

# **ECN**

electronic  
communications  
network

**ECN**

## **STANDARD TERMS AND CONDITIONS**

**(SERVICES)**

## TABLE OF CONTENTS

1	INTERPRETATION AND PRELIMINARY .....	3
2	DURATION .....	5
3	PROVISION OF THE SERVICES .....	5
4	CHARGES .....	6
5	PAYMENT .....	7
6	EQUIPMENT .....	7
7	UNAUTHORISED TRAFFIC .....	8
8	INSURANCE AND ADDITIONAL SERVICES .....	8
9	EARLY TERMINATION .....	8
10	SUSPENSION OF SERVICES OR INTERIM SERVICES .....	9
11	BREACH .....	9
12	DATA PROTECTION .....	10
13	VIS MAJOR .....	10
14	INTELECTUAL PROPERTY RIGHTS .....	11
15	CERTIFICATE .....	11
16	LIMITATION OF LIABILITY AND INDEMNITY .....	11
17	DISPUTE RESOLUTION, GOVERNING LAW .....	11
18	URGENT RELIEF .....	12
19	DOMICILIUM CITANDI ET EXECUTANDI .....	12
20	CESSION .....	12
21	WHOLE AGREEMENT, NO AMENDMENT .....	13
22	COSTS .....	13
23	DEPOSIT .....	13
24	DISCLAIMERS .....	13
25	OVERRIDING PROVISIONS .....	14
26	CONSUMER PROTECTION ACT ACKNOWLEDGEMENT .....	14
27	SIGNATURES .....	14

## 1 INTERPRETATION AND PRELIMINARY

1.1 The following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings, namely -

- 1.1.1 **“the/this Agreement”** means the agreement contained in this document together with the Subscriber Application Form and all schedules and addenda to this agreement from time to time;
- 1.1.2 **“Authority”** means the Independent Communications Authority of South Africa or its successor in title;
- 1.1.3 **“Call Charge”** means the charge for each call registered and recorded on the System as having emanated from the Equipment calculated at the cost per unit of time utilised by the Subscriber, as set out in the Subscriber Application Form, and includes, for the avoidance of doubt, charges for unauthorised or fraudulent calls from the Equipment;
- 1.1.4 **“Charges”** means Connection Charges, Monthly Access Charges, Call Charges and all other charges payable for the provision of the Services or Interim Services as set out in the Subscriber Application Form in respect of the Services or Interim Services subscribed for by the Subscriber;
- 1.1.5 **“Commencement Date”** means the date of activation of the Services;
- 1.1.6 **“Connection Charge”** means the charge payable by the Subscriber to ECN for connecting the Equipment to the System, or the charge for registering the Subscriber for use of the Services or Interim Services;
- 1.1.7 **“Deposit”** means the deposit payable by the Subscriber to ECN as set out in the Subscriber Application Form;
- 1.1.8 **“ECN”** means Electronic Communications Network (Pty) Ltd, registration number 2007/014694/07;
- 1.1.9 **“Equipment”** means electronic communications connections or any other facility or equipment that provides the Subscriber with access to the Services or Interim Services and includes the HPBX switch;
- 1.1.10 **“Initial Period”** means the initial period of the Services set out in the Subscriber Application Form or, in relation to any additional service, upgrade or relocation requested by the Subscriber after the Commencement Date, the Initial Period in respect thereof referred to in clause 2.3, provided that, unless otherwise specified in the Subscriber Application Form, the Initial Period is a period of 24 months calculated from the Commencement Date or the Deemed Commencement Date;
- 1.1.11 **“Interim Services”** means pending activation of the Services, the temporary provision of electronic communication services or electronic communication network services through a temporary solution as set out in the Subscriber Application Form;
- 1.1.12 **“Interim Services Commencement Date”** means the date of activation of the Interim Services;
- 1.1.13 **“Interim Services Period”** means the period from the Interim Services Commencement date until the Commencement Date;

