick-box columns for each party, together with supplemental comments.</i></p> <p><i>There are developing efforts to set national and international standards, which parties may adapt for their use cases or incorporate by reference.</i></p> <p><i>Standard software development concepts of acceptance are unlikely to be applicable. The AI System will require on-going monitoring, validation and testing throughout its</i></p>

¹ See UK Government Guidance, ‘Assessing if artificial intelligence is the right solution’ (10 June 2019) <https://www.gov.uk/guidance/assessing-if-artificial-intelligence-is-the-right-solution#consider-your-current-data-state> [Accessed 18 April 2022].

² See World Economic Forum, ‘AI Procurement in a Box: AI Government Procurement Guidelines’ (June 2020) https://www3.weforum.org/docs/WEF_AI_Procurement_in_a_Box_AI_Government_Procurement_Guidelines_2020.pdf [Accessed 18 April 2018].

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>use, including the implementation phase. Parties contracting for AI Systems need to consider how this will happen.</i>
S1.4 n/a	<i>This Pro-Supplier precedent assumes a ready to use model.</i>	<p>C1.4 In relation to records of training, Acceptance Testing and validation:</p> <p>C1.4.1 The Supplier shall retain such records in accordance with the Schedule at [♦]. Copies of these records shall be provided to the Customer by [insert milestone date] and/or upon reasonable request.</p>	<p><i>Maintenance of records is typically important to being able to prove breach. It also reflects best practice.</i></p> <p><i>Consider whether to include drafting to address a possible rebuttable presumption of liability on the part of the Supplier where it has not retained records. This may be an issue on which there will be greater focus once the EU AI Act is in force. See further at [C1.17.3].</i></p>
Requirements			
<p>S1.5 The Supplier shall provide the AI System in accordance with the Specification at [♦]. The Customer accepts that the Supplier has made or makes no other representations or undertakings regarding the operation and adequacy of the AI System, including whether the AI System meets the Customer’s individual requirements. Any warranties, conditions, or terms as to fitness for purpose or satisfactory quality are excluded.</p>	<i>The Pro-Supplier precedent assumes a COTS system.</i>	<p>C1.5 In relation to the Customer Requirements:</p> <p>C1.5.1 [<u>Pro-Customer:</u> The Supplier will provide an AI System that meets the Customer Requirements.] / [<u>Pro-Supplier:</u> The Supplier shall exercise [best endeavours] to provide an AI System that meets the Customer Requirements.]</p> <p>C1.5.2 [<u>Pro-Customer:</u> The Supplier warrants that it has had a full and sufficient opportunity to</p>	<p><i>These provisions are more appropriate for the supply of a bespoke / adapted AI Systems.</i></p> <p><i>While a detailed specification is common for computer systems, AI systems typically involve more iterative development. In these circumstances, consider whether the Customer Requirements are better expressed as benchmarked and measurable outcomes.</i></p> <p><i>General obligations as to fitness for purpose and satisfactory quality typically lack the specificity required</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		<p>understand those requirements and acknowledges that any failure to understand them shall not entitle the Supplier to any extension of time or additional payment.] / [Pro-Supplier: The Customer shall take reasonable steps to ensure that the Supplier understands the Customer Requirements.]</p> <p>C1.5.3 [Pro-Supplier: The Supplier shall communicate to the Customer whether or not the Customer’s precise needs can be met and, if so, how they can be met. If they cannot be met precisely the appropriate options should be set out by the Supplier.]</p>	<p><i>for good contract management and efficient dispute resolution.</i></p> <p><i>It is therefore important that contracting parties seek to be more prescriptive in terms of requirements/specification, responsibilities and outcomes in the Schedule. Insofar as possible, the parties should identify measurable and clear benchmarks. The general obligations can act as supplementary protection.</i></p> <p><i>If the AI is designed to bring about a particular result for the Customer, consider how to define measurable indicators. It is in both parties' interests to ensure that the requirements are as clear as possible and clearly identify specific outcomes and performance metrics.</i></p> <p><i>It may be in the interests of both parties to build in time-limited mechanisms for root cause analyses and fixes, perhaps at least in the initial deployment period.</i></p> <p><i>Consider addressing general and sector-specific regulatory requirements as well as ethical, environmental / ESG requirements etc.</i></p> <p>AI System Controls</p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<p><i>The parties should consider how AI System Controls will be managed and responsibilities allocated between the parties.</i></p> <p><i>This might be covered within Customer Requirements or in a separate Controls Schedule. Consider how responsibilities around issues such as data encryption, managing end-end user consents (if needed), access control, logical separation of data, key management etc will be allocated.</i></p> <p><i>Define which controls are to be implemented by the Supplier and which are to be implemented by the Customer.</i></p> <p><i>Consider how changes to the Customer Requirements will be addressed through change management process.</i></p> <p><i>Consider whether a framework is required to address how changes required to be made as a result of the AI Act or other applicable changes in law.</i></p> <p><i>Consider timescale for implementing changes arising due to new legislative requirements.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Customer Obligations			
<p>S1.6 The Customer shall:</p> <p>S1.6.1 comply with all the Customer obligations in Schedule [◆].</p> <p>S1.6.2 comply with the User Manual and with all reasonable instructions of the Supplier relating to the use of the AI System.</p> <p>S1.6.3 comply with all applicable laws relating to its use of the AI System, including without limitation [<i>insert list</i>] and shall not use the AI System for any unlawful purposes.</p>	<p><i>The Supplier should consider whether any specific Customer obligations need to be specified in addition to those which are already addressed in these clauses.</i></p>	<p>C1.6 The Customer shall comply with the obligations set out in Schedule [◆].</p>	<p><i>It is in the interests of the Customer as well as the Supplier to ensure that the Customer obligations and dependencies are clearly defined.</i></p>
Co-operation			
<p>S1.7 The Customer shall actively cooperate with the Supplier to resolve any problems that occur in relation to its access to or use of the AI System including, without limitation, providing any information and assistance which the Supplier may reasonably require.</p>		<p>C1.7 The Supplier shall actively cooperate with the Customer to resolve any problems that occur [in accordance with Schedule [◆] [Governance / Account Management]].</p>	<p><i>While generic terms like these may be implied (if they are not express), as noted in <u>Anglo Group Plc v Winther Browne & Co Ltd</u> [2000] 3 WLUK 4 at [126]:</i></p> <p><i>“The parties would have been prudent to reduce to writing precisely what special needs had been communicated to [the supplier], precisely how it was agreed that they should be met and what follow up procedures were to be undertaken eg. systematic noting of problems, review meetings etc”.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>Such details should be set out in the Schedule. Generic provisions invite future disputes.</i>
<i>Circuit Breaker / Roll-back</i>			
<p>S1.8 The Supplier reserves the right to deploy a circuit-breaker capable of [interrupting and stopping] the AI System. The Supplier shall be entitled to deploy the circuit-breaker in any circumstances where the Supplier, acting reasonably, considers it is necessary to do so or to comply with applicable law. The Customer shall not be entitled to any compensation or refunds in any circumstances where the Supplier deploys the circuit-breaker in accordance with this clause S1.8.</p>	<p><i>It is in the Supplier's interest to include such a clause in the event that the AI System acts in a manner which is unintended, to the detriment of the Supplier's reputation, in breach of law.</i></p> <p><i>Consider what, if any, notifications the Supplier might be able to give to the Customer though in practice a Supplier is likely to resist any obligation to give notice before deployment of the circuit-breaker as this may not be possible.</i></p> <p><i>Consider also whether the Supplier wishes to state the previous iterations it will maintain.</i></p>	<p>C1.8 The Supplier shall:</p> <p>C1.8.1 ensure that the AI System contains a circuit-breaker capable of [interrupting and stopping] the AI System immediately [in the circumstances set out in Schedule [♦]] and upon Customer's instructions;</p> <p>[C1.8.2 maintain the previous [insert number] iteration[s] of the AI System for [period of time] and a log of the key differences between each; and]</p> <p>[C1.8.3 [immediately following the Customer's request,] [as soon as reasonably practicable following the Customer's request,] roll-back the AI System to an earlier iteration.]</p>	<p><i>It will be important to discuss and agree the requirements for circuit-breaker and roll-back to earlier iterations of the AI System. The parties should also consider cost of maintaining earlier iterations.</i></p> <p><i>Consider whether the Supplier should be under an obligation to maintain previous iterations of the AI System for roll-back purposes. Drafting is included at C1.8.2 and C1.8.3 but where an AI System has been integrated into the customer environment (as will often be the case) then unless the Supplier is involved in provision of on-going support and maintenance of the AI System this may not be possible.</i></p>
<i>User Manual / User Training</i>			
<p>S1.9 In relation to the User Manual and User Training:</p> <p>S1.9.1 The Customer shall devote reasonable time and patience to</p>	<p><i>The Schedule should identify what precisely is required of the User Manual and training process for effective knowledge transfer. It should make clear who the audience is – e.g. non-specialists, independent</i></p>	<p>C1.9 In relation to the User Manual and User Training:</p> <p>C1.9.1 The Supplier will provide the User Training to the Customer</p>	<p><i>The purpose of this clause is to provide user understanding of the AI System. The content will be detailed in the appropriate schedule but should reflect end-user obligations, the exact use case and any bespoke implementation.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>understanding how to operate the AI System [and shall ensure that only staff who have completed the User Training shall operate the AI System]. Should the Customer have any doubts as to the operation of the AI System, these shall be raised as soon as practicable and in writing with the Supplier.</p> <p>S1.9.2 The Customer shall use the AI System in accordance with the User Manual.</p> <p>S1.9.3 The Supplier will take reasonable steps to ensure that the User Manual is updated to reflect any changes in the AI System, and will provide such updated User Manual to the Customer, [as soon as reasonably possible after the update] [no later than [insert number] days after the update].</p>	<p><i>auditors – and consider how their specific needs will be met.</i></p> <p><i>Consider also whether there needs to be a requirement that only Customer staff who have completed user training should be permitted to operate the AI System.</i></p>	<p>[will take reasonable steps to ensure that the Customer is trained in the [installation and] use of the AI System,] in doing so (but without limitation) the Supplier shall comply with the User Training requirements in Schedule [♦].</p> <p>C1.9.2 Within a reasonable time in advance of [insert relevant milestone date] (and no later than [insert number] days before that [milestone date]), the Supplier shall provide the Customer with the User Manual set out in Schedule [♦] at [insert section] and defined therein.</p> <p>C1.9.3 The Customer will provide the Supplier with the information listed in the Schedule at [♦] for completion of the User Manual. To the extent that the provision of any information is delayed, the Supplier shall promptly identify in writing what is outstanding and still produce the User Manual by the required date, leaving such gaps as are reasonably necessary.</p> <p>C1.9.4 The Supplier warrants that the User Manual shall accord with Good Industry Practice and provide the Customer with adequate</p>	<p><i>If Supplier is unwilling to make available on demand at all times, consider compromise position on provision within a certain timeframe or granting access a set number of times per year. Ideally the User Manual will be in an appropriate digital format and include relevant information in a format which is accessible and comprehensible to users of the AI System.</i></p> <p><i>Training and testing records are dealt with separately.</i></p> <p><i>For specification of the content of the User Manual, Article 13(3) and Annex IV of the AI Act are likely to provide useful starting points.</i></p> <p><i>Consideration should be given to whether the Supplier should be under an obligation to update the User Manual. If the Supplier falls out of the picture this may not be feasible, in this case an alternative approach may be for the Supplier to be required to co-operate with the Customer to update the User Manual following an update.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		instructions to enable effective installation and use of the AI System.	
Upgrades, updates, and source code			
S1.10 n/a	<i>The Supplier will likely want to retain full control of the Source Code.</i>	C1.10 The Supplier shall deliver to the Customer an up-to-date and annotated version of the Source Code in the Bespoke Software prior to each Acceptance Test, immediately after the date of Acceptance and on each occasion on which it provides the Customer with an updated or upgraded version of the Bespoke Software. Any such Source Code shall be delivered [<i>insert how and the media on which the Source Code will be provided</i>].	<i>Drafting has been included for the delivery up of source code in the bespoke software. However, traditional arguments around the usefulness of such provisions (and any related escrow provisions) apply equally here.</i>
