

# General Terms & Conditions for the Provision of Goods and Services

## 1. INTRODUCTION

1.1. This document contains the General Terms (as defined) that apply to the Services and/or Goods being leased or purchased by the Customer from the Service Provider.

1.2. Services and/or Goods leased, purchased or provisioned by the Service Provider may have its own Schedule or any other applicable document as set out in clause 2.2 below, with more detailed terms and conditions that apply specifically to those Services and/or Goods.

1.3. Depending on the nature (simplicity, straightforwardness, quantity and/or value) of the Services and/or Goods being leased or purchased, a Schedule may not be required at all times as will be determined in the Service Provider's sole discretion, in order to avoid unnecessary delays in the processing of Orders.

1.4. Where the Customer purchases equipment outright, i.e. with no ongoing support except for standard warranty obligations, such purchase will be regulated by the Service Provider's Standard Terms & Conditions for the Purchase of Equipment. In which case the latter will supersede the General Terms.

1.5. Where the Customer purchases software outright, i.e. with no ongoing support except for standard warranty obligations, such purchase will be regulated by the Service Provider's Standard Terms & Conditions for the Purchase of Software. In which case the latter will supersede the General Terms. Any right and/or license for access and/or use of software and hardware, and support services provided by an Original Equipment Manufacturer (OEM) to the Customer in terms of the Agreement will also be subject to those terms and conditions prescribed by the OEM.

1.6. The Service Provider will exercise its own discretion on the method and manner of performing its obligation in the Agreement.

1.7. These General Terms are published on the Service Provider's corporate website and same may be amended from time to time in accordance with clause 5.5.

## 2. DEFINITIONS

2.1. **"Abortive Costs"** means costs levied by the Service Provider to the Customer in the event of cancellation or variation of the Services or Goods by the Customer in terms of clause 7.3, to recover the Service Provider's abortive costs which include the costs already incurred by the Service Provider in relation to the provision and/or maintenance of Services and/or Goods Ordered by the Customer. These may without limitation include the following:

(i) all cost relating to the installation and/or de-installation of the service (or any element or part thereof) that may result from termination and/or changes to an Order before the Service and/or Goods are provided,

(ii) all cost relating any software already procured for the Customer which the Service Provider cannot cancel or re-direct to another customer,

(iii) all cost relating to any equipment already procured for the Customer which the Service Provider cannot cancel or re-direct to another customer, in which case the Customer shall be charged for the full purchase price and associated costs such as delivery, and storage,

(iv) all cost relating to commitments to 3<sup>rd</sup> party suppliers/partners and

(v) all costs relating faults caused by equipment not covered by the Service Provider.

2.2. **"Agreement"** means these General Terms and Conditions together with the MSA, any Service Schedule/ Schedule or Renewal Addendum (where applicable) whether captured on paper, or via electronic means such as voice recordings, computer generated and captured data or similar means, that establishes a relationship in law between the Parties;

2.3. **"Applicable Law"** means any of the following, to the extent it applies to the Service Provider, the Customer or the Goods or Services:

2.3.1. any statute, regulation, by-law, ordinance or subordinate legislation in force from time to time,

2.3.2. the common law and the law of equity,

2.3.3. any binding court order, judgment or decree,

2.3.4. any applicable industry code, policy or standard enforceable by law, and

2.3.5. any applicable direction, rule, pronouncement, policy or order that is given by a regulator.

2.4. **"Acceptance"** means:

2.4.1. in the case of Services that are subject to Acceptance Testing as required in the relevant Schedule, the written confirmation by the Customer that the Acceptance Testing in respect of the relevant deliverables was/is successful;

2.4.2. in the case of Services that are not subject to Acceptance Testing, but nevertheless require Sign-Off, that the relevant deliverables in respect of the Services have been delivered in accordance with the Agreement; or

- 2.4.3. deemed acceptance by the Customer of the relevant deliverables on the basis of Customer's failure, delay or refusal to provide Acceptance or Sign-Off in terms of clause 2.4.1 or clause 2.4.2, as the case may be, within five (5) Business Days, unless otherwise specifically agreed between the Customer and the Service Provider.
- 2.5. **"Acceptance Criteria"** means the methodology or process used to test whether the deliverables meet the Service requirements as set out in the Schedule;
- 2.6. **"Acceptance Test" / "Acceptance Testing"** means a test carried out by the Customer to determine whether the relevant deliverables meet the Acceptance Criteria;
- 2.7. **"BCX"** means Business Connexion Namibia (Pty) Limited, with Registration number 89/291 ,a subsidiary of Business Connexion International Group Holding Proprietary Limited, with registration Reg No. 2013/045098/07
- 2.8. **"Business Day"** means any day other than a Saturday, Sunday or official public holiday in the Republic of Namibia;
- 2.9. **"Business Hours"** means the Service Provider 's normal business hours, as determined by the Service Provider from time to time, currently being, 08h00 to 16h30 on any Business Day, unless otherwise stipulated in a Schedule;
- 2.10. **"Change Request Form"** means, where applicable, the form to be completed by the Parties to effect the changes on the Services (e.g. in relation to change or modification of the scope of services);
- 2.11. **"Change Request Procedure"** means a procedure to implement changes as more fully set out in clause 8;
- 2.12. **"Charges" and/or "Fees"** means the amounts charged by the Service Provider in respect of the Services/ Goods, where purchased or leased from the Service Provider, and which charges are set out under the Agreement , and which charges will be set out under the Invoice which will be submitted to the Customer in terms of the Agreement;
- 2.13. **"Commencement Date"** means, in respect of Services that require Commissioning, the date on which the Services have been Commissioned, or in respect of all other Services, the date on which the rendering or delivery of the Services commences, unless a specific date is specified as the Commencement Date in which event the date so specified will be regarded as the Commencement Date of the Agreement;
- 2.14. **"Commissioning" or "Commission"** means that the Service(s), the solution and/or any element thereof have been installed and are available for use by the Customer and "Commissioned" shall have a corresponding meaning;
- 2.15. **"Confidential Information"** means any information of a Party including, but without limitation such Party's, data, software, trade secrets, copyright, proprietary information, Intellectual Property and Know-How (which includes all technical knowledge, expertise and methods whether embodied in drawings, written descriptions or otherwise) and any other information whatsoever of a confidential nature which is not in the public domain concerning the business affairs of either Party;
- 2.16. **"Consumer Price Index" or "CPI"** means the Headline Inflation Rate as published by Namibia Statistics Agency - or if the publication of such Index is discontinued, the most similar Index as compiled and published monthly by Namibia Statistics Agency in a statistical news release or anybody authorised in its stead, in terms of the Statistics Act 9 of 2011 as amended (or any statute replacing such Act);
- 2.17. **"CRAN"** means the Communications Regulatory Authority established in terms of the Communications Act (No 8 of 2009) and its successors who govern and oversee the telecommunications and electronic communications industry;
- 2.18. **"Credit Referencing Procedure"** means the standard procedure set up by the Service Provider to determine the creditworthiness of a Customer;
- 2.19. **"Customer"** means the person who purchases and/or leases and/or use Services from the Service Provider whose details are reflected as the Customer in the Agreement;
- 2.20. **"Customer Data"** means the Customer's proprietary information (including Personal Data) submitted through to the Service Provider by the Customer or either's end user customers, as applicable. Customer Data does not include Service Improvements;
- 2.21. **"Customer Environment"** means the minimum conditions, set up, configurations and operating conditions, to be provided and maintained by the Customer for the proper provision of Services as specified in a relevant Agreement and/or notified in writing by the Service Provider from time to time and implemented pursuant to agreement with the Customer; or such other general requirements as may reasonably be expected to be put in place by the Customer without which the Services may not be properly executed;
- 2.22. **"Customer Specific Agreement"** means a separate agreement entered into between the Parties, which includes the Service Provider's product specific conditions of the ordered Services and/or Goods;
- 2.23. **"Delivery Date"** means the date on which Goods are delivered to the Customer as communicated by the Service Provider to the Customer or as may otherwise be agreed by the Parties;
- 2.24. **"Disengagement Plan"** where applicable means the plan, agreed to by the Parties, which describes the functions reasonably required from the Service Provider for transferring the Services to a successor service provider;
- 2.25. **"Documentation"** means user documents published