- 1.1.14 **“Monthly Access Charge”** means the monthly charge payable by the Subscriber to ECN to provide the Subscriber with access to the Services or Interim Services;
- 1.1.15 **“Numbers”** means numbers assigned to ECN by the Authority from the national numbering range;
- 1.1.16 **“Parties”** means collectively ECN and the Subscriber, and Party shall mean either one of them as the context requires;
- 1.1.17 **“Payment Terms”** means either Pre-Paid or Post-Paid, as set out in the Subscriber Application Form;
- 1.1.18 **“Port or Porting”** means the transfer of the Subscriber’s telephone number to ECN or to another electronic communications service licensee or service provider;
- 1.1.19 **“Post-paid”** means payment is made in arrears;
- 1.1.20 **“Pre-paid”** means payment is made in advance;
- 1.1.21 **“RICA”** means the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002;
- 1.1.22 **“Services”** means the provision of electronic communication services or electronic communication network services as set out in the Subscriber Application Form by means of the final solution, together with such additional and ancillary services as may be made available by ECN to the Subscriber from time to time;
- 1.1.23 **“Signature Date”** means the date of signature of this Agreement by the Party signing last in time;
- 1.1.24 **“Subscriber”** means the subscriber whose particulars are set out in the Subscriber Application Form;
- 1.1.25 **“Subscriber Application Form”** means the Subscriber Application Form which forms part of this Agreement;
- 1.1.26 **“Subscriber Premises”** will mean the premises of the Subscriber where the Equipment must be installed where applicable; and
- 1.1.27 **“System”** means the electronic communications system operated by ECN through which the Services or Interim Services are made available by ECN to the Subscriber.
- 1.2 When any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday;
- 1.3 Expressions defined in this Agreement shall bear the same meanings in schedules, addenda or annexures to this Agreement which do not themselves contain their own definitions.
- 1.4 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.
- 1.5 The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting or preparation of this Agreement, shall not apply.
- 1.6 The headings of the clauses in this Agreement are for the purpose of convenience and reference only and shall not be used in the interpretation of, nor modify nor amplify the terms of this Agreement nor any clause hereof.
- 1.7 An expression which denotes:
- 1.7.1 any gender includes the other genders;

- 1.7.2 a natural person includes a juristic person and vice versa;
- 1.7.3 the singular includes the plural and vice versa;
- 1.7.4 a Party includes a reference to that Party's successors in title and assigns allowed at law.

## 2 DURATION

- 2.1 In the event that the Subscriber subscribes for Interim Services, this Agreement shall commence on the Signature Date, and, unless terminated in accordance with any other provision of this Agreement, shall endure:
  - 2.1.1 from the Interim Services Period until the Commencement Date; and
  - 2.1.2 after the Commencement Date this agreement shall endure for the Initial Period and thereafter indefinitely until terminated by either Party by giving the other Party 90 days' written notice of termination.
- 2.2 In the event that the Subscriber does not subscribe for Interim Services this Agreement shall commence on the Signature Date, and, unless terminated in accordance with any other provision of this Agreement, shall endure:
  - 2.2.1 from the Signature Date until the Commencement Date; and
  - 2.2.2 after the Commencement Date this agreement shall endure for the Initial Period and thereafter indefinitely until terminated by either Party by giving the other Party 90 days' written notice of termination.
- 2.3 Subject to any written notice by ECN to the contrary, each additional service, upgrade or relocation (if any) provisioned to the Subscriber after the Commencement Date shall be subject to the provisions of this Agreement, save that in respect of each such service, the Initial Period shall commence on the date of activation of such service (the "Deemed Commencement Date") and subject to any other lawful termination thereof, this Agreement shall remain binding on the Parties in respect of such service until terminated by either Party in terms of clause 2.1 or 2.2, after the expiry of the Initial Period as calculated from the Deemed Commencement Date.