S1.11 After completion of installation of the AI System the Customer shall be wholly responsible for the continued operation and maintenance of the AI System. The Supplier has no obligation to provide subsequent Updates or Upgrades but the Supplier shall be entitled to Update or Upgrade the AI System at its discretion and without giving notice to the Customer. Alt. S1.11 The Supplier has no obligation to provide AI System Updates or	<i>The Supplier may offer a separate maintenance and support arrangement.</i> OR <i>The Supplier is not under any obligation under the agreement but where provided they can be rolled out by the Supplier without any requirement for notice or customer permission. This is in keeping with the SaaS ‘one to many’ model. Any such updates or upgrades will be</i>	C1.11 For [<i>insert period</i>], the Supplier shall provide the Customer with any Updates or Upgrades to the AI System as often as is reasonably required for the proper functioning and security of the AI System in accordance with this Agreement, including the accompanying Schedules. The provision of any such Updates or Upgrades to the AI System will not have any adverse effect on the	<i>The parties should carefully consider the division between acceptance testing and what is considered ongoing retraining, refreshing and recalibration of the AI System. The nature of AI means that this division may be unclear, so expectations should be set out in the relevant Schedules.</i> <i>This could be reflected in a longer timescale for acceptance testing, or a detailed services-style agreement documenting terms for maintenance to</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Upgrades to the Customer but where so provided it may do so without notice or prior permission. Any such Upgrades or Updates so provided will become subject to the terms and conditions of this Agreement.	<p><i>subject to the terms and conditions of the agreement. The precedent does not envisage that any charge will be made for updates and upgrades but if this is the case then the agreement should be amended accordingly. The Supplier may offer a separate support and maintenance agreement and, if so, this may contain further details about the commercial model for the delivery of updates and upgrades to the Customer.</i></p> <p><i>If the AI System is more SaaS-like in nature, then the default position may entail support and maintenance arrangements even in a pro-Supplier context. In this case, consider using the first paragraph of the pro-Customer clause, with appropriate scoping in the relevant Schedule.</i></p>	functionality, performance or compatibility of the AI System and will not result in any reduction in the features, functionality, characteristics or performance of the AI System.	<p><i>preserve the integrity and performance of the model.</i></p> <p><i>For the AI System more generally, the Schedule should set out expectations around planned updates, updates at Customer request, and discretionary Supplier updates.</i></p> <p><i>If continued provision of data is required for Updates and/or Upgrades, this should be specified in the relevant Schedule.</i></p>
Model Governance			
S1.12 n/a	<p><i>Supplier version is likely to be extremely short or even absent, depending on the use case. Reliance can be placed on existing cooperation and compliance with law clauses.</i></p> <p><i>However, there are some circumstances where the Supplier will wish to put obligations on the Customer, e.g.:</i></p> <p><i>If there is any concern about modifications to the AI System which could impact which party is subject</i></p>	C1.12 The parties shall each comply with their obligations set out in Schedule [♦] [Model Governance]. Without limitation, the Supplier will provide assistance to the Customer in complying with its legal and regulatory obligations in connection with the AI System.	<p><i>The parties should consider which party is responsible for governance and verifying outputs meet the Customer Requirements. In a very pro-Customer agreement, this obligation could extend to compliance with Customer’s own internal standards and requirements (not just legal and regulatory requirements).</i></p> <p><i>Consideration should be given to developing an objective and measurable framework for identifying,</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<i>to obligations under the AI Act, the parties may also wish to consider documenting their intent in this section.</i>		<i>rectifying and mitigating the impact of erroneous outputs and other failures to meet the Customer Requirements.</i> <i>In complex scenarios, where the exact governance and/or risk management requirements are not known in advance, consider a sandbox development stage. This interim phase could address the possibility of unintended outputs, potential misuse, and any other concerns specific to the AI System. Findings could then lead to monitoring and controls in the live implementation of the AI System. This sandbox step would be subject to a separate contract to reflect the relative risk.</i>
Explainability			
S1.13 n/a	<i>The Supplier may not be willing to subject itself to any primary obligations regarding explainability, although this may depend on any applicable regulation which could require this (even to a limited extent).</i>	C1.13 The Supplier will ensure that the AI System is designed, developed and tested in a way which ensures that its operation is sufficiently transparent to enable the Customer to understand and use the AI System appropriately. In particular, the Supplier will produce to the Customer, on request, information which allows the Customer to understand: C1.13.1 the logic behind an individual output from the AI System; and	<i>When specifying what explanations will be needed, consider also requirements of GDPR Art 22 and any other obligations where end-user/subject enquiries require Supplier cooperation.</i> <i>The specific explainability requirements will also depend on the nature of the AI System itself. If bespoke, it may well be capable of “explainability by design” on the Customer side. If closer to SaaS in nature, explainability requirements will be more important. As such, consider if the primary obligation to design in an explainable manner could</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		<p>C1.13.2 in respect of the AI System or any specific part thereof, which features contributed most to the output of the AI System,</p> <p>in each case, in accordance with Good Industry Practice.</p>	<p><i>be documented in the system specifications.</i></p> <p><i>In this precedent, limb 1 is designed to address local explainability and limb 2 is to address global explainability.</i></p> <p><i>Depending on the use case, consider if Supplier needs to prepare (or cooperate in the preparation of) an explainability statement, or similar.</i></p>
Unlawful Discrimination			
S1.14 n/a	<i>Likely to be as per SaaS and covered by a standard compliance with laws provision.</i>	<p>C1.14 Prior to installation of the AI System the Supplier will carry out testing in accordance with Good Industry Practice and appropriate to the intended purpose of the AI System to identify any output or model performance which may result in an individual being treated differently on the basis of a protected characteristic set out in the Equality Act 2010.</p>	<p><i>The consequences of failed testing are not specified here but should be set out and reflect the nature of the AI System and the implications of testing failure.</i></p> <p><i>For example, should it constitute a material breach of the contract? Or should there be a remediation process with the opportunity for repeat testing?</i></p> <p><i>Sophisticated Customers could also consider the right to carry out their own testing.</i></p> <p><i>Consider making Supplier testing records available on demand to Customer.</i></p> <p><i>Finally, all parties should consider how the requirements of this testing clause tie into mirror representations and warranties relating to representative datasets, lack of</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<p><i>discriminatory impact and related concepts.</i></p> <p><i>In an environment where the AI System is integrated into the customer environment and unless the Supplier is also responsible for installation and / or on-going support and maintenance the Supplier will be unable to provide on-going testing of the model but where the Supplier is involved in installation and / or on an on-going basis consider what the Supplier's obligations should be in the installation, support, and maintenance agreement.</i></p>
Security			
S1.15 n/a	<p><i>Likely to be as per standard SaaS and covered by existing provisions – for example obligations on the Customer to ensure that only authorised users access the AI System, that all passwords are kept secret, that any security breach or any compromise of security features is notified to Supplier, rights for the Supplier to change security features.</i></p>	<p>C1.15 The Supplier will ensure that any potential security risks relating to the AI System are mitigated in accordance with Good Industry Practice and as set out in the Specification.</p>	<p><i>These provisions and concerns often blend cybersecurity and privacy provisions. Consider if it is worth including specific provisions here or if it is perhaps unhelpful to be prescriptive.</i></p> <p><i>AI-system specific issues include:</i></p> <ul style="list-style-type: none"> - <i>Model inversion attacks;</i> - <i>Membership inference;</i> - <i>Data poisoning;</i> - <i>Adversarial examples; and</i> - <i>Model Flaws.</i> <p><i>The relevant examples to include in any AI System obligations will always be specific to the relevant circumstances and the risks, but consider if there is a need to tie back to</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>error correction process / notification obligations / support levels.</i>
Records and Audit Rights			
S1.16 The Customer shall retain records in accordance with Schedule [♦], covering [Permitted Use, Permitted Purpose and Licence Restrictions] (“Records”).	<i>Maintenance of records is typically important to being able to prove breach. It also reflects best practice.</i>	C1.16 The Supplier shall retain records in accordance with Schedule [♦], covering [training, Acceptance Testing and validation] (“Records”).	
<p>S1.17 In relation to the review and audit of Records:</p> <p>S1.17.1 Copies of the Records shall be provided to the Supplier upon reasonable request.</p> <p>S1.17.2 [Subject to the limitations and requirements set out in Schedule [♦],] the Customer shall permit the Supplier and its third-party representatives (including its designated auditor) to:</p> <p>S1.17.2.1 gain (physical and remote electronic) access to, and take copies of, the Records and information relating to the Customer’s use of the AI System (whether held at the Customer’s premises or on the Customer’s IT systems);</p> <p>S1.17.2.2 deploy reasonable online audit tools as part of the AI System for these specific purposes; and</p>	<p><i>In certain circumstances, the Supplier may wish to reserve rights to audit the Customer’s use of the AI System on a routine basis and following incidents reported either by the Customer or other users to ensure (a) that the model is functioning as intended and (b) that it is being used by the Customer in accordance with the Agreement.</i></p> <p><i>From a Customer perspective, consideration should be given to what practical limitations and requirements should apply, e.g. confidentiality undertakings.</i></p>	<p>C1.17 In relation to the review and audit of the Records:</p> <p>C1.17.1 Copies of these Records shall be provided to the Customer by [insert milestone date] and/or upon reasonable request.</p> <p>C1.17.2 The parties shall co-operate in connection with an audit of the AI System in the circumstances and subject to the responsibilities defined in Schedule [♦].</p> <p>C1.17.3 [If the Records are not retained by the Supplier as required, then the Supplier shall be subject to a rebuttable presumption that the condition of liability to be proven by the missing information has been fulfilled. For avoidance of doubt,</p>	<p><i>The Customer should give consideration to what audit rights it requires, who should carry out the audit and how it should be carried out.</i></p> <p><i>The burden of proof provision is inspired by the work of the EC Expert Group on Liability and New Technologies. See further in the ‘logging by design’ clause discussed below. It gives a Supplier failure to retain records a defined consequence and may counter-balance an imbalance in knowledge that may otherwise arise between the parties.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S1.17.2.3 inspect the Records and the Customer’s IT Systems relating to the use of the AI System, for the purpose of auditing the Customer’s compliance with its obligations under this agreement including the Licence Restrictions, Permitted Use and Permitted Purpose.]</p> <p>S1.17.3 [The Customer shall give all necessary assistance to the conduct of such audits.]</p> <p>S1.17.4 [The audit rights provided in clauses [S1.16-S1.17] shall only be exercised on reasonable notice (including during normal business hours in respect of physical audits).]</p>		<p>the Customer must still prove causation, loss and damage.]</p>	
Reporting			
<p>S1.18 The Customer shall provide reports on system performance to the Supplier in accordance with Schedule [♦].</p>	<p><i>The Supplier may require the customer to provide reports on the system performance.</i></p>	<p>C1.18 n/a</p>	<p><i>Consider whether it would be appropriate for the Supplier to report to the Customer on any bias, defects or other safety issues found by other users of the AI. [See also the specific clause on Unlawful Discrimination below].</i></p>
<p>S1.19 The Customer shall notify the Supplier [without delay / as soon as reasonably practicable] of any problems and / or unexpected outcomes arising out of its use of the AI System.]</p>		<p>C1.19 n/a</p>	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Logging by design			
<p>S1.20 [The Supplier shall at its sole discretion be entitled to equip the AI System with a means of recording information about the AI System's operation.]</p>	<p><i>The Pro-Supplier precedent assumes that the Supplier will not wish to commit to retaining particular operational records. However, in fact, logging of information may be beneficial to both parties – e.g. in the event of a dispute, the Supplier may be able to show more readily, by reference to an agreed data source, that the tool has not been used properly.</i></p>	<p>C1.20 The Supplier shall equip the AI System with a means of recording the information prescribed in Schedule [◆] about the AI System's operation. To the extent any recorded information is held by the Supplier, the Supplier shall provide the Customer with access to such information upon reasonable request.</p> <p>[C1.20.1 If the AI System fails to record the information prescribed in the Schedule [◆] or the Supplier fails to give reasonable access to such information, then the Supplier shall be subject to a rebuttable presumption that the condition of liability to be proven by the missing information has been fulfilled. For avoidance of doubt, the Customer must still prove causation, loss and damage.]</p>	<p><i>The Customer should consider its requirements (including any legal or regulatory obligations it is obliged to comply with) for maintaining a logging system and what data / information will need to be recorded. The detailed requirements should be set out in the Specification.</i></p> <p><i>The EC Expert Group on Liability and New Technologies has proposed both 'logging by design' and a rebuttable presumption if information is not logged or reasonable access is not given ('Liability for Artificial Intelligence', 2019, pp. 47-48). Parties may consider whether: (i) this is a workable for their use case; and (ii) it is a proportionate response to the Supplier's ease of achieving 'logging by design', the benefits that records may bring and the information asymmetries that may arise if C1.20 is breached.</i></p>