- by the manufacturer or original licensor of equipment or software, describing its functionality and intended operation;
- 2.26. **“Effective Date”** means the date on which an Agreement will take effect, which date may be either the Signature Date or any other date as specified in the Agreement;
- 2.27. **“Electronic Communications”** means the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conductor/conduit, but does not include content service as defined in section 1 of the ECA;
- 2.28. **“Electronic Communications Network” or “ECN”** means any system of electronic communications facilities (excluding Selected SE ), as defined under section 1 of the ECA, including without limitation satellite systems; fixed systems (circuit- and packet-switched); mobile systems; fibre optic cables (undersea and land-based); electricity cable systems (to the extent used for electronic communications services); and other transmission systems, used for conveyance of electronic communications;
- 2.29. **“Fixed Term Agreement”** means an Agreement concluded by the Service Provider with a Customer which is not less than a 12 month period , as selected by the Customer under the Agreement;
- 2.30. **“General Terms”** means the general terms and conditions as contained in this document not including any Schedule, Order Form or Customer Specific Agreement, the Service Provider Price List, or any other extrinsic document such as any quotation or proposal;
- 2.31. **“Good Industry Practice”** means the practices, methods, techniques, designs, standards, skills, diligence, efficiency, reliability and prudence which are generally and reasonably expected from a reasonably skilled and experienced service provider engaged in the same type of undertaking as envisaged under the Agreement and which would be expected to result in the performance of its obligations by the Service Provider in accordance with this Agreement and Applicable Laws;
- 2.32. **“Goods”** means any and all goods (including any and all equipment, hardware or third party software) to be provided by the Service Provider to the Customer pursuant to an Agreement;
- 2.33. **“Holding Company”** means Telkom SA SOC Limited, a public company registered in terms of the laws of the Republic of South Africa, with registration number 1991/005476/30, of the Hub, Telkom Park, 61 Oak Avenue, Highveld, Centurion;
- 2.34. **“Initial Period”** means the initial contract duration selected by the Customer under the Agreement, which duration will start on the Commencement Date or the Effective Date as the case may be;
- 2.35. **“Installation”** means the unpacking and assembly of equipment and/or software, and/or any act or process of making such equipment and/or service or other technology available and ready to be used as required in the Agreement pertaining to the Services and/or Goods;
- 2.36. **“Intellectual Property”** means, collectively, patents, copyright, trademarks, logos, style names, slogans, designs, models, methodologies, Know-How, inventions, trade and business secrets and any other type of intellectual property (whether registered or unregistered including applications for and rights to obtain, use or for their protection) which are used or held, whether or not currently, in connection with a Party's business;
- 2.37. **“Interim Services”** means the interim or alternative Services and/ or Products rendered, delivered, installed or otherwise provided by the Service Provider for the benefit of the Customer as may be agreed by the Service Provider and the Customer in writing in accordance with the Change Request Procedure, in the event that (a) the contracted Services are not ready to be rendered, delivered, installed or otherwise provided for any reason, or (b) the intended Services and/or Products are not viable in the Customer environment; or (c) for any other reason as may be agreed by the Parties.
- 2.38. **“Invoice”** shall mean the written notification of Charges sent to the Customer setting out all amounts due and owing to the Service Provider by the Customer in respect of the Services and/or Goods rendered and/or provided by the Service Provider in terms of the Agreement;
- 2.39. **“Know-How”** means ideas, designs, documents, diagrams, information, devices, technical data, scientific data, secret and other processes and methods used in connection with a Party's business, and all available information regarding marketing and promotion of the products and services of a Party and all and any modifications or improvements to any of them;
- 2.40. **“MSA”** means the Master Services Agreement in terms of which all Service Schedules shall be governed;
- 2.41. **“Month-to-Month”** means a contract duration which continues on a month-to-month basis after the expiration of the Initial Period or Renewal Period as the case may be. On the other hand the duration period of the Agreement may be set as a month-to-month from the onset (Effective Date or Commencement Date) where agreed as such;
- 2.42. **“NAMRA”** means the Namibia Revenue Agency established in terms of the Namibia Revenue Agency Act 12 of 2017;

- 2.43. **“Order”** means an order for Goods and/or Services, recording and confirming the Customer’s request to the Service Provider for the purchase or lease of specific Goods and/or Services by the Customer;
- 2.44. **“Order Form”** means a standard order form of the Service Provider on which the details of the Customer’s Order are recorded;
- 2.45. **“Parties”** means collectively, the Service Provider and the Customer as indicated in the Agreement;
- 2.46. **“Payment Date”** means thirty (30) days from the date of invoice issued by the Service Provider unless an earlier payment date is indicated on the account rendered by the Service Provider;
- 2.47. **“Personal Information”** means all personal information as shared between the Parties;
- 2.48. **“Prime Rate”** means the publicly quoted rate of interest, compounded monthly, at which the Service Provider’s bankers lends on unsecured overdraft;
- 2.49. **“Regulator”** means anybody having regulatory or supervisory authority over any part of the business or affairs, Services or Products of either Party, including CRAN.
- 2.50. **“Renewal Addendum”** means the renewal agreement concluded by the Parties, which sets out the additional terms applicable to the Renewal Period;
- 2.51. **“Renewal Period”** means a fixed additional number of months (excluding a Month-to-Month) which the Parties have agreed to renew the Agreement for, as set out under the Renewal Addendum, which period will start on the day following the last day of the Initial Period, where applicable;
- 2.52. **“Schedule”** or **“Service Schedule”** means a document agreed between the Parties in writing in which the specific Services and/or Goods to be delivered or performed and the specific terms and conditions relating thereto are set out. The Schedule may be made up of one or more of the following documents; Service Provider’s quote, Order Form, or any other document that forms part of the Agreement as defined which is in addition to the General Terms and Conditions;
- 2.53. **“Sign-Off”** means the Acceptance issued by the Customer acknowledging that a deliverable in terms of the Agreement has been delivered to the Customer and/or Commissioned if expressly required under the relevant Schedule;
- 2.54. **“Service”** or **“Services”** means each of the various services and/or solutions leased or purchased, as agreed between the Parties which conditions shall be more fully described in the Agreement;
- 2.55. **“Service Improvements”** means, with respect to the Service Provider’s Services and/or Goods, the aggregated data and information related to the performance, operation and use of the Service Provider’s Services used by the Service Provider to create statistical analyses, perform benchmarking, research and development, and other similar activities. The Service Provider will not incorporate Customer Data in Service Improvements in a form that could identify the Customer or end user customer thereof;
- 2.56. **“Service Levels”** means the applicable levels according to which each Service is to be provided, as set out in the Agreement;
- 2.57. **“Service Provider”** means the service provider as set out in the Schedule;
- 2.58. **“Signature Date”** means the signature date of the Agreement of the Party signing last in time;
- 2.59. **“Staff”** means a Party’s employees, agents and/or representatives;
- 2.60. **“VAT”** means value-added tax in terms of the Value-Added Tax Act 10 of 2000, as amended from time to time.
- 3. INTERPRETATION**
- 3.1. The headings to the clauses on the Agreement are merely indicative of the purpose of the relevant clauses and shall not override the meaning of the clauses therein.
- 3.2. In the Agreement, except where the context clearly indicates a contrary intention, the singular includes the plural and vice versa, words importing the masculine gender include the other genders and vice versa, the word “person” includes a company and any other juristic person, partnership and any other body of persons (whether corporate or incorporate).
- 3.3. The Parties warrant and acknowledge that the relationship between them is not in the nature of a partnership and that neither Party is entitled to make or enter into binding agreements of any nature on behalf of the other Party. The relationship between the Service Provider and Customer under the Agreement will be that of an independent contractor.
- 3.4. Any reference to an enactment in this Agreement is to that enactment as at the Signature Date and as amended or re-enacted from time to time.
- 3.5. Any substantive provision in any definition in this Agreement which confers rights or imposes obligations on a Party shall, notwithstanding that it is only in a definition, be given effect to as if it were a substantive provision in the body of the Agreement.
- 3.6. When a number of days are prescribed in this Agreement, they shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day, in which case the last day shall be the next succeeding Business Day.
- 3.7. Reference to days, months or years in this Agreement shall be construed as Gregorian calendar days, months or years.