## 3 PROVISION OF THE SERVICES OR INTERIM SERVICES

- 3.1 ECN undertakes to provide the Services or Interim Services to the Subscriber upon the terms and conditions set out in this Agreement. The Services or Interim Services may include the installation and activation of one or more service (as specified in the Subscriber Application Form or in any subsequent addenda, schedules or purchase orders) on behalf of the Subscriber and the connection of the Equipment to the System, and/or may include solely connection of the Equipment to the System.
- 3.2 The Subscriber shall be responsible for obtaining all necessary approvals and consents that may be necessary for provisioning of the Services or Interim Services at the Subscriber Premises.
- 3.3 **The Subscriber acknowledges and accepts that the availability and/or quality of the Services or Interim Services may be affected by factors including, but not limited to, the System, the Equipment and accessories used with the Equipment, atmospheric conditions, radio frequency disturbances and other factors beyond the control of ECN.**
- 3.4 **Whilst ECN will take all reasonable steps to ensure that the Services or Interim Services are provided in accordance with this Agreement, ECN cannot and does not guarantee or undertake that the provision of the Services or Interim Services will be provided at all times and accordingly, ECN will, to the fullest extent permissible in law, not be liable for any direct or indirect loss or damage of any nature whatsoever or howsoever arising that may be sustained by the Subscriber as a result of any faults or interruptions in the provision of the Services or Interim Services .**
- 3.5 The Services or Interim Services are to be provided on the basis that the Subscriber -

- 3.5.1 will use the Services or Interim Services in accordance with the terms and conditions of this Agreement;
  - 3.5.2 will use the Services or Interim Services in accordance with ECN's Acceptable Use Policies as may be applicable from time to time;
  - 3.5.3 will not utilise the Services or Interim Services, or allow others to do so, for any improper, immoral, or unlawful purpose;
  - 3.5.4 will only use the Equipment in accordance with the manufacturer's instructions and for the purposes and in the manner for which it is intended;
  - 3.5.5 will comply with all relevant legislation and regulations and all instructions issued by any governmental authority or by ECN regarding the use of the Services or Interim Services; and
  - 3.5.6 will not act or omit to act, or allow others to do so, in any way likely to damage, disrupt or interfere with the System or to injure or damage any person or property or to cause the quality of the Services or Interim Services to be impaired or interrupted in any manner whatsoever.
- 3.6 **The Subscriber agrees to defend, indemnify and hold ECN, its directors, employees, agents and other members of its group of companies, as that term is defined in the Companies Act 71 of 2008, (each an "indemnified Party") harmless from any use of the Services or Interim Services by the Subscriber, that is not in accordance with the terms and conditions of this Agreement.**
- 3.7 The Subscriber shall remain fully liable for payment of all Charges for Services or Interim Services to ECN incurred through the use of the Services or Interim Services regardless of whether such use is by the Subscriber or whether such use is with or without the authority, knowledge or consent of the Subscriber.
- 3.8 The Subscriber acknowledges that ECN will not be required to commence the provision of the Services or Interim Services until ECN is satisfied that the Subscriber has met the requirements set forth under RICA. The Subscriber agrees that it will provide ECN with the necessary documentation and information required by ECN to verify that the Subscriber has complied with RICA.

#### **4 CHARGES**

- 4.1 By its signature to the Subscriber Application Form, the Subscriber acknowledges that it is aware of and has agreed to be bound by all the terms of this Agreement and to effect payment of the Charges relating to the Services or Interim Services selected by the Subscriber in the Subscriber Application Form, which Charges shall be payable to ECN as follows –
- 4.1.1 if the Subscriber's Payment Terms are Post-paid:
    - 4.1.1.1 the Connection Charge, Monthly Access Charge and all other charges excluding Call Charges and usage based charges referred to in 4.1.1.2, shall be paid in advance within 14 days from the date of ECN's invoice;
    - 4.1.1.2 Call Charges and all other usage based charges shall be paid, within 14 days after the date of ECN's invoice in respect thereof.
  - 4.1.2 If the Subscriber's Payment Terms are Pre-paid, the Connection Charge, Monthly Access Charge, Call Charges and all other charges shall be paid in advance.
- 4.2 The timing, format and details of invoices shall be in the sole discretion of ECN.
- 4.3 All Charges, unless otherwise stated in the Schedule of Charges, are exclusive of value added tax, which shall be borne and paid for by the Subscriber together with the Charges in question.
- 4.4 The Monthly Access Charge is a charge for permitting the Subscriber continued access to the Services or Interim Services and the Subscriber will be liable for each and every Monthly Access Charge irrespective of the use made the Services or Interim Services.