2. Licences / Intellectual Property

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Retention, Assignment and Licence of Intellectual Property Rights in the AI System and Derivative Works			
<p>S2.1 Except as expressly agreed in this clause S2.1, no Supplier Intellectual Property Rights are transferred or licensed under this Agreement.</p>	<p><i>The supplier has developed an AI System and is selling it to the customer as an ‘off-the-shelf’ solution. There will be little to no bespoke development or customisation for the customer.</i></p> <p><i>In the event of any customisation (for example, for system integration within the customer environment), the supplier will retain rights in and to any resultant IPR. Any rights arising in relation to any learning by AI system while being operated or used by the customer, are owned by (and where necessary assigned to) the supplier, with appropriate licences granted to the customer.</i></p> <p><i>The customer will retain rights to its customer data and any other proprietary materials that it gives to the supplier but will grant the supplier a licence to use the same.</i></p> <p><i>In the event that there is IPR arising in any works that are created by the AI System, these may be owned by either the supplier or the customer depending on the commercial</i></p>	<p>C2.1 Any and all Intellectual Property Rights arising in relation to the Licensed Software or in the Supplier Training Data are retained by the Supplier.</p>	<p><i>The supplier will develop a bespoke AI offering for the customer and the customer will take proprietary ownership of elements of that offering as set out in [C2.4] below.</i></p> <p><i>Note that, in the majority of cases, where such bespoke development has been commissioned, the supplier/developer will still expect to retain ownership of underlying parts of the AI offering that it developed prior to being commissioned by the customer. It is most likely that the supplier will want to retain ownership of its existing underlying algorithms (it is also likely that there will also be a significant proportion of open source materials included in the existing and developed solution). The Customer may want to consider this in detail and carry out its own due diligence around open source usage within the AI System.</i></p> <p><i>A very pro-customer approach would be to provide that the customer takes ownership of any and all intellectual property arising in the delivered AI system.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<p><i>scenario. As this precedent takes a very pro-supplier approach, for the purpose of these clauses it is assumed that any such rights would be owned by the supplier.</i></p> <p><i>For a pro-customer approach to IPR ownership, where there is significant bespoke development, see the pro-customer version of these clauses.</i></p>		<p><i>However, as this is relatively unlikely to be the case, these clauses assume that:</i></p> <ul style="list-style-type: none"> - <i>the supplier retains ownership of existing underlying algorithms/models/software and will licence these to the customer;</i> - <i>third party software is licensed on the same terms as the supplier’s proprietary software (unless expressly identified in a Schedule to the agreement, in which case additional terms apply); and</i> - <i>the existing software will contain open source material.</i> <p><i>Where the commercial deal does not meet with these assumptions the clauses should be modified accordingly.</i></p>
<p>S2.2 The parties acknowledge and agree that all rights title and interest in and to any Intellectual Property Rights arising:</p> <p>S2.2.1 as a result of implementation or integration of the AI System in the Customer Environment; or</p> <p>S2.2.2 in any Adapted Software shall belong to and remain vested in (or automatically upon creation, vest in) the Supplier.</p>		C2.2 n/a	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S2.3 Subject to the terms of this Agreement and payment of the Licence Fee, the Supplier hereby grants to the Customer a non-exclusive, non-transferable, non-sub-licensable licence to access and use the AI System for the Permitted Purpose in the Territory for the Licence Term.</p>	<p><i>This is the core licence grant to the Customer, allowing installation and use of the AI System on the terms of the agreement. As the licence is intended to be used for COTS software, the grant is limited. It is non-transferable and non-sub-licensable and non-exclusive.</i></p> <p><i>As it is most likely that the COTS system will be hosted in the cloud (as opposed to on the customer premises) the licence provides that the customer may access and use the AI System. Depending on the circumstances, the parties may need to amend the clause to include a right for the Customer to install the AI System, for example, where it is an on-premises solution.</i></p>	<p>C2.3 [Subject to clause C3.1,] the Supplier grants the Customer a perpetual, irrevocable, royalty-free, worldwide, non-exclusive licence to Use the Licensed Software (in both Source Code and object code).</p>	<p><i>This clause grants a licence to the customer to use the Licensed Software, being the AI System as it stood prior to implementation in the Customer environment. This includes any underlying algorithms/software that the Supplier may have brought into the AI solution that it is developing/training for the Customer. This is often referred to as legacy or background software. The clause assumes that the Customer will not require a license to use any Supplier Training Data as any training on Supplier data will have been done prior to any Customer implementation, on the background product. The licence is only in respect of the Licensed Software (being the software as at the date of the agreement). However, in the event that the parties agree that the Supplier will continue to train the AI System on the Supplier Training Data following the date of the agreement (instead of or as well as the Customer training data) careful consideration should be given as to whether the Customer requires a licence to the Supplier Training Data.</i></p> <p><i>Each party should consider whether the provisions describing how the Licensed Software may be used by the Customer (and any third-party providers that the Customer may allow to use its systems and software) are sufficiently clear in the circumstances.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>As this is a pro-customer position, the clause grants a wide licence to the customer. However, a Supplier may want to limit the licence grant so that the Customer is only entitled to use the Licensed Software in connection with its use of the Bespoke Software. This will be a point for negotiation.</i>
<p>S2.4 In relation to AI System Works:</p> <p>S2.4.1 The parties hereby agree that, to the extent necessary and possible, all the present and future Intellectual Property Rights in the AI System Works (other than any Customer Materials provided by the Customer) are hereby assigned to the Supplier, absolutely with full title guarantee and free of any encumbrances or moral rights.</p> <p>S2.4.2 Subject to the terms of this Agreement and payment of the Licence Fee, the Supplier hereby grants to the Customer a non-exclusive, non-transferable, non sub-licensable licence to use the AI System Works for the Permitted Purpose in the Territory for the Licence Term.</p>	<p><i>In this Pro-Supplier precedent, all rights in any AI System Works (the outputs of the AI system) are to be owned by the Supplier. This allows the Supplier full control of any outputs of the AI System which may facilitate the development and improvement of the AI System (as the Supplier’s product) by the supplier.</i></p> <p><i>The Customer is granted a licence to use the AI System Works at clause S2.4.2. The Supplier is likely to want to keep the scope of this licence relatively narrow, limited to a particular purpose, territory and the term of the licence. The Customer should check the scope of the licence grant to ensure that it is sufficient for their intended use.</i></p> <p><i>The Customer is also likely to want to include contractual assurances (elsewhere in the agreement) as to confidentiality (and potentially anonymization and pseudonymization</i></p>	<p>C2.4 Subject to clause C2.1 and 2.3 and excluding Customer Materials, the Supplier hereby assigns, by way of present, and where appropriate, future assignment, to the Customer absolutely with full title guarantee and free of any encumbrances or moral rights all the present and future Intellectual Property Rights (other than any Customer Materials provided by the Customer) in:</p> <p>C2.4.1 the Bespoke Software;</p> <p>C2.4.2 the Adapted Software;</p> <p>C2.4.3 the AI System Works</p> <p>C2.4.4 the AI System Training Instructions;</p> <p>C2.4.5 [the Documentation]; and</p> <p>C2.4.6 the Specification.</p>	<p><i>This clause assigns the following intellectual property rights to the Customer:</i></p> <ul style="list-style-type: none"> - <i>rights arising in the AI software that the supplier has created/trained for the customer (bespoke software)</i> - <i>rights arising in the learning that the AI software has made (adapted software)</i> - <i>rights arising in any output from the AI software (AI system works)</i> - <i>rights arising in the training instructions (AI system training instructions)</i> - <i>rights arising in the documentation, and</i> - <i>rights arising in the Specification</i> <p><i>In this pro-Customer clause rights in the bespoke software, the adapted software and the training instructions are assigned absolutely to the customer (with limited licence back to the Supplier to use to support/supply services to the Customer – the licence to use the Customer Materials). However, where</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<p><i>where personal data) of any customer data that may reside in the AI System Works as a result of the Customer’s deployment or use, prior to any use by the Supplier.</i></p> <p><i>Depending on the commercial agreement, the parties may agree a more nuanced ownership /use of the AI System Works and this will require careful drafting. It could be that the parties agree that the customer will own all AI System Works but that the Supplier will take a licence which will allow it to continue to commercialise the AI System; licensing to its other customers. For suggested drafting which may accommodate such circumstances see clause S2.5.3.</i></p> <p><i>If the Supplier agrees to assign ownership in any AI System Works to the Customer, care should be taken when drafting relevant definitions and provisions to ensure that the Supplier’s background IP is not captured in the definition of AI System Works.</i></p>		<p><i>the commercial model is more supplier friendly (e.g. where the supplier will use some of the learnings, adaptations, training etc in its core offering which it provides to other customers) the assignment/licensing position will need careful consideration to ensure that both parties have sufficient rights.</i></p>