- 3.8. The use in this Agreement of any expression covering a process available under Namibian law shall, if any Party to this Agreement is subject to the law of another jurisdiction, be construed as including equivalent or analogous proceedings under that law.
- 3.9. Any term defined within the context of any particular clause in this Agreement shall, unless otherwise determined by the context, bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that such term is not defined in the definition clause.
- 3.10. Expiration or termination of the Agreement shall not affect such of its provisions as expressly provide that they shall continue to operate thereafter or which of necessity must continue to have effect thereafter notwithstanding that the clauses themselves do not expressly provide for this.
- 3.11. Any reference in this Agreement to a Party shall, if such Party is liquidated or sequestrated, be applicable also to and binding upon that Party's liquidator or trustee, as the case may be.
- 3.12. In this Agreement the words "include", "including" and "in particular" shall be construed as being by way of example or emphasis only and shall not be construed nor shall they take effect as limiting the generality of any preceding words.
- 4. ORDER OF DOCUMENTS AND ANY ANNEXES**
- 4.1. The following documents constitute the Agreement:
- a) Schedule;
  - b) if applicable, Change Request Form;
  - c) MSA (that forms part of the Agreement); and
  - d) General Terms and Conditions.
- 4.2. In the event of any conflict between the General Terms and the Schedule, in respect of:
- 4.2.1. the description or technical specifications or pricing of Services/Goods or applicable Service Levels, the terms and conditions in the Service Schedule shall prevail,
  - 4.2.2. any other matter, the General Terms shall prevail.
- 4.3. For the purposes of interpretation, any written proposal or quotation furnished to the Customer by the Service Provider and accepted by the Customer will have the status equivalent to that of an Order Form for the purposes of this Agreement.
- 5. AGREEMENT TO CONTRACT AND APPLICATION OF THESE GENERAL TERMS AND CONDITIONS**
- 5.1. This clause confirms that the Customer, has placed an Order for Services and/ or Goods from the Service Provider, as set out in the Agreement.
- 5.2. The Service Provider shall, subject to clause 5.4, render or deliver to the Customer the selected Services or Goods as set out in the Agreement, subject to the Service Provider's Credit Referencing Procedure and subject to the terms and conditions set out under the Agreement.
- 5.3. The provision of the Services shall be subject to the relevant laws of the Republic of Namibia read together with the applicable policies of the Service Provider relating to the relevant Services and/or Goods such as but not limited to credit vetting.
- 5.4. The Customer accepts and agrees that the terms and conditions set out under the Agreement will become binding on the Customer once the Service Provider has processed the Agreement and agreed to provide the Customer with the Services and/or Goods.
- 5.5. The Service Provider reserves the right to amend these General Terms and Conditions from time to time. The Service Provider will give notice to the Customer of such amendments and will place the amended terms and conditions on the Service Provider's website, which amendment will be deemed to be incorporated into the Agreement and bind the Customer from the date such amendment becomes effective. The notice as envisaged in terms of this clause can be in the form of a letter, insert into account or a note on the account.
- 5.6. By appending signature on the Agreement, the Customer, confirms that it is bound by these General Terms and Conditions.
- 6. INSTALLATIONS AND PROVISION OF THE SERVICES AND/OR GOODS**
- 6.1. The Service Provider shall render or deliver the Services or Goods as set out in the Schedule/ Service Schedule or any one or more of documents referred to in the definition of Schedule or Service Schedule entered into by the Parties.
- 7. DURATION, RENEWAL AND TERMINATION**
- 7.1. The clause sets out how long the Agreement will run for and the details around cancellation under the Agreement.
- 7.2. Duration of the Agreement and renewal rights**
- 7.2.1. The term of the Agreement will start on the Commencement Date unless otherwise specified in the Agreement that the start date will be the Effective Date and will endure for either the Initial Period or on a month-to-month basis, as selected by the Customer under the Agreement and for any Renewal Period or Month-to-Month, where applicable, save for where the Agreement is terminated earlier by either of the Parties in accordance with their respective rights as set out under the Agreement.
- 7.2.2. On expiration of the Initial Period and/or Renewal Period, the Customer will have the right to terminate or renew the Agreement. The Customer must in

writing notify the Service Provider of its intention to terminate or renew the Agreement no later than 90 (ninety) days prior to the expiry of the Initial Period and/or Renewal Period as the case may be. In the event of the Customer electing to enter into a Renewal Addendum or complete a new Order Form, such Renewal Addendum or Order Form will set out the Renewal Period, and the applicable terms and conditions pertaining to such renewal.

- 7.2.3. Should a Customer fail to notify the Service Provider of its election to terminate or renew the Agreement, then the Agreement will, unless stated otherwise in the Schedule or Service Schedule, continue on a Month-to-Month basis on the same terms and conditions as contained under the Agreement and subject always to any variations relating to the Charges and the scope of Services. Any Month to Month Agreement as envisaged in terms of this clause may be terminated by either party by giving 1 (one) month's written notice to the other party. The renewal of any Services that contain software shall be for a minimum subscription period applicable to the software concerned.

**7.3. Cancellation or variation of the Services or Goods prior to the Commencement Date or Delivery Date**

- 7.3.1. Where the Customer cancels or varies any of the Services, and/or Goods as selected under the Agreement, which cancellation is not as a result of any breach on the part of the Service Provider, before the Commencement Date or Delivery Date as the case may be, in whole or in part, the Service Provider will have the right to charge the Customer all Abortive Costs which the Service Provider has incurred as a result of the cancellation or variation, which amount shall be payable by the Customer.

- 7.3.2. Abortive Costs are billed to the Customer at the end of the billing period in which such costs are incurred and are payable by the Payment Date.

**7.4. Termination of the Services and/or Goods by the Customer**

- 7.4.1. Should an Order, Fixed Term Agreement be terminated for whatever reason other than as a result of breach by the Service Provider, in respect of any of the Service(s), after the Commencement Date of the Services and prior to the expiry of the Initial Period and/or Renewal Period, the Customer shall be obliged to pay the Service Provider the full outstanding amount payable for the remainder of the Agreement, unless stated otherwise in the applicable Schedule.