- 4.5 Any call and/or connection registered and recorded on the System as having emanated from the Equipment shall, until the contrary is proved, be deemed to have been made by or by means of, the Equipment.
- 4.6 For the purpose of calculating Call Charges payable by the Subscriber, the duration of each call and/or connection as recorded and registered on the applicable metering system used by ECN shall be final and binding on the Subscriber.
- 4.7 ECN may at any time by written notice require the Subscriber to furnish such security as ECN may deem appropriate for the payment of the Charges, and any failure by the Subscriber to furnish such security to ECN within 14 days after the date of such notice shall constitute a material breach of this Agreement by the Subscriber.
- 4.8 ECN shall be entitled to adjust the Charges on an annual basis. The adjustment shall be in line with any change in the Consumer Price Index ("CPI for services") as published by Statistics South Africa in publication P0141 or its replacement from time to time.

## **5 PAYMENT**

- 5.1 All Charges shall be paid by means of direct debit order, free of exchange and bank charges. The Subscriber shall not for any reason whatsoever withhold payment of any Charges and the Subscriber accepts responsibility to ensure that the banking details provided to ECN are at all times current and correct.
- 5.2 Should any payment not be made on due date, ECN shall be entitled, without detracting from its other rights, to charge the Subscriber interest on such arrear payments from due date of such payments to date of actual payment thereof, at a rate equal to 4% above the annual prime bank overdraft rate charged by Nedbank Limited, from time to time.
- 5.3 All payments made by the Subscriber shall be appropriated firstly towards the payment of legal costs incurred in the recovery thereof, thereafter towards the payment of interest accruing thereon and lastly in reduction of the capital sum due.
- 5.4 ECN will submit statements to the Subscriber monthly. The Subscriber accepts responsibility to ensure that the statement is received and checked.

## **6 EQUIPMENT**

- 6.1 Ownership in the Equipment will remain vested in ECN.
- 6.2 **All risk in and to the Equipment shall pass to the Subscriber upon delivery thereof to the Subscriber and the Subscriber shall take reasonable steps to avoid damage to Equipment and the Subscriber Premises where the Equipment is installed.**
- 6.3 The Equipment provided to the Subscriber, including the software incorporated in the Equipment and all intellectual property rights in and to the Equipment, will not become the property of the Subscriber and the Equipment will be returned to ECN on termination of this Agreement for any reason whatsoever, unless the Subscriber has purchased the Equipment from ECN.
- 6.4 The Subscriber will not be entitled to give up possession of the Equipment, in whole or in part to any third party and will not be entitled to remove and re-install the Equipment at a different location.
- 6.5 The Subscriber shall notify ECN immediately in the event of the Equipment being stolen or damaged.
- 6.6 ECN will instruct contractors to install the Equipment at the Subscriber's premises and further instruct contractors to maintain the Equipment for the duration of this Agreement. ECN's representatives, employees, agents and contractors may at all reasonable times, without giving rise to any claim or right of action on the part of the Subscriber, enter the Subscriber's premises to inspect the Equipment, carry out necessary repairs, replacement of Equipment, or to perform any other lawful function in the bona fide interest of ECN in respect of the Equipment.

- 6.7 The Subscriber acknowledges and agrees that the Equipment is movable property and that it will not be installed with the intention that it remains or accedes to whatever housing it may be installed with or to.
- 6.8 The Subscriber may not make any alteration or modification to the Equipment.
- 6.9 The Subscriber must ensure that all electronic equipment that is not provided by ECN and that is installed at the Subscriber Premises has been type approved by the Authority (to the extent necessary).
- 6.10 The Subscriber must ensure that any equipment installed at the Subscriber Premises, which has not been leased, purchased from and/or installed by ECN, does not interfere with or degrade the System.
- 6.11 The Subscriber will advise the landlord of the Subscriber's premises that ownership of the Equipment vests in ECN. The Subscriber will advise ECN of the full name and address of its landlord.