<i>Intellectual Property Rights in the Customer Materials and Licensing Thereof</i>			
<p>S2.5 The parties hereby agree that in relation to Customer Materials:</p> <p>S2.5.1 Any and all Intellectual Property Rights arising in relation to the</p>	<p><i>The customer will retain rights to its customer data and any other proprietary materials that it gives to the supplier but will grant the supplier a licence to use the same.</i></p>	<p>C2.5 Any and all Intellectual Property Rights arising in relation to the Customer Materials are retained by the Customer [and any rights, title or interest in any and all</p>	<p><i>The Customer retains all rights in any materials that it provides to the Supplier for the development and operation of the AI System.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>Customer Materials are retained by the Customer.</p> <p>S2.5.2 The Customer hereby grants a royalty-free, worldwide, sub-licensable, non-exclusive licence for the Supplier (and each of its direct and indirect sub-contractors) to use, copy and otherwise utilise the Customer Materials as required to develop or provide the AI System and/or the Adapted Software, for further developing and improving its algorithms and models and to exercise or perform the Supplier’s rights, remedies and obligations under the Agreement.</p> <p>S2.5.3 Where the Customer Materials are or have become part of the AI System the Customer hereby grants to the Supplier a perpetual, irrevocable, royalty-free, worldwide, sub-licensable, non-exclusive license to use, copy and otherwise utilise the Customer Materials as necessary to commercialise, sell and support the AI System and/ or the Adapted Software with the Supplier’s other existing and future customers;</p> <p>S2.5.3.1 to the extent that they are incorporated in the AI System and/or the Adapted Software; and</p>	<p><i>Some examples have been included in the drafting restricting the supplier’s use of the Customer Materials. However, the Customer may want to include further restrictions around Supplier use of Customer Materials in their raw form, either here or by cross reference to relevant confidentiality and/or permitted use provisions elsewhere in the agreement.</i></p> <p><i>Another way that the ownership and licence of Customer Materials may be dealt with is to divide the data into high and low value data. The Customer may be willing to licence its low value data back to the Supplier with little to no restriction but may want to grant more limited and exclusive rights to the Supplier in respect of its high value or more sensitive data.</i></p>	<p>Intellectual Property Rights in or relating to any modifications to the Customer Materials by the Supplier in the performance of the Services are hereby irrevocably assigned by the Supplier to the Customer with full title guarantee].</p>	<p><i>Optionally the Customer can also include an assignment of any rights that may arise as a result of any modifications to the Customer Materials made by the Supplier in the performance of the services under the agreement, unless the definition already incorporates updates and modifications.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
S2.5.3.2 provided that they are anonymized, non-identifiable, and reduced to mathematical constructs.			
S2.6 The Customer hereby waives (and shall ensure that all relevant third parties have waived) all rights to be identified as the author of any work, to object to derogatory treatment of that work and all other moral rights in the Intellectual Property Rights assigned to the Supplier under this Agreement.	<i>This is a relatively standard position on moral rights waiver.</i>	<p>C2.6 The Customer grants to the Supplier a limited, personal, revocable and non-exclusive licence during the term of this Agreement to access and use Customer Materials provided to the Supplier under this Agreement to the extent strictly necessary to perform the Supplier’s obligations under this Agreement and provided always that:</p> <p>C2.6.1 the Supplier ensures that the Customer Materials are processed and/or used only by the Supplier and only as strictly necessary in order to perform its obligations under this agreement; and</p> <p>C2.6.2 the Supplier at all times complies with its obligations under this Agreement.</p>	<i>This provision provides the supplier with a basic licence to use the customer materials as necessary for the performance of its obligations.</i>
S2.7 The Supplier may use any feedback and suggestions for improvement relating to the AI System, the Adapted Software [or the Services provided by the Supplier] (‘Feedback’) without charge or limitation. The Customer	<i>This clause covers circumstances where the Customer may give feedback to the Supplier relating to the functionality or performance of the AI System and ensures that the Supplier will own any resultant IP.</i>	C2.7 The Supplier hereby warrants and represents that all rights to be identified as the author of any work, to object to derogatory treatment of that work and all other moral rights in the Intellectual	<i>This is a relatively standard position on moral rights waiver.</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
acknowledges and agrees that any Intellectual Property Rights arising in the Feedback or the related improvements will be owned exclusively by the Supplier, and the Customer hereby assigns absolutely and with full title guarantee (including by way of present assignment of future Intellectual Property Rights) to the Supplier any such Intellectual Property Rights that may vest in the Customer.		Property Rights assigned to the Customer under this Agreement have been waived.	
S2.8 n/a		C2.8 Except as expressly agreed in this clause C2, no Intellectual Property Rights of either party are transferred or licensed (whether implied or otherwise) as a result of this Agreement.	
<i>Permitted Use</i>			
<p>S2.9 Except as otherwise permitted under this Agreement or by law, the Customer shall not:</p> <p>S2.9.1 use, copy, modify, adapt, correct errors, or create derivative works from, the AI System;</p> <p>S2.9.2 decode, reverse engineer, disassemble, decompile or otherwise translate or convert the AI System or any part thereof;</p>	<p><i>This clause seeks to exclude all uses of the AI System other than those expressly allowed under the agreement or permitted by law. Note some exclusions under CDPA 1988, ss 50 and 296A, cannot be contracted out of.</i></p> <p><i>In relation to S2.9.5: As it is most likely that the off-the-shelf AI-system will be hosted in the cloud (as opposed to on the customer premises) the clause provides that the customer may not access or use the AI System</i></p>	C2.9 n/a	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S2.9.3 assign, sub-licence, lease, resell, distribute or otherwise deal in or encumber the AI System;</p> <p>S2.9.4 remove or modify any copyright or similar notices, or any of the Supplier’s or any other person’s branding, that the AI System causes to be displayed when used or that is displayed in any documentation (electronic or hard copy) accompanying the AI System;</p> <p>S2.9.5 access or use the AI System, or permit it to be accessed or used, on behalf of any third party or otherwise than for the Permitted Purpose; or</p> <p>S2.9.6 attempt to circumvent or interfere with any security features of the AI System.</p>	<p><i>other than for the permitted purpose. Depending on the circumstances, the parties may need to amend the clause to include a prohibition on the customer installing the AI System, for example where it is an on-premises solution.</i></p>		
<i>Back ups and disaster recovery</i>			
<p>S2.10 The Customer acknowledges that the Supplier does not maintain dedicated back up or disaster recovery facilities and the Customer should ensure that it at all time maintains backups of all Customer Data.</p>		<p>C2.10 n/a</p>	
<p>S2.11 The Customer shall notify the Supplier in writing as soon as it becomes aware of any actual or</p>		<p>C2.11 n/a</p>	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
suspected unauthorised installation or use of the AI System (including any installation or use in excess of the Licence Restrictions).			

