

END-USER LICENCE AGREEMENT FOR CEM SELECT ENTRANCE ASSESSMENT SERVICES
PROVIDED BY CEM (CENTRE FOR EVALUATION AND MONITORING)

THIS AGREEMENT IS MADE BETWEEN THE END USER OF THIS SOFTWARE IDENTIFIED AT THE FOOT OF THIS LICENCE (THE "CLIENT") AND THE UNIVERSITY OF DURHAM, WHOSE REGISTERED ADDRESS IS THE PALATINE CENTRE, STOCKTON ROAD, DURHAM, DH1 3LE AS REPRESENTED BY THE CENTRE FOR EVALUATION AND MONITORING ("CEM").

WHEREAS:

- A. The Client wishes to purchase a licence from CEM to use one or more of CEM's assessment and monitoring systems (henceforth referred to as the "System"), install or access online software belonging to CEM to facilitate computer based assessment which may include associated software components, media, printed materials, and "online" or electronic documentation which will be administered by the Client in the form of a test (henceforth referred to as the "Assessment"), and access online or downloadable analysis of assessment data and other data provided by the Client, including additional guidance material (henceforth referred to as the "Reports");
- B. CEM has agreed to allow the Client to install or access online, and otherwise use the Assessment and Reports subject to the terms and conditions of this Agreement;
- C. In placing an online order with CEM (an "Order") for any of CEM's Systems, the Client understands that in doing so, the Client enters into a legally binding contract with the University of Durham in respect of a Licence to access and use such Systems. Incorporated into this Licence are the terms of the Order, and the conditions as set out in this Licence.

TERMS AND CONDITIONS OF LICENCE:

1. CEM hereby grants to the Client the right to install and use multiple copies of the Assessment on the Client's computers running validly licensed copies of the operating system for which the Assessment was designed.
 - 1.1. The Client purchases access to the Assessment described herein on the explicit understanding that:
 - 1.1.1. some of the materials that are used to form the Assessment have been previously disclosed to:
 - 1.1.1.1. candidates who previously undertook previous entrance tests supplied by CEM; and
 - 1.1.1.2. individuals responsible for the administration and marking of the previous entrance tests in which some of the materials from the Assessment were contained.
 - 1.2. For the avoidance of doubt, the Client acknowledges that the Previous Users who have accessed materials which may form part of the Assessment are not under any specific obligation of confidentiality to CEM, or to the Client in regards to these materials and are therefore at liberty to further disclose and/or discuss any information in regards to these materials which they may have accessed and which they may have committed to memory, with any third party they choose and through any medium. The Client acknowledges that this is outside of the control of CEM.
 - 1.3. The Client acknowledges to CEM that it is aware the Assessment will also be licenced for use by a number of other Clients.
 2. CEM agrees to provide the Assessment and Reports as detailed in the Client's Order in accordance with the terms and conditions of this Agreement. CEM will use its best endeavours to ensure that the Assessment is provided under the best care, skill and diligence and in accordance with best industry practice as outlined by the guidelines of the British Educational Research Association (BERA), and in accordance with CEM's ethical research framework, and in accordance with all applicable laws and regulations, and in consultation with the Clients.
 3. In consideration of the rights granted to the Client hereunder, the Client undertakes and agrees to make payment to CEM of the Licence Fee detailed in the Order, within thirty (30) days of receipt of an invoice.
 4. The Client acknowledges and agrees that any and all Intellectual Property Rights held in the System, Assessment and Reports including but not limited to all copyright therein, shall remain the sole and exclusive property of CEM.
 5. CEM shall at its own expense obtain written permission for the inclusion of any copyright material in the Assessment or Reports, and shall be responsible for the payment of all fees charged for the use of such material subject to copyright.
 6. CEM warrants to the Client that the Intellectual Property Rights in the Assessment and Reports, so far as it is aware and to the best of its knowledge and belief, do not infringe the rights of any third party and that no third party has threatened or is currently threatening proceedings in respect of such infringement, and none of its Intellectual Property Rights in the Assessment or Reports is the subject of any actual or, so far as it is aware, threatened challenge, opposition or revocation proceedings.
 7. The Parties agree at all times to handle personal information of the candidates strictly in accordance with the Data Protection Legislation which for the purposes of this Agreement means the Data Protection Act 2018, the Regulation EU/2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation) and all applicable laws and regulations relating to processing of personal data and privacy including where applicable the guidance and codes of practice issued by the Information Commissioner.
 8. The Client will act as Data Controller, and CEM will act as Data Processor, in respect of any personal data entered into the System or otherwise supplied to CEM for the purpose of the Assessment or Reports. CEM will act as Data Controller in respect of information processed for research purposes.
 9. The Client agrees they are responsible for ensuring they have a lawful basis for sharing any of the personal data provided to CEM as part of the System.
 10. The Client agrees that they are responsible for ensuring that adequate privacy notices are provided to data subjects and for seeking consent for the processing of personal data.
 11. The Client agrees to grant CEM permission to subsequently share this personal information with any Client or admissions authority performing similar testing for any reason deemed necessary by the University in order to ensure the integrity of the Assessment.
 12. The Client acknowledges that personal data provided to CEM will be used by CEM for research purposes and for service improvement. No Client or individual will be identified as part of any published research. The Client is responsible for ensuring that this processing activity is included within privacy notices.
 13. CEM shall provide appropriate technical and organisational measures to protect the security of the data, in particular against unauthorised and unlawful access or processing, alteration, accidental loss or destruction of or damage to the data, and will take all reasonable steps to ensure the reliability of any of its staff who have access to the data.
 14. The Client hereby acknowledges to CEM that CEM is subject to the requirements of the Freedom of Information Act 2000 and the Client agrees to assist and co-operate with CEM (at their own expense) to enable CEM to comply with these information disclosure requirements. Further, in the event that the Client is also subject to the requirements of the Freedom of Information Act 2000, CEM agrees to assist and co-operate with the Client (at their own expense) to enable the Client to comply with these information disclosure requirements. Any disclosure made by either party pursuant to such party's obligations under the provisions of the FOIA, shall not constitute a breach of this Agreement. The provisions of this clause 13 shall apply during the continuance of the Agreement and indefinitely after its expiry or termination.