## **7 UNAUTHORISED TRAFFIC**

- 7.1 **The Subscriber is responsible for the security of its network and the Equipment and for taking the necessary steps to prevent unauthorized or fraudulent use of the Services or Interim Services perpetrated using the Subscriber's equipment and network or the Equipment including, but not limited to, keeping all username and passwords used to access the System secret.**
- 7.2 **ECN will use its best commercial endeavours to monitor traffic and will suspend the Services or Interim Services if it appears, in the reasonable opinion of ECN, that the Services or Interim Services are being used improperly.**
- 7.3 **Notwithstanding the provisions of clause 7.2, ECN disclaims all liability and the Subscriber indemnifies ECN against all liability for unauthorised or fraudulent use of the Services or Interim Services that takes place outside of the System.**

## **8 INSURANCE**

- 8.1 **The Subscriber shall at its own costs comprehensively insure all Equipment installed at the Subscriber Premises against all insurable risks (and at all times maintain such insurance policies).**
- 8.2 **Should the Subscriber on request from ECN fail to provide proof of such insurance and payment of the premiums thereof, ECN shall be entitled to effect the insurance and recover all premiums from the Subscriber.**

## **9 EARLY TERMINATION**

- 9.1 Without prejudice to any rights that ECN may have in terms of this Agreement, in the event that the Subscriber terminates this Agreement for any reason, other than the reasons for termination contemplated in clauses 2.1 and 10.2, or breach by ECN, the Subscriber shall pay to ECN any arrear Call Charges, Monthly Access Charges and other charges that may be in arrears at that time. In addition the Subscriber shall be liable for and shall pay the Monthly Access Charges applicable for the remainder of the Initial Period if the Agreement is terminated by the Subscriber during the Initial Period. Such Monthly Access Charges shall be paid to ECN on demand.
- 9.2 Should the Subscriber terminate this Agreement after the Signature date, but before the Commencement Date, the Subscriber shall be liable for the payment of the Monthly Access Charges for the Initial Period and the Connection Charge, the Monthly Access Charges and Call Charges for the Interim Services Period (if applicable).



## **10 SUSPENSION OF SERVICES OR INTERIM SERVICES**

- 10.1 **ECN may at any time suspend the Services or Interim Services, in whole or in part and without incurring any liability whatsoever -**
- 10.1.1 **should ECN be unable to provide the Services or Interim Services, in whole or in part, whether due to vis major or otherwise through no fault of its own; or**
  - 10.1.2 **should ECN suspect that the Services or Interim Services are being used improperly under circumstances as detailed in clause 7.2; or**
  - 10.1.3 **should an agreement in terms of which ECN derives its rights to provide the Services or Interim Services, be suspended, cancelled or terminated; or**
  - 10.1.4 **should such suspension of the Services or Interim Services be necessary in order to facilitate any repairs, modification, maintenance, improvements or remedial works in respect of the System; or**
  - 10.1.5 **should the Subscriber fail to comply with any term of this Agreement;**
- 10.2 Should the Services or Interim Services be suspended pursuant to 10.1.1, 10.1.3 or 10.1.4, ECN shall use its reasonable endeavours to provide an alternative service to the Subscriber, whether through another electronic communications network operator or service provider or otherwise, all in ECN's discretion. Should ECN fail to provide an alternative service within 14 days after the commencement of the suspension, either Party shall be entitled by written notice to the other, to terminate this Agreement with immediate effect. In such event, the Subscriber shall remain liable for all Charges accrued up to date of such termination, which Charges shall be payable on demand.
- 10.3 Should the Services or Interim Services be suspended by reason of default of the Subscriber, the Subscriber shall be liable to ECN:
- 10.3.1 for its then applicable Connection Charges, payable on cessation of the suspension; and
  - 10.3.2 for the duration of the suspension, all Call Charges, Monthly Access Charges and any other charges which would have been payable to ECN, notwithstanding the suspension of the Services or Interim Services.