3. Third Party Software

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S3.1 Third Party Software supplied as part of, or in addition to, the AI System shall be subject to any additional terms and conditions [set out in Schedule [♦] or otherwise] notified to the Customer. The Customer agrees to comply with any terms and conditions relating to such Third Party Software.</p>	<p><i>Many Suppliers will include third-party software components in their products and it is important that both the Supplier and the Customer understand the terms on which the third-party software is made available.</i></p> <p><i>Any additional terms that are applicable to the Customer's use of that software should be set out in a Schedule to the agreement.</i></p>	<p>C3.1 The Customer shall comply with any terms and conditions applicable to Third Party Software contained in Schedule [♦].</p>	<p><i>Many suppliers will include third party software components in their products and it is important that both the supplier and the customer understand the terms on which the third party software is made available.</i></p> <p><i>This agreement is structured on the basis that any third-party software (not subject to open source licensing regimes) is sub-licensed to the Customer by the Supplier and is included in the definition of 'Licensed Software' with the implication that third party software will be licensed to the Customer and will be subject to the same terms (unless otherwise expressly agreed or set out in a Schedule).</i></p> <p><i>All third party software used in the software is intended to be listed in a Schedule to the agreement, together with any additional terms that are applicable to the customer's use of that software.</i></p>
		<p>C3.2 The Supplier warrants and represents that all Third Party Software used as part of, or supplied with, the AI System is listed in Schedule [♦].</p>	<p><i>This gives the Customer greater certainty as to the relevant Third Party Software.</i></p> <p><i>It is likely that the supplier will have used open source software in the development of underlying algorithms</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<p><i>and, where this is the case the agreement should address this accordingly (see the drafting notes to the open source clauses).</i></p> <p><i>To the extent that Third Party Software includes open source software the Customer may wish to gain certainty around what is included in the AI system and ensure that there are no open source licensing terms which may pose a threat to its IP.</i></p>

4. Supplier Warranties

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Quality			
<p>S4.1 The Supplier warrants that the AI System shall operate materially in accordance with the Specification, provided that it is used by the Customer pursuant to this Agreement. Otherwise, the Customer disclaims (and acknowledges to be excluded) any express or implied rights or obligations in respect of the AI System’s performance, including any terms, warranties or conditions as to the satisfactory quality or fitness for purpose of the AI System.</p>	<p><i>The Supplier should precisely define and limit the expected performance in the Schedule</i></p> <p><i>A user acceptance provision like the one in the pro-Supplier column is obviously attractive to suppliers (and also defect limitation periods). Given that AI System development is complex and iterative, with most knowledge on the Supplier side, it represents a very significant transfer of risk to the Customer.</i></p>	<p>C4.1 The Supplier warrants that the AI System is or will be:</p> <p>C4.1.1 Fit for purpose, of satisfactory quality, and [materially] free from defects;</p> <p>C4.1.2 Developed by the Supplier with reasonable care and skill, and in accordance with Good Industry Practice.</p> <p>C4.1.3 Without limiting the foregoing, conformant with the Specification. This includes, but is not limited to, meeting the performance criteria defined therein.</p>	<p><i>General obligations as to fitness for purpose and satisfactory quality typically lack the specificity required for good contract management and efficient dispute resolution. Similarly, while parties often refer to ‘best practice’ or ‘good industry practice’, these standards can be difficult to apply in developing industry. Accordingly a clear Specification is required, although the Customer would still benefit from general obligations in case there are gaps.</i></p> <p><i>The Schedule should set out precisely how performance obligations are to be met, including results to be achieved, accuracy, and operability in the Customer’s environment. Measurable and clear benchmarks (if carefully chosen) are more likely to avoid disputes.</i></p> <p><i>Consider whether the AI System can be designed to report upon the performance criteria.</i></p> <p><i>‘Defect’ may be separately defined, so it fits with the Customer’s use case.</i></p> <p><i>Consider also the allocation of risk and responsibility for changes in law and regulation. This may be very pertinent in a developing space.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Training			
S4.2 The Supplier warrants that it has trained and tested the AI System as set out in Schedule [♦]. The Customer acknowledges that the AI System has not been trained or tested for any specific use by the Customer and no further warranties or undertakings are provided as to the training and testing of the AI System for the Customers' Permitted Purpose.	<i>This assumes that the Supplier will not want to repeat any testing or training of the AI System.</i> <i>Consideration should be given to whether there is any general testing or training lifecycle for the AI System.</i>	C4.2 The Supplier warrants that it has trained and tested (and will train and test) the AI System in accordance with the requirements in the Schedule [♦] and Good Industry Practice, including (without limitation) in real-life conditions reflecting the Customer's intended use].	<i>As above regarding the value to parties of specifying their requirements, rather than simply relying on generic standards.</i>
User Manual			
S4.3 The User Manual will be supplied 'as is'. No warranties or undertakings are provided as to the content or quality of the Documentation and the Supplier has no obligation to update the Documentation or provide further Documentation, including to adapt it to the Customer's use.	<i>This assumes that the Supplier will not update or tailor any of the existing Documentation.</i>	C4.3 The Supplier warrants that the Documentation (including User Manual and any amendments of the Documentation by the Supplier) shall accord with the requirements set out in Schedule [♦] and Good Industry Practice, and shall provide the Customer with adequate instructions to enable effective installation, use and maintenance of the AI System.	<i>As above regarding the value to parties of specifying their requirements, rather than simply relying on generic standards.</i>
Personal data			
S4.4 n/a	<i>While a Supplier should be astute to comply with its data protection responsibilities, in a pro-</i>	C4.4 The Supplier warrants and represents that:	<i>Important: where there is processing of personal data, the parties are likely to require detailed terms around GDPR</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<p><i>Supplier context it may be reluctant to expressly warrant the same.</i></p> <p><i><u>Important:</u> where there is processing of personal data, the parties are likely to require detailed terms around GDPR compliance (including in light of Article 28(3) of the UK/EU GDPR). We have not suggested any additional extensive drafting here to reflect the use of personal data specifically in an AI context and it may be that the parties existing provisions around data privacy will suffice anyway.</i></p>	<p>C4.4.1 It has and will continue to comply with all applicable data protection legislation in respect of the AI System and any personal data that is processed; and</p> <p>C4.4.2 It has obtained and will continue to obtain all [reasonably necessary] consents, licences and permissions for use of the Supplier Training Data for all purposes contracted for under this Agreement.</p>	<p><i>compliance (including in light of Article 28(3) of the UK/EU GDPR). We have not suggested any additional extensive drafting here to reflect the use of personal data specifically in an AI context and it may be that the parties existing provisions around data privacy will suffice anyway.</i></p>
Open Source			
S4.5 n/a	<p><i>An alternative position, more favourable to the Customer, may qualify the Supplier’s warranties/representations in the Pro-Customer version (e.g. limit the obligation to ‘reasonable efforts’).</i></p>	<p>C4.5 The Supplier warrants and represents that:</p> <p>C4.5.1 It has not included or used, and will not include or use, any Restrictive Open Source Software in the development of the AI System;</p> <p>C4.5.2 The AI System does not, and will not, operate in such a way that it complies with or links to any Restrictive Open Source Software;</p> <p>C4.5.3 The AI System has not been, and will not be, developed</p>	<p><i>The Pro-Customer drafting makes the Supplier’s warranties/representations absolute.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		<p>and is not being, and will not be, used in contravention of any applicable Open Source Software licensing terms and conditions:</p> <p>C4.5.4 The Customer’s Use in accordance with this Agreement of the Open Source Software identified in the Specification will not infringe the Intellectual Property Rights of any third party or infringe any licence of any Open Source AI System</p> <p>C4.5.5 None of the Open Source Software would be recognised by a reasonably skilled professional in the IT industry as being licensed under ‘copyleft’ terms; and</p> <p>C4.5.6 No third party is asserting, has asserted, or will assert any contravention under this clause.</p>	
Transparency			
S4.6 n/a	<i>The Supplier is unlikely to offer any warranty around transparency, particularly in circumstances where it has already developed an off-the-shelf AI system which might be used in multiple contexts.</i>	C4.6 The Supplier warrants that, so far as is possible [to achieve the intended use of the AI System / comply with the Specification], the AI System is	<i>Transparency may be a contentious issue given that many AI systems will have a ‘black box’ component (in particular, the code file containing the weights / parameters of the trained model will be too</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		transparent and interpretable [such that its output can be traced back to the input data]	<p><i>complex to be interpreted, meaning that each individual output from the AI system will be incapable of being traced back to the AI system’s input data.</i></p> <p><i>However, the purpose of this provision is to ensure that the Supplier has not used an overly-complex algorithm if this is unnecessary for the intended use of the AI System or to comply with its Specification. That said, effectiveness and accuracy are often trade-offs for transparency in AI models.</i></p> <p><i>In cases where the AI System is inherently more transparent (e.g. where it is based on a Bayesian network algorithm), it may be easier for a Supplier to agree to this protection.</i></p>
S4.7 n/a	As above.	C4.7 The Supplier warrants that the User Manual provides, or allows the Customer to provide, meaningful information about the logic involved in the AI System for the purposes of satisfying any applicable transparency provisions under the EU / UK GDPR (including but not limited to Articles 13(2)(f), 14(2)(g), and 15(1)(h)).	<p><i>The “meaningful information about the logic involved” wording comes from the GDPR, but there is not much clarity on what it means. Ultimately, however, if the AI System processes personal data and makes decisions impacting data subjects in a solely-automated way, and if the Customer is the controller of that data, then it will be subject to this explainability obligation. In these circumstances, it is likely to need information from the Supplier about how the AI System operates, how it arrives at decisions etc. to enable it to comply with this obligation.</i></p> <p><i>The Supplier may be reluctant to disclose</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<p>information regarding the AI System, particularly information which is or comes close to confidential information or trade secrets. However, it should be possible for the Supplier to be able to provide sufficient information to allow the Customer to comply with its explainability obligation without disclosing sensitive information.</p> <p>The parties might agree additional confidentiality protection around this information. Another option could be for this information to be held in escrow until and unless the Customer is actually required to provide the information to a data subject, regulator or other legitimate recipient.</p>
Bias / discrimination			
<p>S4.8 The Supplier warrants that it has taken reasonable steps to mitigate the risk of the AI system causing [material] discrimination against a class of individuals on the basis of one or more of the protected characteristics set out in the Equality Act 2010.</p>	<p><i>It may be difficult to obtain any warranty about bias / discrimination from Suppliers of ready to use models. However, given that bias / discrimination is becoming such an issue in AI, Suppliers are likely to come under increasing pressure to provide assurances that they have taken steps to mitigate it and customers will increasingly expect this.</i></p> <p><i>It may therefore be difficult to avoid any contractual protection. In these circumstances, Suppliers may look to qualify the extent of their contractual commitments (e.g., through the word “material” in this provision).</i></p> <p><i>Note that the drafting here is premised on UK anti-discrimination law and will need to be</i></p>	<p>C4.8 The Supplier warrants that the AI System will not provide any output or AI System Work which causes [material] unlawful discrimination.</p>	<p><i>Where the Customer is seeking to procure a bespoke AI System rather than a ready to use system, it may be more appropriate to include primary obligations to address bias e.g. agreed steps that the Supplier will take, rather than to address through warranties, especially as a supplier may be reluctant to provide such a warranty.</i></p> <p><i>The Customer may nevertheless seek additional or alternative protection through warranties, particularly where they are reliant on the Supplier’s technical knowledge as regards the steps that might be taken to reduce bias. The Customer might seek an outcomes-based warranty around bias / discrimination i.e. that the AI</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<i>amended / supplemented depending on the relevant jurisdiction(s).</i>		<p><i>System does not cause bias / discrimination (rather than a process-based warranty i.e. around the steps taken by the Supplier).</i></p> <p><i>Note that this is an area where technical standards may help in the future e.g. on steps to take to reduce bias.</i></p>
IP infringement			
<p>S4.9 The Supplier warrants that it has taken reasonable steps to ensure that the development of the AI System does not infringe the Intellectual Property Rights of any third party.</p>	<p><i>This is becoming an increasingly important issue with AI. In particular, issues can arise when the AI System has been trained on datasets which are subject to copyright or other licensing restrictions. In particular, with large language models where the AI systems are trained on vast quantities of data, a Supplier is likely to be unwilling to provide any such warranties.</i></p> <p><i>However, there have been instances in the market where Suppliers are prepared to give such warranties (and indemnities) in relation to the provenance of the training data used). Mostly where the training data is proprietary or sourced from a closed loop or pool.</i></p> <p><i>Where the Supplier agrees separately to provide indemnities, the scope of such indemnities should be considered carefully (limiting them to the provenance of the training data and excluding any infringement arising as a result of the customer instruction use or prompt of the system) and the Supplier may wish to limit its liability under them.</i></p>	<p>C4.9 The Supplier warrants that the development, installation, use or possession of the AI System will not infringe the Intellectual Property Rights of any third party.</p>	<p><i>As above, the Customer may seek stronger protection through an outcomes-based warranty around IPR infringement.</i></p> <p><i>The Customer may also seek separate indemnities for IPR infringement, particularly in relation to:</i></p> <ul style="list-style-type: none"> - <i>the Licensed Software</i> - <i>the Bespoke Software</i> - <i>the Supplier Training Data</i> - <i>the Adapted Software other than to the extent that the infringement arises solely and as a direct result of the Customer Materials</i> - <i>the AI System Works other than to the extent that the infringement arises solely and as a direct result of the Customer Materials</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<i>Security / customer assurance</i>			
S4.10 n/a		C4.10 The Supplier warrants that the AI System [as provided according to the Specification] will not cause any loss or damage to the Customer’s data, systems, hardware, records, programs or other property.	<i>Provisions such as this are likely to be impacted by the extent to which the Customer is able to modify the AI System given that any loss or damage may be caused by the modification, rather than the underlying AI System as it was provided according to the Specification.</i>
S4.11 The Supplier warrants that, during the development of the AI System, it took reasonable steps to ensure that no virus capable of preventing the AI System from functioning in its entirety for a sustained period of time was introduced into the AI System	<i>This is another area where technical standards in due course may impact the contractual position.</i>	C4.11 The Supplier warrants that no viruses, disabling code (including code intended by the Supplier to limit or prevent use of the AI System) or malicious software (including spyware) are contained in the AI System, the media on which it is delivered or the Documentation (including the User Manual) (if supplied or made available electronically).	