**8. CHANGES TO THE AGREEMENT**

- 8.1. Either Party may request changes to the Services and/or Goods from time to time. Such changes and the Charges thereof shall be set out in such detail in the Change Request Form so as to enable the non-requesting Party to make a decision. Unless otherwise agreed in writing, such changes will become part of the Services and the relevant Agreement will be regarded as updated to reflect such changes.

- 8.1.1.1. Should the Change Request Procedure of a specific product/Service be different from what is set-out in clause 8.1 above, then in such an instance the Change Request Procedure will be set-out in the relevant Schedule.

- 8.1.2. Any amendments other than those set out in clause 8.1 and 8.1.3 to the content of the Agreement shall not be subject to the Change Request Form, but shall be executed by way of an addendum to the Agreement.

- 8.1.3. Any changes to the Services not requiring a re-negotiation of the Agreement will be reflected in an updated annexure to the relevant Schedule which once agreed by both Parties will be signed by duly authorised representatives of both Parties and will be deemed to be incorporated into the Schedule and be regarded as the latest reflection of the Services for purposes of the Schedule.

**9. OBLIGATIONS OF THE SERVICE PROVIDER**

- 9.1. The Service Provider shall:
- 9.1.1. provide the Services and/or Goods with the care and skill that would reasonably be expected in the circumstances in line with Good Industry Practice,
- 9.1.2. assign and maintain appropriately qualified and skilled Staff to perform the Services,
- 9.1.3. render the Services in accordance with the requirements of the Agreement.
- 9.2. The Service Provider's Staff shall be required when on the Customer's premises, to perform the Services in accordance with the Customer's reasonable security, health and safety requirements, directives, procedures and schedules, provided that they are disclosed to the Service Provider prior the visit to the Customer's premises.
- 9.3. The Service Provider (where required and set out in the Agreement) shall appoint an account representative who shall act as a single point of contact for all the Service Provider activities relevant to the Services.
- 9.4. The Service Provider shall be responsible for compliance with all legal and regulatory requirements governing the provision of its Services.

**10. OBLIGATIONS OF THE CUSTOMER**

- 10.1. The Customer shall:
- 10.1.1. make suitable skilled Staff available in assisting the Service Provider to provide the Services,
- 10.1.2. appoint (where required and set-out in the Agreement) the Customer representative who shall be responsible for all the Customer activities relevant to the Agreement,
- 10.1.3. grant (subject to the security policies and processes of the Customer and obligations of confidentiality) the

Service Provider access to all data, information, systems and facilities as reasonably required by the Service Provider to effectively perform its duties and obligations in terms of the Agreement,

- 10.1.4. report all failures and non-compliances of the Services to the Service Provider promptly or in accordance with the relevant Service Level,
- 10.1.5. be responsible for compliance with legal and regulatory requirements which are applicable to the Customer which affect the delivery of Goods, acceptance or consumption of the Services,
- 10.1.6. perform the obligations recorded in the Agreement within the time periods prescribed therein for performance, to facilitate the due performance by the Service Provider of its obligations which are in whole or in part dependent on timely performance by the Customer,
- 10.1.7. provide and maintain the Customer Environment more fully described in each associated Schedule, for the proper provision of the Services described therein.

#### 11. SERVICE LEVELS

- 11.1. Service Levels may be applicable and defined for some Services. Where Service Levels are applicable the details thereof will be set out in the Agreement.

#### 12. ACCEPTANCE TESTING AND SIGN-OFF

- 12.1. In the case of Services that require Acceptance Testing, such Services shall be subjected to Acceptance Testing in accordance with the Acceptance Criteria.
- 12.2. In the case of Services that do not require Acceptance Testing, but require Sign-Off by the Customer, the Customer shall, upon confirmation by the Service Provider that a deliverable has been delivered or Commissioned provide Sign-Off.
- 12.3. The Customer shall provide Acceptance or otherwise notify the service Provider that the Acceptance Testing was or is unsuccessful.
- 12.4. In the event that the Acceptance Testing is unsuccessful the Service Provider shall reperform the relevant deliverables and subject same to Acceptance Testing until successful Acceptance is attained.
- 12.5. The provisions of clause 9 shall not apply or deemed to apply to any deliverables unless expressly stated in the relevant Schedule that such deliverables are subject to Acceptance Testing or Sign-Off, as the case may be.
- 12.6. Any dispute that may arise between the Service Provider and the Customer relating to Acceptance or Sign-Off shall be dealt with in accordance with the provisions of clause 26.

#### 13. FACTORS BEYOND SERVICE PROVIDER'S CONTROL

- 13.1. Should the Service Provider be delayed or prevented from performing its obligations by factors beyond its reasonable control, including Customer's failure to perform its responsibilities in a timely manner, the Service Provider shall notify the Customer in writing of such delay and set out the factors for such failure. The Service Provider shall be entitled to an equitable adjustment in the timetable and consideration set out in each associated Service Schedule, such adjustments and considerations shall be mutually agreed between the Parties, such adjustments shall not be unreasonably withheld.

- 13.2. The Service Provider shall not be responsible for any malfunction, non-performance or degradation of performance of any Services and/or Goods which is caused by or results from, directly or indirectly, any alteration to, adjustment of, attachment to or modification of those Services and/or Goods made without the prior written approval of the Service Provider.

#### 14. FEES AND PAYMENT

- 14.1. The Customer shall be liable for and shall pay the Charges in respect of Services and/or Goods supplied pursuant to the Agreement.

- 14.2. The Invoice rendered by Service Provider and/or its Holding Company to the Customer is on the face of it, and until the contrary is proved, (*prima facie*) proof of the amount due by the Customer to the Service Provider. The Customer may in good faith query or dispute any element of the Invoice, but any undisputed portion of the Invoice must be paid by the Payment Date.

- 14.3. The Service Provider will be entitled to start invoicing for the Service(s) from the date that the Service or any billable element thereof have been Commissioned. The Service Provider will be entitled to start invoicing for the Goods once delivered or where installation form part of the Agreement, upon the installation date.

- 14.4. Where the relevant Schedule requires Acceptance Testing or Sign-Off, the Service Provider will be entitled to start invoicing upon Acceptance or Sign-Off.

- 14.5. Any undisputed amount/ Invoice not paid by the Customer on Payment Date shall bear interest at the Prime Rate plus two percent (2%) compounded monthly and will be calculated from the Invoice date.

- 14.6. Should the outcome of the dispute be in favour of the Customer, the Service Provider will reverse the incorrect amount debited, or should the outcome of the dispute be in favour of the Service Provider that the amount was in fact correctly billed, such outstanding amount together with interest at Prime Rate plus two (2%) percent shall be payable to the Service Provider.

- 14.7. Unless otherwise agreed in terms of an Agreement –

- 14.7.1. The Invoice rendered to the Customer by the Service Provider will be payable by the Payment Date, and will meet the requirements as published

by the NAMRA from time to time;

14.7.2. All such prices, fees and Charges are exclusive of:

14.7.2.1. VAT which shall be charged to the Customer in addition, at the rate and in the manner for the time being prescribed by law;

14.7.2.2. any other taxes and duties which are levied or charged by any revenue authority (including the NAMRA), all of which shall be for the account of the Customer. Should the Customer be obliged to deduct any withholding taxes from any prices, fees or charges due to the Service Provider, then:

14.7.2.2.1. the Customer shall gross up the amount payable by the Customer such that after deduction of the withholding tax, the Service Provider receives the full price, fee or charge specified in the relevant Service Schedule,

14.7.2.2.2. the Customer undertakes and warrants that it shall make, due and timely payment of such withholding taxes due by it to the appropriate revenue or other government authority whilst the Service Provider undertakes to refund the Customer for such withholding taxes if the Service Provider is reimbursed such taxes pursuant to a tax treaty.