## **11 BREACH**

- 11.1 Should the Subscriber breach any term of this Agreement and fail to remedy such breach notwithstanding 10 (ten) days' notice of breach, or should the Subscriber be provisionally or finally liquidated or declared insolvent or die, or attempt to compromise with any of its creditors, or allow any judgement against it to remain unsatisfied for a period of 14 (fourteen) days after the date of such judgement, ECN shall be entitled, but not obliged, and without detracting from any other rights that it may have in law or in terms of this Agreement to -
- 11.1.1 terminate this Agreement with or without claiming any damages it may have suffered; or
  - 11.1.2 terminate this Agreement and recover from the Subscriber as liquidated damages, the aggregate of the Monthly Access Charges for the unexpired portion (if any) of the Initial Period plus all amounts payable under any Agreement between ECN and a third party provider in order to offer the Services or Interim Services in terms of this Agreement; or
  - 11.1.3 without terminating this Agreement, claim immediate payment of all Call Charges, Connection Charges, Monthly Access Charges and any other charges which are due and/or which would have fallen due for the remainder of the Initial Period in terms of this agreement, all of which shall be immediately due and payable. ECN will, pending payment of these amounts be entitled to suspend the Services or Interim Services, in whole or in part to the Subscriber and without notice be possessed of the Equipment and to retain possession thereof until all amounts due to ECN has been paid in full; or
  - 11.1.4 claim specific performance with our without claiming damages.

**11.2 In the event of termination of this Agreement for any reason whatsoever ECN shall be entitled to disconnect and retake possession of the Equipment.**

## **12 DATA PROTECTION**

12.1 In performing its obligations under this Agreement, ECN shall: -

- 12.1.1 Comply with the provisions of prevailing privacy and data protection legislation governing the collection, use and processing of personal information as defined in the relevant legislation (hereinafter "Personal Information");
- 12.1.2 Not process Personal Information for any purpose other than to perform its obligations under this Agreement;
- 12.1.3 Only act on the instructions of the Subscriber in collecting, processing and utilising the Personal Information (and for avoidance of doubt, this Agreement shall constitute such instructions);
- 12.1.4 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 on a need to know basis, in order for ECN 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;
- 12.1.5 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;
- 12.1.6 Immediately notify the Subscriber in case of possible infringement of the applicable data protection legislation, the terms of this clause or other irregularities by ECN, its staff or any other party acting on behalf of ECN in relation to the Subscriber's Personal Information; and
- 12.1.7 At the Subscriber'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.

## **13 VIS MAJOR**

- 13.1 Failure by a Party to comply with any of the terms and conditions of the Agreement if occasioned by or resulting from an act of nature or public enemy, lightning, fire, explosion, earthquake, perils of the sea, flood, storm or other adverse weather conditions, war declared or undeclared, civil war, revolution, civil commotion, riot, strikes, blockade, embargo, sanctions, epidemics, act of any government or other authority, compliance with government orders, demands or regulations, as well as shortages, interruptions, fluctuations or the unavailability of electrical power, water supply or means of communication or any circumstances of like or different nature beyond the reasonable control of the Party so failing ("vis major"), will not be deemed to be a breach of this Agreement, nor will it subject either Party to any liability to the other.
- 13.2 Should a Party's performance of an obligation become temporarily impossible owing to vis major, that Party shall:
- 13.2.1 as soon as reasonably possible after the vis major sets in notify the other Party in writing of the incidence of vis major;
  - 13.2.2 be released from performance or observance of the affected obligation for so long as the vis major prevails;
  - 13.2.3 use commercially reasonable efforts to recommence performance or observance of the affected obligation to the extent possible; and

- 13.2.4 co-operate with the other Party in implementing such contingency measures as the other Party may reasonably require.
- 13.3 Should the circumstances of vis major continue for longer than 30 (thirty) days, either Party shall be entitled to terminate the Agreement forthwith by written notice to the other Party.

## **14 INTELLECTUAL PROPERTY RIGHTS**

Nothing contained in this Agreement shall be construed to confer on either Party any rights or licenses to the intellectual property of the other Party.

## **15 CERTIFICATE**

A certificate signed by any manager of ECN (whose appointment and authority it shall not be necessary to prove) as to the existence of any facts and, in particular, without limiting the generality of the foregoing, as to the amount of any indebtedness of the Subscriber to ECN in terms of and pursuant to this Agreement, shall constitute prima facie proof of such facts for any purpose and, more particularly, for the purposes of obtaining provisional sentence, default judgment or summary judgment or their equivalent in any court of competent jurisdiction.