5. Customer Warranties

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
User Manual			
S5.1 The Customer warrants that it shall use the AI System at all times in accordance with the User Manual [and/or the Supplier’s reasonable written instructions].	<i>Provisions such as this are likely to receive increased scrutiny as the EU AI Act gets closer to being in force, in which the concepts of “intended purpose” and “high-risk” purpose are key.</i>	C5.1 n/a	
Lawfulness			
S5.2 The Customer shall use the AI System in accordance with all applicable laws in force from time-to-time. Without limitation, the Customer represents and warrants to the Supplier that: S5.2.1 It has and will continue to comply with all applicable data protection legislation in respect of its use of the AI System and any personal data that is processed; and S5.2.2 It has obtained and will continue to obtain all consents, licences and permissions in relation to any personal data it provides or otherwise makes available to the AI System.	<i>Determining the laws that apply to the AI System or its use might not be straightforward given that: (a) the AI legal landscape is rapidly evolving, with new laws being proposed and adopted in various jurisdictions, and (b) existing laws might apply to AI.</i>	C5.2 n/a	<i>In due course, it may be possible (and even prudent) to specify the laws that should apply to the AI System or the Customer’s use of the AI System.</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
Responsible and ethical use			
S5.3 The Customer shall use the AI System responsibly and ethically at all times.	<i>Whilst there is now considerable guidance on responsible / ethical AI, these terms are still inherently uncertain and may benefit from further detail in a contractual context, e.g. by reference to a specific ethical framework.</i>	C5.3 n/a	<i>The parties may agree provisions relating specifically to certain principles of responsible / ethical AI e.g. human oversight, as set out below.</i>
Reputation of the Supplier			
S5.4 The Customer shall not use the AI System in any way which may damage the reputation of Supplier.		C5.4 n/a	
Human oversight			
S5.5 The Customer warrants that there will be human oversight of the use of the AI System at all times in which it is in use.	<i>Human oversight is a fundamental principle of responsible / ethical AI and the Supplier might wish to ensure that the AI System is used with sufficient oversight to avoid issues. This point might be addressed in the User Manual or the Supplier may wish to have specific protection. Given the inherent uncertainties around this, and that the level of appropriate human oversight will vary depending on the nature of the AI System and its use, it may be preferable to rely on the User Manual for this purpose and/or specify the nature of the oversight e.g. in a Schedule, as set out in the adjacent pro-Customer clause.</i>	C5.5 The Customer warrants that it will provide the level of oversight set out in Schedule [♦].	

6. Termination

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S6.1 Upon termination or expiry of this Agreement for any reason, all rights granted to the Customer under this Agreement shall terminate, and the Customer shall:</p> <p>S6.1.1 Immediately cease using the AI System;</p> <p>S6.1.2 Return to the Supplier or, at the Supplier's request, irrevocably delete and destroy any copies of or object code related to the AI System, including any and all Supplier Training Data or Adapted Software in the Customer's possession or control, and certify in writing to the Supplier that this has been done;</p> <p>S6.1.3 Return to the Supplier or at the Supplier request, irrevocably delete and destroy all Confidential Information and Intellectual Property Rights of the Supplier in the Customer's possession or control, and certify in writing to the Supplier that this has been done.</p>	<p><i>What needs to happen on termination will again depend heavily on the context of the relationship. For example, an off-the-shelf AI System that the Customer is licensing will need to be deleted from the Customer's environment (if the solution is on-prem), but where it is licensed by the Supplier on a SaaS-basis, the Supplier will likely be able to disable the Customer's access immediately upon termination.</i></p> <p><i>Consider what run-off rights the Customer might need, for example to migrate data out of the AI System, or move to an alternative supplier.</i></p> <p><i>Where the scenario is such that the supplier is providing an off-the shelf solution but has agreed to develop it in some bespoke manner for the customer (and where likely the customer will own/retain rights these developments post-termination), consider whether it would be desirable or feasible for the Customer to continue to use such bespoke developments post termination and, if so, what will need to be delivered up to the Customer to ensure they have everything they need to continue to use post termination, and ensure that they have everything that they own under the Agreement, including appropriate formats and timescales.</i></p>	<p>C6.1 Upon termination or expiry of this Agreement for any reason, the Supplier shall:</p> <p>C6.1.1 immediately deliver up to the Customer in a format and on media specified by the Customer, at the Supplier's cost, the AI System and all object code and Source Code in and to the AI System within the Supplier's possession or control;</p> <p>C6.1.2 immediately deliver up to the Customer all Customer Materials, and Adapted Software in the Supplier's possession or control;</p> <p>C6.1.3 Provide to the Customer all post-termination assistance required by the Customer, including the full migration of the AI System to the Customer's environment or any third party environment that the Customer so directs and any training or support that the Customer may require in order to be able to continue to use the AI System post-termination;</p>	<p><i>Consider what run-off rights the Customer might need, for example to migrate data out of the AI System or move to an alternative supplier.</i></p> <p><i>Where a bespoke AI System is being developed which the customer will own/retain rights to post-termination, consider what will need to be delivered up to the Customer to ensure they have everything they need and everything they own under the Agreement, and appropriate formats and timescales for doing that.</i></p> <p><i>The Customer may want the Supplier to continue providing post-termination support / maintenance services for a solution that has been developed specifically for the customer and that the customer will own, so considering to what extent this will be feasible and what the Supplier is willing to provide will be important.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<i>The Customer may also want the Supplier to continue providing post-termination support / maintenance services for the solution,, so considering to what extent this will be feasible and what the Supplier is willing to provide will be important.</i>	C6.1.4 Within [14] days of termination [OR successful migration of the AI System to the Customer's environment], delete all Customer Materials and Adapted Software from the Supplier and its subcontractors' systems, and certify in writing to the Customer that this has been done.	
S6.2 n/a		C6.2 For the avoidance of doubt the licenses granted by the Supplier to the Customer at clause C2 shall survive the expiry or termination of this Agreement.	