14.7.3. All amounts due and payable by the Customer shall be paid to the Service Provider in Namibia Dollar (unless otherwise agreed in writing) without deduction or set-off.

14.8. All Charges shall be subject to adjustments from time to time as determined by the Service Provider, but usually on an annual basis, unless agreed otherwise in a Schedule. The monthly recurring discounted Charges for Services associated with the term commitment of the Agreement will apply for the term commitment only and will thereafter be adjusted in accordance with a new term commitment. Unless a term commitment is agreed the standard prescribed services fee/charges applicable to a Month-to-Month term agreement will be applicable and payable.

14.9. Where a Service Schedule identifies that the consideration for Services are linked to CPI, and then save as expressed to the contrary in that Service Schedule, that consideration shall adjust upwards on the anniversary of the Commencement Date.

14.10. For any Services and/or Goods procured from or through the Service Provider where prices are based in any currency other than Namibia Dollar, the Service Provider shall prepare its quote in Namibia Dollar in accordance with the prevailing exchange rate plus the costs of forward exchange cover at time of the final order being placed by the Customer. Once calculated, the above amounts shall remain fixed and firm notwithstanding any subsequent fluctuations in the exchange rate.

14.11. Unless expressly included in the Charges, the Customer shall reimburse all reasonable expenses as are incurred by the Service Provider in fulfilling its

obligations pursuant to the Agreement, provided such expenses are not included in any quote or fee and provided that Customer's prior written approval of such expenses has been obtained. Travelling and subsistence expenses will be billed in accordance with the Service Provider's standard policies in respect of such matters from time to time.

14.12. Unless stated otherwise, the validity of Charges for the Services quoted in any written quotation or proposal shall not exceed thirty (30) days from the date such document was prepared and furnished to the Customer by the Service Provider and may be changed by the Service Provider at any time thereafter, but prior to the signing of the Agreement.

## 15. TITLE AND RISK OF LOSS

15.1. Any reference to "equipment" in this clause 15 relates to any equipment provided by the Service Provider for and in connection with the provision of the Services and which is not purchased outright by the Customer, and which is not intended to be transferred to the Customer.

15.2. The ownership of the equipment installed by the Service Provider on the Customer's premises for providing the Services shall vest in the Service Provider unless the Customer has bought and paid in full the equipment from the Service Provider as set out in the relevant Agreement.

15.3. The Customer agrees and acknowledges that all engineering, diagnostic, maintenance and support manuals and documentation supplied and used by the Service Provider but located at the Site or Customer's premises generally ("Removable Materials") are the property of and includes Confidential Information of the Service Provider. The Customer further agree that the Service Provider may remove them from Customer's premises or Site or request the immediate return of such Removable Materials should the Service Provider not have access to the Customer's premises.

15.4. The risk of loss or damage to the equipment delivered by the Service Provider on the Customer's premises shall vest in the Customer. The Customer shall be liable for any loss or damage to the equipment installed on the Customer's premises unless same is caused by the Service Provider. The Customer shall adequately insure the equipment with a reputable insurer of which the Service Provider may request proof of at any time for the total value of the equipment at the price the Service Provider purchased the equipment from the Original Equipment Manufacturer ("OEM").

15.5. The Customer hereby acknowledges that there are no circumstances arising out of or in connection with the Agreement whereby it obtains any contractual or legal right to require that the title in the equipment be transferred to it at any time apart from instances where the Customer has purchased such equipment.

15.6. The Parties agree that the Service Provider may transfer ownership in the underlying equipment of the Services and may cede its right, title and interest in the



relevant Agreement to any third party, for the purpose of obtaining finance, however, the Service Provider shall remain exclusively responsible for the performance of its obligations in terms of the Agreement.

- 15.7. The Customer shall notify the Service Provider, in writing, of the name, together with detailed postal and street addresses, of the landlord, owner or mortgagee of any premises upon which the equipment is, at any time, kept or stored and notify such landlord, owner or mortgagee that the equipment is the property of the Service Provider by virtue of the provisions of the Agreement, within seven (7) calendar days from the date of signing of the relevant Agreement.
- 15.8. The Customer shall not, under any circumstances, be entitled to sell, offer for sale, transfer, lease, assign, charge, encumber or otherwise dispose of, deal with, or part with possession of the equipment or any interest therein whatsoever. The Customer shall, at its own expense, keep the equipment free from attachment or other legal process and shall immediately notify the Service Provider on the occurrence of same.
- 15.9. The Customer acknowledges and agrees that the equipment is movable property, and shall so remain, notwithstanding the means used to install the equipment on any premises and the Parties agree that the equipment should not accede to, or become permanently attached to, any premises or to any other property or asset. On termination of the relevant Agreement, for whatsoever reason, the Service Provider shall be entitled to remove the equipment.
- 15.10. The Customer may not remove the equipment from the installation address without the prior written consent of the Service Provider.

## 16. INTELLECTUAL PROPERTY

- 16.1. Neither Party shall acquire any rights, title or interest of any kind in any Intellectual Property owned by the other Party.
- 16.2. All Service Improvements made or developed during the term of a relevant Agreement or extension thereof, shall at all times vest in the Service Provider. All modification, changes, upgrades, updates and the like of any software owned by a Party or 3<sup>rd</sup> party will vest in that party.
- 16.3. Unless specifically authorised in the Agreement or in writing by both Parties and then only to the extent so agreed, the Parties shall have no right to use the other Party's Intellectual Property in any manner whatsoever.
- 16.4. Subject to clause 16.1, any Intellectual Property rights (in any media or format) which are prepared, created, authored or developed by the Service Provider exclusively and specifically for the Customer as a separate and distinct project indicating that the ownership in the Intellectual Property will be owned and paid for in full by the Customer, in terms of this Agreement shall belong exclusively and in totality to

the Customer.

## 17. INTELLECTUAL PROPERTY INDEMNITY

- 17.1. The Service Provider agrees to resist or defend at its own expense any request for royalty payments or any claim for equitable relief or damages against the Customer based on an allegation that the manufacture of any equipment or the use, lease, or sale thereof or that any Documentation infringes any patent or copyright, and to pay any royalties and other costs related to the settlement of such request and to pay the costs and damages, including attorney's fees on an attorney and own client scale, finally awarded as the result of any suit based on such claim, provided that the Service Provider is given seven (7) days written notice of such request or claim by the Customer and given authority and such reasonable assistance and information as the Service Provider may request in writing and as is available to the Customer for resisting such request or for defending such claim.
- 17.2. In the event that the manufacture, use, lease, or sale of any item supplied by the Service Provider hereunder is interdicted prior to delivery or after delivery, the Service Provider will, at its option and expense, either negotiate a license or other agreement or arrangement with the claimant/ plaintiff so that such item is no longer infringing; or modify such item suitably or substitute a suitable item therefore, which modified or substituted item is not subject to request or claim and extend the provisions of this clause thereto.
- 17.3. Notwithstanding the above, the Service Provider will not be liable for any damage or costs resulting from claims pursuant to:
  - 17.3.1. the Service Provider's compliance with the Customer's design, specifications or written instructions and/or
  - 17.3.2. the use of any item provided by the Service Provider in combination with any product not supplied by the Service Provider and/or
  - 17.3.3. a manufacturing or other process carried out by or through the Customer and utilising any item provided by the Service Provider which constitutes either direct or contributory infringement of any patent (such claims being collectively referred to herein as Other Claims), where, but for the above, there would be no infringement.
- 17.4. The indemnity referred to in clause 17.1 shall fall away and be of no force or effect should the Customer:
  - 17.4.1. fail to promptly notify the Service Provider in writing of any such claims or lawsuits, or
  - 17.4.2. make any admission or settlement or attempt at settlement in respect of any such claims or lawsuits, or
  - 17.4.3. fail to permit the Service Provider to defend or settle the claim or lawsuit exclusively; or