## **16 LIMITATION OF LIABILITY AND INDEMNITY**

- 16.1 **ECN, its directors, employees and sub-contractors shall not be liable whether in contract, delict or under any other cause of action for:**
- 16.1.1 **loss of profit, loss of use, interruption or reduction of operation, loss of data (including the recovery thereof), loss of production, loss of contracts or for any indirect or consequential damage;**
  - 16.1.2 **death, injury, or damage to property unless caused by ECN's gross negligence;**
  - 16.1.3 **any damage arising out of the infringement of any intellectual property rights;**
- arising out of or in connection with this Agreement.**
- 16.2 **ECN's liability for any act or omission, whether in contract, delict or under any other cause of action, will in no single event or in aggregate exceed a maximum amount of R500 000-00 (five hundred thousand Rand).**
- 16.3 **ECN may, without the consent of the Subscriber, disclose any information of the Subscriber to any third party as it may be required to do in terms of any legislation.**

## **17 DISPUTE RESOLUTION, GOVERNING LAW**

- 17.1 Subject to ECN's right in each instance to elect to institute action for payment of the prices and any other amounts due under the Agreement in any court of competent jurisdiction, in the event of any disagreement or claim ("dispute") arising out of or relating to this Agreement, the senior executives of the Parties or their delegates designated in writing shall endeavour to settle the dispute through bona fide negotiations within 14 (fourteen) days of the dispute being referred to them by written notice from either Party.
- 17.2 Should the Parties be unable to settle the dispute by the means and within the timeframe stated above, either Party may refer the dispute for final decision by arbitration in accordance with the rules for commercial arbitrations ("rules") of the Arbitration Foundation of Southern Africa ("AFSA"), by one or more arbitrator/s appointed in accordance with the rules.
- 17.3 Unless otherwise agreed in writing the arbitration shall be held in Sandton in the Republic of South Africa and conducted in the English language. Only the Parties and their legal representatives or persons agreed to shall attend the arbitration proceedings.
- 17.4 The decision of the arbitrator/s may be made an order of court.

17.5 This Agreement shall in all respects be governed by the law of South Africa, without regard to its conflict of law provisions. The application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) of April 11, 1980 shall be excluded.

17.6 This clause 17 is severable from the rest of the Agreement and shall survive the expiry or termination for whatsoever reason of the Agreement.

## **18 URGENT RELIEF**

The provisions of clause 17 shall not preclude any party from access to a competent court of law for relief in the form of:

18.1 an interdict, including a mandatory interdict; or

18.2 an order for specific performance.

## **19 DOMICILIUM CITANDI ET EXECUTANDI**

19.1 The Parties choose as their domicilia citandi et executandi for all purposes of this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the following addresses:

19.1.1 ECN

42 James Crescent

Halfway House, Midrand, 1685

19.1.2 the Subscriber: at its physical address set out in the Subscriber Application Form;

19.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing and delivered by hand to a Party's chosen domicilium citandi et executandi.

19.3 Either Party may by notice to any other Party change the physical address chosen as its domicilium citandi et executandi vis-à-vis that Party to another physical address provided that the change shall become effective vis-à-vis that addressee on the 10th business day after receipt of the notice by the addressee.

19.4 Any notice to a Party delivered by hand to a responsible person during ordinary business hours at the physical address chosen as its domicilium citandi et executandi shall be deemed to have been received on the day of delivery.

19.5 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a Party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

## **20 CESSION**

20.1 ECN shall, without notice thereof, be entitled to cede, assign and delegate all or any of its rights and obligations in terms of this Agreement to a third party.

20.2 The Subscriber shall not be entitled to cede, assign or delegate any of its rights or obligations in terms of this Agreement without the prior written consent of ECN.

20.3 ECN shall be entitled, without prejudice to any of its other rights, to terminate this Agreement on 7 days written notice to the Subscriber in the event that the Subscriber shall purport to cede, assign or delegate any of its rights or obligations in terms of this Agreement without the prior written consent of ECN.