7. Dispute Resolution

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>S7.1 [Model A: Any dispute arising under this agreement shall be referred to adjudication in accordance with the Society for Computers & Law Adjudication Rules (SCLA Rules) and no litigation or arbitration proceedings relating to that dispute may be commenced prior to the publication of the Adjudicator’s Decision.</p> <p>If either party wishes to commence litigation or arbitration proceedings after the Decision has been published it must do so within six calendar months of the Effective Date of the Adjudicator’s Decision, otherwise the claim will be time-barred.]</p> <p>S7.1 [Model B: Either party may refer any dispute arising under this agreement to adjudication in accordance with the Society for Computers & Law Adjudication Rules (SCLA Rules) and, if a dispute is so referred, no litigation or arbitration proceedings relating to that dispute may be commenced</p>	<p><i>The parties will need to consider the most appropriate dispute resolution forum for their agreement.</i></p> <p><i>One option could be to use the Society for Computers & Law Adjudication Rules into the Agreement using one of these SCL Model Adjudication Clauses.</i></p> <p><i>The key details of the Scheme are as follows</i></p> <p><i>:</i></p> <ul style="list-style-type: none"> <i>- A three-month procedure for “technology” disputes – meaning any dispute arising from a contract for the provision of tech-related goods and services including software development contracts, outsourcing arrangements, systems integration contracts, IT consultancy contracts, software licensing agreements, blockchain/smart contracts and cloud computing contracts.</i> <i>- No restriction on the size or scope of tech disputes that may be referred.</i> <i>- A pre-selected panel of adjudicators (set up and maintained by SCL) from which an adjudicator may be chosen for individual adjudications.</i> 	<p>C7.1. No change.</p>	<p><i>See Pro-Supplier comments.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>prior to the publication of the Adjudicator’s Decision.</p> <p>If either party wishes to commence litigation or arbitration proceedings after the Decision has been published it must do so within six calendar months of the Effective Date of the Adjudicator’s Decision, otherwise the claim will be time-barred.]</p> <p>S7.1 [Model C: The parties may agree to refer any dispute arising under this agreement to adjudication in accordance with the Society for Computers & Law Adjudication Rules (SCLA Rules), in which case no litigation or arbitration proceedings relating to that dispute may be commenced prior to the publication of the Adjudicator’s Decision.</p> <p>If either party wishes to commence litigation or arbitration proceedings after the Decision has been published it must do so within six calendar months of the Effective Date of the Adjudicator’s Decision, otherwise the claim will be time-barred.]</p>	<p>- <i>Incorporation of an SCL Model Adjudication Clause into contracts is not mandatory. Ad hoc referrals are also welcome.</i></p>		

8. Definitions

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
8.1 The following defined terms are used in this Agreement:		8.1 The following defined terms are used in this Agreement:	<i>No change.</i>
‘ Acceptance ’ means [<i>insert own or standard definition</i>];		‘ Acceptance ’ means [<i>insert own or standard definition</i>];	<i>No change.</i>
n/a	<i>The Pro-Supplier precedent assumes a COTS product, without separate acceptance testing.</i>	‘ Acceptance Tests ’ means [<i>insert own or standard definition</i>].	<i>Consider the division between acceptance testing and what is considered ongoing retraining, refreshing and recalibrating of the AI System. See the comments in the Primary Obligations section.</i>
‘ Adapted Software ’ means any modifications or adaptations to the AI System, including any AI System Data;	<p><i>This does not differentiate between learning that the AI System may make prior to and post implementation in the Customer environment. As this is a Pro-Supplier precedent, it assumes that there is no need for a distinction as all such learnings will be owned by the Supplier and licensed back to the Customer.</i></p> <p><i>However, where the parties intend that some of the learnings will result in rights being owned by the customer the agreement should be amended. For example, drafting see the Pro-Customer version of these clauses.</i></p>	‘ Adapted Software ’ means any modifications or adaptations to the AI System, including any AI System Data, arising as a result of the AI System learning or developing parameter values based on its use of algorithms or training data at any time after its implementation in the Customer’s environment;	<p><i>Adapted Software is intended to cover any learning that the AI system may make following implementation in the Customer environment. Depending on the AI system this definition may not be relevant as there may not be any machine learning element of the AI.</i></p> <p><i>Where AI includes machine learning, put very simply, the trained AI model executes the developed algorithm. Training the model is the process of determining values for the parameters of the model to produce an accurate prediction for the input or training data. As it executes the algorithm, using the training data, it finds a set of model parameters. It will continue to refine those parameters as against the training data that it is exposed to, allowing it to provide predicted outcomes.</i></p> <p><i>The definition is intended to protect these learned parameters.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>The definition includes clarification that this is learning following implementation in the customer environment. Prior to implementation any learning would arguably be part of the Supplier’s underlying product, but post implementation the learning is part of the training/development of the bespoke software element of the AI system. Depending on the specific circumstances and the commercial agreement over the ownership of IPR as between the parties, this definition may need to be amended.</i>
‘ AI System ’ means the Supplier Software, the Third Party Software, the Supplier Training Data and the Adapted Software	<i>This is an expansive definition as it includes: all software owned or licensed by the supplier (the Supplier Software); any third-party software (the Third Party software); any training data used by the supplier to train the AI system (the supplier training data) and all software resulting from the AI system learning or evolving (the Adapted Software).</i>	‘ AI System ’ means the Licensed Software, the Bespoke Software and the Adapted Software;	<i>The definition of AI system includes all software owned or licensed by the supplier (the Licensed Software); all software developed by the supplier for the customer (the Bespoke Software), and all software resulting from the AI system learning or evolving (the Adapted Software).</i>
‘ AI System Data ’ means any data produced by and resulting from the Customer’s use of the AI System or the training of the AI System on the Customer Training Data, and which are stored, contained or embedded in the AI System or its underlying model(s), including any statistical and aggregated data;		‘ AI System Data ’ means any data produced by and resulting from the Customer’s use of the AI System or the training of the AI System on the Customer Training Data, and which are stored, contained or embedded in the AI System or its underlying model(s), including any statistical and aggregated data;	<i>No change.</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
‘AI System Training Instructions’ means any and all documentation, methodology, and training materials or instructions developed and used for the purpose of training, testing or validation of the AI System;		‘AI System Training Instructions’ means any and all documentation, methodology, and training materials or instructions developed and used by either the Supplier or the Customer for the purpose of training, testing or validation of the AI System but excluding the Supplier Training Instructions;	<i>No change.</i>
‘AI System Works’ means any and all works created, invented or devised by the AI System or arising in relation to or as a result of any output of the AI System;	<i>The definition of AI System Works is intended to capture the works or outputs created by the AI System. Depending on the nature of these works they may or may not be afforded protection as intellectual property rights.</i>	‘AI System Works’ means any and all works created, invented or devised by the AI System or arising in relation to or as a result of any output of the AI System;	<i>No change.</i>
‘Agreement’ means this contract between [parties] dated [execution date].		‘Agreement’ means this contract between [parties] dated [execution date].	<i>No change.</i>
n/a	<i>The Pro-Supplier precedent assumes a COTS product, without Bespoke Software.</i>	‘Bespoke Software’ means the software code, algorithms or applications to be written for the Customer identified in paragraph [◆] of Schedule [◆] in both Source Code and object code form, including all other releases, versions, upgrades or updates of such software applications provided by or on behalf of the Supplier to the Customer at any time [as well as all associated	<i>This is the bespoke code, algorithms or applications being written by the Supplier for the Customer and should be described as accurately as possible in a Schedule to the agreement. Under clause C2.4, the intellectual property rights in this bespoke software will be assigned to and owned by the Customer.</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		documentation (including the Documentation) and the Specifications for such software applications];	
‘Confidential Information’ means [insert own or standard definition];		‘Confidential Information’ means [insert own or standard definition];	No change.
‘Customer’ means [party name];		‘Customer’ means [party name];	No change.
<p>‘Customer Data’ means any data provided or made available by the Customer, or by any third party on behalf of and at the direction of the Customer, to the AI System under or in connection with this Agreement, including the Customer’s Confidential Information;</p>	<p><i>The AI System will almost certainly have been trained, prior to licence, by the Supplier on the Supplier Training Data. Following licence, the Customer may input its own data into the AI System, either for further training or for use of the AI System.</i></p> <p><i>Whether the customer provides data for training the AI System will depend on the circumstances.</i></p> <p><i>For example, a COTS system which the Customer will license from the Supplier may come as a ready to use model having already been trained by the Supplier on its/third party data sets. The Supplier will simply grant the Customer access to the AI System so that it can use it, through a licence.</i></p> <p><i>However, it may be that the parties intend that the customer will continue to train the AI system, using its own training data, post-licence grant.</i></p>	<p>‘Customer Data’ means any data provided or made available to the Supplier by or on behalf of the Customer which is to be processed or analysed by the AI System in the course of the Project, or which otherwise is used in the development or use of the AI System, including any proprietary or Confidential Information of the Customer and any and all Customer Training Data;</p>	<p><i>Where possible to do so, it can be beneficial to list out the Customer Data/Customer Training Data/Supplier Training Data in a Schedule to the agreement to give both parties as much certainty as possible around what falls within these definitions and the subsequent ownership pursuant to the Agreement. This may not be practicable in every circumstance.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<p><i>If Customer Data is used in some way to train the AI system, a reasonable pro-supplier position would be that the Customer retains rights to the Customer Data in its raw form. The supplier will own any learnings derived from the application of the AI system to that Customer Data provided that they are stored in mathematical constructs or technological manners and in so far as they do not constitute confidential information and do not contain personal information (see Adapted Software).</i></p> <p><i>It is both parties' interests that the agreement defines as clearly as possible the parties' respective data contributions. Both parties will want to retain the rights in their data and confidentiality. Further, where the data is personal information, the parties will owe regulatory duties under the relevant data protection laws and will need to ensure that those are met. Careful mapping of data flows and analysis of roles and responsibilities will need to be undertaken.</i></p> <p><i>Where possible to do so, it would be beneficial to list out the nature of Customer Data/Customer Training Data/Supplier Training Data in a Schedule to the agreement to give both parties as much certainty as possible</i></p>		