15. The following sets out the entire financial liability of CEM to the Client in respect of any breach by CEM of this Agreement, non or incomplete performance or contemplated performance by CEM of this Agreement, negligence for which CEM is liable, and any representation or statement arising under or in connection with this Agreement or by or on behalf of CEM:-
 - 15.1. in respect of all other losses and claims, the aggregate liability of CEM for any breach, negligence and/or liability arising in any other way out of the subject matter of this Agreement or the performance of the Assessment will not exceed in total the amounts actually received by CEM from the Client for the licence of the Assessment software under this Agreement; and
 - 15.2. CEM shall in no circumstances be liable for any loss of profits, loss of business or production, depletion of goodwill, loss of or corruption to data, and/or any indirect loss.
16. CEM will in no event be liable for any statement or representation about the Client, their business, products or services made or communicated in or by any item, material or work approved by the Clients in writing.
17. For clarity, nothing in this Agreement limits or excludes either Party's liability for death or personal injury caused by such Party's negligence or any fraud or for any sort of liability that by law cannot be limited or excluded.
18. The Client undertakes that under no circumstance shall the Client:
 - 18.1. copy, reproduce or create derivative works from the System, Assessment and/or Reports;
 - 18.2. provide the System, Assessment and/or Reports to any a third party, other than as contemplated under this Licence, without the express written permission of CEM.
 - 18.3. sublicense, rent, sell or lease any portion of the System, Assessment and/or Reports ; nor use the System, Assessment and/or Reports in any manner not authorised by these terms.
19. The Client agrees that under no circumstance is it permitted to make any copy of the Assessment or of any part therein, and the Client shall use its best endeavours to procure that no employee or representative of the Client shall be permitted to make any copy of the Assessment or, except as expressly permitted by this Agreement, supply to any third party, any of the Assessment or any part thereof.
20. Each party acknowledges and agrees that copies of the Assessment will be accessed by the candidates undertaking the Assessment, and accepts that no Client shall be held liable for any disclosure of any contents of the Assessment made by any candidate who undertakes the Assessment.
21. The Client hereby acknowledge that certain elements of the System, Assessment and Reports may at any time be in the process of being developed. The System, Assessment and/or Reports may subsequently be substantially modified or withdrawn at the sole discretion of CEM.
22. The Client's installation and use of the System, Assessment and/or Reports is at the Client's sole discretion and risk and may produce unintended or erroneous results and may contain bugs, errors and other problems that could cause system or other failures and data loss. The Client accepts that the System, Assessment and/or Reports is provided to the Client "as is" without any warranty, and CEM expressly disclaims any and all warranties, including, but not limited to, warranties of merchantability, fitness for a particular purpose or error free operation.
23. To the extent permitted by applicable law, in no event shall CEM be liable for damages of any kind under this agreement including, without limitation, direct, indirect, incidental, punitive, or consequential damages. Therefore the entire risk arising out of the use or performance of the System, Assessment and/or Reports shall remain with the Client.
24. Notwithstanding any damages that the Client might incur for any reason whatsoever (including, without limitation, all damages referenced above and all direct or general damages), the entire liability of CEM and any of its suppliers under any provision of this Agreement, the Client's exclusive remedy for all of the foregoing shall be limited to the greater of the amount actually paid by the Client for access to the System, Assessment and/or Reports under this Agreement, or FIVE GBP (£5). The foregoing limitations, exclusions, and disclaimers shall apply to the maximum extent permitted by applicable law, even if any remedy fails its essential purpose.
25. CEM is not obligated to provide updates to the System, Assessment and/or Reports. However, in the event CEM elects in its sole discretion to provide updates to the System, Assessment and/or Reports, such updates shall be deemed to constitute part of the System, Assessment and/or Reports and shall therefore be subject to these terms.
26. The Client warrants to CEM it shall at no point:
 - 26.1. take any action which is intended, or could reasonably be expected, to harm in any way CEM or the University of Durham, or CEM's, or the University of Durham's reputation; or
 - 26.2. take any action which is intended, or could reasonably be expected to lead to any unwanted or unfavourable publicity for CEM or for the University of Durham.
27. The Client may terminate this Agreement for convenience at any time prior to commencement of installation or use of the Assessment, by written notice to CEM. Where this Agreement is terminated by the Client for convenience prior to installation or use of the Assessment, the Client agrees to pay CEM a withdrawal fee to a total sum of FIFTY GBP (£50). Payment of said withdrawal charge shall be made within thirty (30) days of receipt by the Client of an invoice. Where the Client wishes to terminate this Agreement following installation or use of the Assessment, the Client may do so by written notice to CEM, however, where installation of the Assessment has already begun, the Client shall remain liable to CEM to pay the Licence Fee in full.
28. In the event that any Court or other competent authority decides that any provision of this Agreement is void or otherwise ineffective in whole or in part then any other part and the other terms and conditions of this Agreement shall continue in full force and effect.
29. The parties do not intend that any term of this Agreement shall be enforceable solely by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person who is not a party to this Agreement.
30. This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all previous agreements, arrangements or undertakings between the parties relating to the subject matter of this Agreement and any representations or warranties previously given or made to it.
31. This Agreement is governed by and interpreted in accordance with English law. Any disputes or claims relating to this Agreement shall be subject to the exclusive jurisdiction of the English Courts.