## **21 WHOLE AGREEMENT, NO AMENDMENT**

- 21.1 No extension of time or waiver or relaxation of any of the provisions or terms of this Agreement or any agreement, bill of exchange or other document issued or executed pursuant to or in terms of this Agreement, shall operate as an estoppel against any Party in respect of its rights in this Agreement, nor shall it operate so as to preclude such Party thereafter from exercising its rights strictly in accordance with this Agreement.
- 21.2 To the extent permissible by law no Party shall be bound by any term, representation, warranty, promise or the like not recorded herein, whether or not it induced the contract.
- 21.3 This Agreement together with all addenda and schedules signed by the Parties constitutes the entire agreement between the Parties.
- 21.4 Save as may be otherwise expressly provided in this Agreement, no alteration, variation or consensual cancellation of this Agreement and no addition to this Agreement shall be of any force or effect unless reduced to writing and signed by the Parties or their duly authorised representatives.
- 21.5 No failure, delay, relaxation or indulgence on the part of ECN in exercising any power or right conferred upon it in terms of this Agreement shall operate as a waiver of such power or right, nor shall any such failure, delay, relaxation or indulgence be deemed to be a novation of any of the terms and conditions of this Agreement. The acceptance by ECN of any payment by the Subscriber after the termination of this Agreement shall not be deemed to be a waiver of ECN's rights or be deemed to constitute a novation of this Agreement.

## **22 COSTS**

The Subscriber shall on demand pay all expenses incurred by ECN either on behalf of the Subscriber or as a result of the Subscriber's failure to comply with any provision of this Agreement, including tracing costs and all legal costs calculated on the scale as between attorney and client.

## **23 DEPOSIT**

- 23.1 The Subscriber undertakes that it shall, on the Signature Date, pay to ECN the Deposit as set out in the Subscriber Application Form.
- 23.2 ECN shall be entitled, in its sole and absolute discretion to determine the amount of the Deposit required by it.
- 23.3 The Deposit paid by the Subscriber shall be retained by ECN until the termination of this Agreement, free of any interest to the Subscriber and as security for the payment by the Subscriber of all amounts for which the Subscriber shall be liable to pay to ECN in terms of this Agreement.
- 23.4 ECN shall have the right to appropriate all or part of the Deposit, upon termination of this Agreement, towards payment of any amount then owing to it in terms of this Agreement.
- 23.5 Subject to the provisions of 23.3 and 23.4, ECN will repay such Deposit to the Subscriber, or the balance thereof if any, within 14 days after the termination of this Agreement.

## **24 DISCLAIMERS**

- 24.1 **The Subscriber specifically accepts and acknowledges that ECN acts merely as a distributor of any data and the Subscriber accepts all liability, arising from any claims, inter alia claims relating to:**
- 24.1.1 **any intellectual property infringement contained in the information including copyright infringement (whether digital or otherwise), trade mark infringement, infringement of trade secrets and/or databases;**
- 24.1.2 **the distribution of any defamatory, discriminatory or obscene material, whether unacceptable or illegal; the distribution of any sexually explicit messages, images, cartoons or jokes, whether unacceptable or illegal; the distribution of**

**offensive, disruptive, harmful or insulting material; the distribution of computer viruses; the distribution and/or disclosure of private information; and the Subscriber's breach of contract to a third party; or**

24.1.3 **non-compliance with any legislation and/or regulations, including but not limited to, regulations issued by the South African Revenue Services from time to time.**

## 25 OVERRIDING PROVISIONS

Unless otherwise specifically stipulated in writing to the contrary, the terms and conditions herein contained shall supersede and prevail over any terms and conditions contained in any other document(s) signed or submitted by the Subscriber.

## 26 CONSUMER PROTECTION ACT ACKNOWLEDGEMENT

In the event that the Subscriber is a consumer as defined in the Consumer Protection Act 68 of 2008, ("the CPA") the Subscriber's attention is in terms of section 49 of the CPA, drawn to all provisions in this Agreement printed in **BOLD**.

<b>Subscriber Initials</b>	
----------------------------	--

## 27 SIGNATURES

Signed by the duly authorised signatories of the Parties, each signatory warranting his/her authority hereto.

For: <b>The Subscriber</b>		For: <b>ECN</b>	
(signature)	(signature)	(signature)	(signature)
(name)	(name)	(name)	(name)
(date and place)		(date and place)	
(witness)		(witness)	