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
	<p><i>around this, although this may not be practicable in every circumstance, and in practice is unlikely to be done in the case of a truly COTS.</i></p> <p><i>In drafting, be careful to ensure that each party knows, and the agreement reflects, what data will be provided by each party, including customer data, supplier data and third party data and how that data should be treated; including ownership, confidentiality, security and permitted use. In considering relevant data, include both input data and any output produced by the input data – algorithms, models (as the system learns) and any works produced by the AI system.</i></p> <p><i>The parties should also include relevant warranties as to the data provided by the parties. This is covered in more detail in the warranty provisions.</i></p>		
<p>‘Customer Materials’ means any Customer Data, and any other materials supplied by the Customer to the Supplier under or in connection with this Agreement;</p>	<p><i>Consider amending the definition to include any improvements, modifications and updates. If such amendments are likely consider adding to the definition, although the IPR implications should be worked through accordingly.</i></p>	<p>‘Customer Materials’ means any Customer Data, Customer Requirements, software, data, calculations, algorithms, methods, information, Intellectual Property Rights and other materials created or supplied by the Customer and any enhancements, adaptations or amendments arising as a result of the Supplier’s manipulation or</p>	<p><i>Consider amending the definition to include any improvements, modifications and updates. If such amendments are likely consider adding to the definition, although the IPR implications should be worked through accordingly.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		formatting of the same under or in connection with this agreement [together with all Intellectual Property Rights assigned to the Customer by the Supplier under this Agreement];	
n/a	<i>The Pro-Supplier precedent assumes a COTS product, without tailoring to Customer requirements.</i>	‘Customer Requirements’ means the requirements are set out in Schedule [◆];	
n/a	<i>The Pro-Supplier precedent assumes a COTS product, which is not trained with Customer data.</i>	‘Customer Training Data’ means any Customer Data which the AI System processes and/or the Supplier or Customer uses pursuant to this Agreement in order to develop or train the Bespoke Software;	<p><i>An AI system being developed exclusively for the Customer may be trained on data provided by the Customer, and data provided by the Supplier, but that will all form part of the AI System to be owned by the Customer, and the Customer will want to have the right to use and, to the extent possible, own, all such data.</i></p> <p><i>In contrast, an off-the-shelf AI system which the Customer will license from the Supplier may come ready to use model having already been trained by the Supplier on its/third party data sets. The Supplier will simply grant the Customer access to the AI System so that it can use it, through a licence.</i></p> <p><i>However, the agreement should be tailored, in every case, according to the agreed operating model and the commercial terms.</i></p> <p><i>In drafting, be careful to ensure that each party knows, and the agreement reflects, what data will be provided by each party, including customer data, supplier data and third-party data and how that data should be treated;</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
			<i>including ownership, confidentiality, security and permitted use. In considering relevant data, include both input data and any output produced by the input data – algorithms, models (as the system learns) and any works produced by the system.</i>
n/a	<i>The Pro-Supplier precedent assumes a COTS product, so there will be no deliverables other than the AI programme itself.</i>	‘Deliverable’ means any product or services provided to the Customer by the Supplier under this Agreement. This includes but is not limited to [♦].	
‘Documentation’ means the technical documentation and instructions specified in Schedule [♦] to be provided by the Supplier to the Customer to accompany the AI System;		‘Documentation’ means the technical documentation and instructions specified in Schedule [♦] to be provided by the Supplier to the Customer to accompany the AI System;	<i>No change.</i>
‘Effective Date’ means <i>[insert own or standard definition]</i> ;		‘Effective Date’ means <i>[insert own or standard definition]</i> ;	<i>No change.</i>
‘Feedback’ is defined in clause S2.7;		n/a	<i>The relevant Feedback clause does not appear in the Pro-Customer precedent.</i>
‘General Public Licence’ means <i>[insert own or standard definition]</i> ;		‘General Public Licence’ means <i>[insert own or standard definition]</i> ;	<i>No change.</i>
‘Good Industry Practice’ means <i>[insert own or standard definition]</i> ;	<i>In the context of suppliers of AI systems, it may be difficult to benchmark this effectively. For this reason, generic standards like this should be supplemented with specific requirements and obligations.</i>	‘Good Industry Practice’ means <i>[insert own or standard definition]</i> ;	<i>No change.</i>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
‘Intellectual Property Rights’ means [insert own or standard definition];		‘Intellectual Property Rights’ means [insert own or standard definition];	No change.
‘Licence Fee’ means [insert own or standard definition];		‘Licence Fee’ means [insert own or standard definition];	No change.
‘Licence Restrictions’ means the restrictions set out in Schedule [◆];	<i>Restrictions that the supplier intends to place on the grant of licence to the customer (i.e. number of concurrent users, location, sites, equipment etc). See clauses S1.1.1 for the operative provisions.</i>	‘Licence Restrictions’ means the restrictions set out in Schedule [◆];	<i>The Schedule should cover the relationship between Customer Materials and the terms of the Licence</i>
‘Licence Term’ means [insert own or standard definition];		‘Licence Term’ means [insert own or standard definition];	No change.
n/a		‘Licensed Software’ means the Supplier Software and the Third Party Software;	<i>This definition is intended to include any software being licensed to the customer. It should be amended to reflect the specific circumstances or removed if there will be no licensed software.</i>
‘Open Source Software’ means any software programs which are licensed under any form of open-source licence meeting the Open Source Initiative’s (www.opensource.org/docs/osd) open source definition from time to time;		‘Open Source Software’ means any software programs which are licensed under any form of open-source licence meeting the Open Source Initiative’s (www.opensource.org/docs/osd) open source definition from time to time;	No change.

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>‘Permitted Purpose’ means [insert own or standard definition];</p>	<p><i>AI regulatory compliance is, in some jurisdictions, linked to usage with the compliance burden being far greater where the AI is being used in high-risk applications.</i></p> <p><i>The supplier should consider whether the AI system is such that the agreement should contain usage restrictions on the customer.</i></p> <p><i>The supplier should also consider whether to include provisions in the primary obligations, warranty and indemnity clauses pushing the responsibility for ensuring that any uses of the AI system comply with relevant regulation back to the customer.</i></p> <p><i>Permitted Use to be used for IP sections.</i></p>	n/a	<p><i>The concept of permitted purpose is not included in the pro-customer version of this agreement as it would not be in the customer’s interests to include limitations around its implementation or use of the AI System.</i></p>
n/a		<p>‘Project’ means [insert own or standard definition];</p>	
<p>‘Records’ is defined in clause S1.16;</p>		<p>‘Records’ is defined in clause C1.16;</p>	
<p>‘Restrictive Open Source Software’ means any Open Source Software licensed under the General Public Licence or any similar licence containing a ‘copyleft’ requirement;</p>		<p>‘Restrictive Open Source Software’ means any Open Source Software licensed under the General Public Licence or any similar licence containing a ‘copyleft’ requirement;</p>	<p><i>No change.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
‘Source Code’ means [<i>insert own definition</i>];		‘Source Code’ means [<i>insert own definition</i>];	
‘Specification’ means the specification for the AI System agreed between the parties and set out in Schedule [♦] (or as otherwise agreed between the parties in writing);		‘Specification’ means the specification for the AI System agreed between the parties and set out in Schedule [♦] (or as otherwise agreed between the parties in writing);	<i>No change.</i>
‘Supplier’ means [<i>party name</i>];		‘Supplier’ means [<i>party name</i>];	<i>No change.</i>
‘Supplier Software’ means the proprietary software of the Supplier identified in Schedule [♦], including any customisation or modification made pursuant to this Agreement, and including any Updates made available by the Supplier under this Agreement] as well as all associated specifications, Documentation, Supplier Training Instructions and other materials supplied with or for such software code, algorithms, models or applications;		‘Supplier Software’ means the software code, algorithms, models or applications owned by the Supplier, existing as at the date of this Agreement, and identified in paragraph [♦] of Schedule [♦] including all releases, versions, upgrades or updates of the same provided by or on behalf of the Supplier to the Customer at any time [as well as all associated specifications (including the Specifications), documentation (including the Documentation), Supplier Training Instructions and other materials supplied with or for such software code models or applications] but not including any Bespoke Software or any Adapted Software;	<p><i>It is common for a developed software solution (even where there is bespoke customer development) to include pre-existing applications, modules or code that have not been specifically written for the customer and that, as a result, the supplier will retain ownership of.</i></p> <p><i>In this pro-customer version of the clause it is assumed that, the supplier will grant a wide licence for the customer to use this supplier-owned software.</i></p> <p><i>This definition can be deleted and appropriate amendments made throughout the agreement if there is to be no such supplier-owned software.</i></p>

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
<p>‘Supplier Training Data’ means the data that the Supplier, or its licensors, has used or provided in order to train or develop the AI System;</p>	<p><i>In a Pro-Supplier, COTS scenario, the likelihood is that any AI System has been developed to a certain standard of performance prior to the Customer’s implementation. As such the Supplier will already have input its own (or third party) training data into the AI System that has nothing to do with the Customer.</i></p>	<p>‘Supplier Training Data’ means any data, other than the Customer Training Data, that the supplier has used or provided to the AI System in order to train or develop the AI System, including any third party data;</p>	<p><i>Where a Customer is engaging a Supplier to develop a bespoke AI System for it the Customer will want to have a say in what data is used and from where it is sourced.</i></p>
<p>‘Supplier Training Instructions’ means any and all documentation, methodology, and training materials or instructions developed or used by the Supplier for the purpose of training the AI System;</p>		<p>‘Supplier Training Instructions’ means any and all documentation, methodology, and training materials or instructions developed and used by the Supplier for the purpose of training the Licensed Software;</p>	<p><i>No change.</i></p>
<p>‘Territory’ means [<i>insert own or standard definition</i>];</p>		<p>‘Territory’ means [<i>insert own or standard definition</i>];</p>	<p><i>No change.</i></p>
<p>‘Third Party Software’ means the existing software code or applications owned by third parties and supplied as part of, or in addition to, the AI System;</p>		<p>‘Third Party Software’ means the existing software code or applications owned by third parties and identified in paragraph [♦] of Schedule [♦] including all releases, versions, upgrades or updates of such software applications provided to the Customer at any time [as well as all associated documentation (including the Documentation)]</p>	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
		and the Specifications for such software code or applications];	
‘Updates’ means <i>[insert own or standard definition]</i> ;	<i>The agreement is likely to deal with updates in the same way as under any standard form software licence. It is most likely that a COTS system will be provided as a cloud-based solution. As such, updates will be rolled out across the supplier’s customer base.</i>	‘Updates’ means <i>[insert own or standard definition]</i> ;	<i>No change.</i>
‘Upgrades’ means <i>[insert own or standard definition]</i> ;	<i>The agreement is likely to deal with upgrades in the same way as under any standard form software licence. It is most likely that a COTS system will be provided as a cloud-based solution. As such, upgrades will be provided, subject to a subscription fee and the supplier will not commit to supporting older versions.</i>	‘Upgrades’ means <i>[insert own or standard definition]</i> ;	<i>No change.</i>
n/a		‘Use’ means to download, install, load, execute, store, transmit, distribute, access, display, use, copy, maintain, modify, adapt, enhance, [reverse compile], translate, [decompile] or otherwise utilise in any manner anywhere;	<i>This pro-customer precedent includes a very wide definition of use but the parties may agree to narrow the definition through negotiation.</i>
‘User Manual’ means the user manual provided by the Supplier as updated (in the Supplier’s sole discretion) from time to time;		‘User Manual’ means the User Manual developed and provided by the Supplier in accordance with clause S.4.3;	

Pro-Supplier / COTS		Pro-Customer / Bespoke	
Clause	Comment	Clause	Comment
'User Training' means the mandatory training to be completed by the Customer's staff who will use the AI System [as described in Schedule ♦];		'User Training' means the mandatory training to be completed by the Customer's staff who will use the AI System [as described in Schedule ♦];	<i>No change.</i>