- 17.4.4. fail to provide all reasonable assistance, at its own cost, to the Service Provider in defending or settling any such claim or lawsuit.
- 17.5. The indemnity referred to in clause 17.1 shall not apply if such claim or lawsuit –
- 17.5.1. is made by a subsidiary or affiliate of the Customer or Customer's holding company or any organ/body of state (where the Customer is an organ/body of state);
- 17.5.2. results from any modification, alteration, repair or addition made by the Customer to the goods to the extent that if it were removed, the infringement or violation would cease;
- 17.5.3. arises out of the use by the Customer of the goods in combination with any other product, service or materials;
- 17.5.4. results from a breach by the Customer of the provisions of this Agreement.
- 18. DATA PROTECTION**
- 18.1. In performing its obligations under the Agreement, the Parties shall:
- 18.1.1. comply with the provisions of the prevailing privacy and data protection legislation governing the collection, use and processing of Personal Information as defined in the relevant legislation,
- 18.1.2. not process Personal Information for any purpose other than to perform its obligations under the Agreement and ensure that such processing will not place either Party in breach of any applicable privacy and data protection laws or stated requirements,
- 18.1.3. only act on the instructions of the Party disclosing the information "the Disclosing Party" in collecting, processing and utilising the Personal Information (and for avoidance of doubt, this Agreement shall constitute such instructions),
- 18.1.4. not disclose or otherwise make available the Personal Information to any third party other than authorised Staff or sub-contractors who require access to such Personal Information strictly in order for the Party processing the information "the Processing Party" to carry out its obligations pursuant to this Agreement, and ensure that such Staff and any other persons that have access to the Personal Information are bound by appropriate and legally binding confidentiality and non-use obligations in relation to the Personal Information,
- 18.1.5. take appropriate, reasonable technical and organisational measures to ensure that the integrity and confidentiality of the Personal Information in its possession or under its control is secure and that such Personal Information is protected against accidental loss, destruction, damage, unlawful access or processing,
- 18.1.6. immediately notify the Disclosing Party in case of possible infringements of the applicable data protection legislation, the terms of this clause or other irregularities by the Processing Party, its Staff or any other party acting on behalf of the Processing Party in relation to the Disclosing Party's Personal Information, and
- 18.1.7. at the Disclosing Party's option, return or destroy the Personal Information once it is no longer required for the purposes of performing obligations under this Agreement or any directly related purpose.
- 18.2. The Processing Party hereby indemnifies and holds harmless the Disclosing Party, its affiliates and their respective Staff, successors, cessionary and assigns, from all penalties and fines arising from the processing Party's non-compliance with the provisions of this clause and any relevant data protection legislation.
- 18.3. The processing Party agrees that breach of this clause shall be regarded as a material breach of the Agreement.
- 18.4. The obligations contained in this clause shall endure, even after the termination of this Agreement for whatever reason.
- 19. BREACH**
- 19.1. If a Party (breaching Party) is in material breach of any term or condition or performance due in terms of the Agreement and fails to correct such material breach within thirty (30) Business Days of receipt of the written notice to that effect by the other Party (aggrieved Party), the aggrieved Party may terminate the Agreement with immediate effect and without prejudice to its other rights in law if the event of the material breach is not rectified.
- 19.2. If either Party commits an act of insolvency as defined in the Insolvency Act number 24 of 1936 or is subject to an order of provisional or final liquidation or has made or attempts to make an offer of compromise to creditors or gives notice of an application for voluntary liquidation; or makes an assignment for the benefit of its creditors; or a business rescue practitioner, curator or trustee is appointed whether provisionally or finally, the other Party shall be entitled to cancel the Agreement with immediate effect and without prejudice to any of such cancelling Party's rights in law.
- 19.3. Upon termination, for whatever reason, the Customer will no longer have any right to the use of the equipment belonging to the Service Provider and will immediately make available all equipment supplied pursuant to any provisions of the Agreement.
- 19.4. Should cancellation of a Fixed Term Agreement be caused by a breach committed by the Customer, then the Customer will pay the Service Provider all undisputed amounts lawfully due and owing at such time, and an early termination amount equal to the remainder of the Initial Period and a recovery/decommissioning fee unless specified differently in the Agreement.

- 19.5. On termination or expiration of the Agreement where Equipment was financed the Customer shall elect one of the following options:
- 19.5.1. to pay the Settlement Value of all equipment and/or software as reflected in the Rental Schedule(s) as at the date that written notice is received for contract settlement;
- 19.5.2. to pay the Settlement Value plus an ownership fee to acquire ownership of the equipment; or
- 19.5.3. to continue paying the applicable monthly rental as set out in the Service Schedule for the equipment and/or software for the remainder of the period or such shorter period as was set out in the Service Schedule, Schedule, Order, Work Order or Service Request for that specific equipment and/or software and upon final payment the Customer will notify within ten (10) calendar days to the Supplier of which election they wish to exercise.

## **20. DISCONTINUING OF SERVICES AND END OF LIFE**

- 20.1. Any reference to "equipment" in this clause 20 relates to any equipment provided by the Service Provider for and in connection with the provision of the Services and which is not purchased outright by the Customer, and which is not intended to be transferred to the Customer; or the equipment that is rented by the Service Provider to the Customer.
- 20.2. The Service Provider may from time to time, and on notice where this is possible, or without notice where this is not possible, and without prejudice to any other claims or remedies, which the Service Provider may have in terms hereof or in law, discontinue or terminate or replace any part of the Service and where applicable the right to use the equipment, or in its discretion disconnect the equipment from the network in any of the following circumstances:
- 20.2.1. where the Service or equipment is found to contain a defect, which enables the Customer to exploit the Service to the detriment of the Service Provider,
- 20.2.2. where the Service or equipment has reached the end of its lifespan, or is no longer supported by the OEM and it is uneconomical to maintain or continue,
- 20.2.3. where the Service and/or equipment is no longer commercially available or the required spares or support is no longer available or there has been an insignificant interest in the use of a particular Service or equipment which render the provision of this Service and/or equipment uneconomical,
- 20.2.4. in response to an instruction from the Regulator or other body in terms of applicable law, to discontinue the Service or equipment,
- 20.2.5. where the Customer uses equipment that is not approved by the Regulator for such use,
- 20.2.6. if the Customer has received the Service as a result of fraud or misrepresentation,
- 20.2.7. if the Customer uses in connection with the Service, equipment that belongs to the Service Provider but which the Customer has obtained illegally,
- 20.2.8. if the Customer does or allows to be done any act or omission, which in the Service Provider's opinion will or may have the effect of negatively affecting the operation of the Service or the Service Provider's network,
- 20.2.9. if the Customer is using, or permitting the use of the Service or any element thereof for any illegal purpose or in contravention of any law; or
- 20.2.10. if the Service Provider has been instructed to do so by any authority competent to issue such instruction.

## **21. DISENGAGEMENT AND TRANSITION SERVICES**

- 21.1. Following the termination of the Services, the Service Provider shall not perform disengagement and transition services, unless specifically provided for in the Agreement.
- 21.2. Termination will not discharge either Party from performing any obligation already due or from making payment of any sums already due and owing at such time arising from the Agreement.

## **22. INTERIM SERVICES**

- 22.1. In the event that the Service Provider and the Customer agree that the Service Provider shall implement Interim Services, the terms and conditions of the Agreement as amended to accommodate the Interim Services, shall continue to apply and the Service Provider shall be entitled to invoice, and the Customer shall be obliged to make payment, for such Interim Services.
- 22.2. The Interim Services shall be implemented for a specific short period of time as agreed by the Service Provider and the Customer provided that the Service Provider and the Customer may agree that such Interim Services shall be implemented on a longer term basis, in which case the Service Provider and the Customer shall reduce such agreement in writing by way of a Change Request Procedure, and thereafter the Interim Services shall be deemed to be the Service(s) contracted under the Agreement, in the place of the originally contracted Services. .

## **23. ACCEPTABLE USE AND FAIR USE POLICY**

- 23.1. The Customer agrees that the use and access to certain Services and Products offered by the Service Provider may be subject to the Service Provider's acceptable and fair use policies.

## **24. CONFIDENTIALITY OF INFORMATION**

- 24.1. The Service Provider and the Customer to the extent of their contractual and lawful right to do so will exchange Confidential Information as reasonably necessary for each to perform its obligations under the Agreement and for the Customer to avail itself of the

- Services rendered by the Service Provider under the Agreement.
- 24.2. All information relating to the Agreement provided by either Party to the other, whether oral and or written, is hereby deemed to be Confidential Information.
- 24.3. Except as set forth in clause 24.3.3 below, a Party receiving Confidential Information pursuant hereto (the "Receiving Party") will not, without the prior written consent of the Party disclosing such information (the "Disclosing Party"):
- 24.3.1. use any portion of the Confidential Information for any purpose other than the purpose of the Agreement; or
- 24.3.2. disclose any portion of the Confidential Information to any persons or entities other than the Staff of the Receiving Party who reasonably need to have access to the Confidential Information in connection with the purposes of the Agreement and who are bound by confidentiality.
- 24.3.3. A Receiving Party will not be liable for disclosure of Confidential Information, or part thereof, if the Receiving Party can demonstrate that such Confidential Information:
- 24.3.3.1. was in the public domain at the time it was received or subsequently entered the public domain through no fault of the Receiving Party,
- 24.3.3.2. was known to or is in the possession of the Receiving Party at the time of receipt,
- 24.3.3.3. became known to the Receiving Party from a source other than the Disclosing Party without breach of an obligation of confidentiality.
- 24.4. In the event of any legal action or proceeding or asserted legal requirement for disclosure of Confidential Information furnished hereunder, the Receiving Party will promptly notify the Disclosing Party and, upon the request and at the expense of the Disclosing Party, will co-operate with the Disclosing Party in lawfully contesting such disclosure. Except in connection with any failure to discharge its responsibilities under the preceding sentence, the Receiving Party will not be liable for any disclosure pursuant to court order.
- 24.5. Confidential Information will remain the property of the Disclosing Party and will, at the Disclosing Party's request and when no longer needed for the purposes of the Agreement, and subject to the parties legal and corporate governance obligations to retain same promptly be returned to the Disclosing Party or be destroyed, together with all copies made by the Receiving Party and by anyone to whom such Confidential Information has been made available by the Receiving Party in accordance with the provisions of this clause 24.
- 24.6. Subject to clause 24.4, neither Party shall, without the written consent of the other Party, directly or indirectly make any disclosure to any third party or make any public announcement or statement (including through any social media platform or press) relating to the Parties, the Agreement, or any matter relating to the Agreement.
- 24.7. Upon termination or expiry of:
- 24.7.1. the Agreement, the Parties shall deliver to each other, or, at the Disclosing Party's written election, the Receiving Party shall destroy all originals and copies (including partial copies) of the Disclosing Party's Confidential Information received by the Receiving Party or in its possession, and all notes (in any media or format) which it may have prepared or may have obtained as a result of the Confidential Information being made available to it; and
- 24.7.2. the Receiving Party shall, on written request by the Disclosing Party, certify its compliance with the aforesaid requirements by way of a written notice addressed by a director of the Receiving Party to the Disclosing Party.
- 24.7.3. The content of this clause will survive the termination of the Agreement.
- 25. LIMITATION OF LIABILITY**
- 25.1. Neither the Service Provider nor its subcontractors will be liable for:
- 25.1.1. defamation, or infringement of copyright from or in connection with the transmission of communications hereunder,
- 25.1.2. any claim arising out of any act or omission of the Customer or any other entity furnishing services or equipment for use in conjunction with the equipment and Service provided hereunder,
- 25.1.3. any unlawful or unauthorised use of the equipment or Services provided hereunder by the Customer, its Staff,
- 25.1.4. any claim arising out of a breach in the privacy or security of communications transmitted over the facilities or other property of the Service Provider, unless to the extent of losses attributable to the Service Provider's negligence or wilful default.
- 25.2. The total liability of the Customer and the Service Provider respectively in respect of a claim arising in terms of this Agreement (whether arising from negligence, breach of contract or otherwise howsoever) (in this clause, "Default") limited to the aggregate of the fees/charges paid (or payable if not fully paid) by the Customer to the Service Provider in the twelve (12) months preceding such claim hereunder with respect the relevant Schedule in terms of which the cause of action arose.
- 25.3. The Parties will not be liable to each other or anyone else for special, collateral, exemplary, indirect, incidental or consequential damages (including without limitation, loss of goodwill, loss of profits or revenues, loss of savings, loss of use, interruptions of business), whether such damages occur prior or

subsequent to, or are alleged as a result of, delict or breach of any of the provisions of this Agreement, even if the defaulting Party has been advised of the possibility of such damages.

- 25.4. The limitations contained in this clause 25 shall not apply to (i) any breach by a Party of the other Party's confidential information or Intellectual Property; or (ii) a claim in respect of which liability cannot be limited or excluded in law; or (iv) claim based on death or personal injury.

## 26. DISPUTE RESOLUTION

- 26.1. Should any dispute arise between the Parties in connection with the formation or existence, implementation, interpretation or application of the provisions, the Parties' respective rights and/or obligations in terms of or arising out of, the breach or termination, the validity, enforceability, rectification, termination or cancellation, whether in whole or in part, or any documents furnished by the Parties pursuant to the provisions of this Agreement, or which relate in any way to any matter affecting the interests of the Parties in terms of this Agreement, the Parties shall meet within thirty (30) calendar days of written notice of the dispute from one Party to the other (or such longer period as mutually agreed by the Parties in writing) to negotiate in good faith in an effort to settle such dispute.
- 26.2. Should the dispute remain unresolved as between the Parties within thirty calendar (30) days of a dispute being declared (or such longer period as may be mutually agreed between the Parties in writing), then the Parties undertake to meet promptly and consider whether to refer the dispute to arbitration. If the Parties agree to refer the dispute to arbitration, such dispute will be determined in accordance with the rules of the then current rules of the Law Society of Namibia or its successor and shall be held in Windhoek.
- 26.3. The decision of the arbitrator (including any award for costs of the arbitration) shall be final and binding on the parties, unless either Party appeals the decision within a period of thirty (30) calendar days from the date of the arbitrator's ruling and may be made an order of a court of competent jurisdiction at the instance of either of the Parties, subject to the Parties' rights of appeal in terms of clause 26.4 below.
- 26.4. Either Party may appeal the decision of the arbitrator within a period of thirty (30) calendar days after the ruling has been handed down by the arbitrator by giving written notice to that effect to the other Party, which notice shall be received before the expiration of the thirty (30) calendar day period of the written ruling.
- 26.5. Should the Parties fail to reach agreement in writing to refer the dispute to arbitration, as contemplated in section 26.2 above, then either Party shall be entitled to commence litigation proceedings against the other Party.
- 26.6. The Parties hereby consent to the non-exclusive jurisdiction of the High Court of Namibia having jurisdiction in respect of all legal proceedings connected with the Agreement.

- 26.7. The entire contents of clause 26 constitutes an irrevocable consent by the Parties to any proceedings in terms thereof and no Party shall be entitled to withdraw there from or to claim at any such proceedings that it is not bound by this clause.

- 26.8. This clause is severable from the rest of the Agreement and shall remain in effect even if the Agreement terminates for any reason.

## 27. SUSPENSION

The Service Provider may from time to time suspend the Services for a specific Service Schedule in any of the following circumstances:

- 27.1. If the Customer fails to comply and remains in breach of its obligations under the Agreement.
- 27.2. If the Customer is in breach of its payment obligations for thirty (30) calendar days as set out in clause 14, the Service Provider shall be entitled to suspend the Services after five (5) calendar days written notice was given to the Customer.
- 27.3. During the pre-arranged modification or maintenance window of the Service Provider's equipment, as more fully set out in the Service Level Agreement attached to each Service Schedule .
- 27.4. The suspension in terms of clauses 27.1 or 27.2 will remain in force until the breach is remedied.

## 28. FORCE MAJEURE

- 28.1. If the performance of a material part of the Agreement is suspended due to *force majeure* (any event which is beyond the reasonable control of that Party and which could not have reasonably been foreseen by that Party, e.g. an act of God, lock-out, strikes, government action, sabotage, civil unrest, war or events of like or similar nature), that Party shall notify the other party of the condition of *force majeure* and shall be excused from performance as long as the *force majeure* event prevails.
- 28.2. The Party first affected by *force majeure* shall do its utmost to reinstate the performance due in terms of the Agreement in the shortest possible time.
- 28.3. The Party not invoking Force Majeure shall be entitled to suspend or terminate the Agreement if the Force Majeure endures for a continuous period of more than 30 (thirty) calendar days.

## 29. DOCUMENTATION

- 29.1. Upon delivery of an item of goods to the Customer, the Service Provider shall deliver any associated Documentation to the Customer on paper or electronic media format as determined by the Service Provider, in conjunction with the Customer.
- 29.2. To the extent that any Documentation expressly permits the Customer to incorporate it (or extracts from it) into works prepared for Customer's business

operations, the Customer shall be entitled to do so provided that the Customer includes all copyright, trademark, and other notices of the manufacturer or owner in the same form as they appear on or in the Documentation.

### 30. SEVERABILITY

If any term, condition, provision or performance or any part of a term, condition, provision or performance of this Agreement is determined to be invalid, illegal, unlawful or unenforceable to any extent, that term, condition, provision or performance or the relevant part thereof shall be removed from the remaining terms, conditions, provisions and performance of this Agreement, or amended to make it valid, lawful and enforceable, in such a manner as to leave the amended Agreement substantially the same in essence, and the Agreement so amended shall remain of force and effect.

### 31. ASSIGNMENT

Notwithstanding clause 15.6, neither Party may cede its rights and/or delegate its obligations under the Agreement without the prior written consent of the other Party, provided that the Service Provider shall be entitled to cede its rights and/or delegate its obligations under the Agreement to any member in the Telkom Group without the consent of the Customer.

### 32. NO WAIVER

Failure by either Party to exercise any rights under the Agreement in any one or more instances will not constitute a waiver of such rights in any other instance. Waiver by such Party of any default under the Agreement will not be deemed a waiver of any other default. No alteration or modification of any provision of the Agreement will be deemed a waiver of any other default.

### 33. SUB-CONTRACTING

33.1. Customer agrees that the Service Provider may, at its sole discretion, subcontract the whole or any part of its obligations under the Agreement and the Service Provider agrees that it will retain full responsibility for such obligations despite such subcontract.

33.2. In the event that the Customer prescribes or recommend specific subcontractors that should be used by the Service Provider to provide Services and/or Goods or products to the Customer, the Customer indemnifies and holds the Service Provider and its respective officers, directors, staff, successors, and assigns (in whose favour this constitutes a stipulatio alteri / third party contracts), harmless from all and any direct or indirect losses or damages arising directly out of or in connection with any claim, demand, charge, action, cause of action or other proceeding (including product liability) arising out of such subcontractor's performance of Services and/or Goods or subcontractor's breach of or failure to observe or perform any of its duties or obligations in terms of the Agreement.

### 34. APPLICABLE LAW AND COMPLIANCE POLICIES

## AND DIRECTIVES

34.1. The terms and conditions of the Agreement shall be determined in accordance with the laws of the Republic of Namibia.

34.2. The Parties shall comply with all laws including (but not limited to) legislation, regulations, ordinances, rules of regulatory authorities and all other relevant enactments of any governmental authorities.

34.3. The Customer warrants that in awarding and extending this Agreement or an Order Form with the Service Provider it had authority and has complied with:

34.3.1. the relevant Customer's policies and directives;

34.3.2. any other applicable law relevant to the Customer and its clients, and hereby indemnify the Service Provider and its subsidiaries from any liability resulting from non-compliance with such process;

34.3.3. and where applicable, the Public Procurement Act 15 of 2015.

### 35. AMENDMENTS

No amendment, alteration, addition, variation or consensual cancellation of the Agreement or any Schedule will be of any force or effect unless reduced to writing and signed and executed by the Parties.

### 36. SIGNATURE AND COUNTERPARTS

Any legal document, including the Agreement, that requires signature of the Parties may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement. A counterpart of this Agreement in scanned form shall be conclusive evidence of the original signature and shall be as effective in law as the counterparts in original form showing the original signatures. For the purposes of this clause, "original signature" shall mean a signature executed by hand on paper containing the document or digital and/or electronic signature applied to the document by the signatory.

### 37. ENTIRE AGREEMENT

The Agreement constitutes the entire agreement between the Parties and supersedes any prior written or oral agreement or understanding with respect to the subject matter hereof. No interpretation, amendment, or change to the Agreement will be effective unless made in writing and signed by both Parties.

### 38. DOMICILIUM CITANDI ET EXECUTANDI

For the purpose of this Agreement the Parties they choose their respective *domicilium citandi et executandi* for all notices and processes at their recorded addresses in the Agreement.

- 38.1. Either Party shall be entitled from time to time, by written notice to the other, to vary its *domicilium* address.
- 38.2. All notices given in terms of the Agreement shall be in writing and any notice given by either Party to the other ("the addressee") which:
  - 38.2.1. is delivered by hand shall be deemed to have been received by the addressee on the date of delivery;  
or
  - 38.2.2. if send by e-mail shall be deemed to have been received by the addressee on the second (2<sup>nd</sup>) day after the date of such e-mail being send.
- 38.3. Notwithstanding anything to the contrary contained or implied in the Agreement, a written notice or communication actually received by one of the Parties from another shall be adequate written notice or communication to such Party.