

# ECN

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electronic  
communications  
network  
a **Reuert** company

**ECN**

## **SERVICES TERMS AND CONDITIONS**

**(ADDITIONAL SERVICES - SERVICE PROVIDERS AND WHOLESALERS)**

## 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 concluded between the Parties consisting of the Subscriber Application Form and the terms and conditions contained in this document, as the same may be amended from time to time;
- 1.1.2 **“Call Charge”** means the charge for each call registered and recorded on the System, as having emanated from the Equipment and/or Subscriber Equipment, as set out in the Subscriber Application Form and varied from time to time, as well as the applicable international origination rate in respect of international calls. Call Charges are calculated per unit of time. For the avoidance of doubt, Call Charge includes charges for unauthorised or fraudulent calls from the Equipment and/or Subscriber Equipment;
- 1.1.3 **“Charges”** means Connection Charges, Monthly Access Charges, Call Charges and all other charges payable for the provision of the Services or Interim Services in respect of the Services or Interim Services subscribed for by the Subscriber;
- 1.1.4 **“Commencement Date”** means the date of activation of the Services;
- 1.1.5 **“Connection Charge”** means the charge payable by the Subscriber to ECN for training, connecting the Equipment and/or Subscriber Equipment to the System, or the charge for registering the Subscriber and/or End-User for use of the Services or Interim Services;
- 1.1.6 **“Corrupt Act”** means any offence in respect of corruption or corrupt activities contemplated in the Prevention and Combatting of Corrupt Activities Act, 2004 of South Africa;
- 1.1.7 **“ECN”** means Electronic Communications Network (Pty) Ltd, registration number 2006/023090/07;
- 1.1.8 **“End-User”** means the end-user of the Services or Interim Services, as set out in the Subscriber Application Form. For the avoidance of any doubt, if no end-user is specified in the Subscriber Application Form, the Subscriber shall be deemed the end-user of the Services or Interim Services;
- 1.1.9 **“End-User Premises”** means the premises of the End-User as specified in the Subscriber Application Form;
- 1.1.10 **“Equipment”** means the ECN supplied electronic communications connections or any other facility or equipment that provides the Subscriber and/or End-User with access to the Services or Interim Services. For the avoidance of any doubt, Equipment excludes Subscriber Equipment;
- 1.1.11 **“ICASA”** means the Independent Communications Authority of South Africa or its successor in title;
- 1.1.12 **“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;
- 1.1.13 **“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;
- 1.1.14 **“Interim Services Commencement Date”** means the date of activation of the Interim Services;
- 1.1.15 **“Interim Services Period”** means the period from the Interim Services Commencement date until the Commencement Date;
- 1.1.16 **“Monthly Access Charge”** means the monthly charge payable by the Subscriber to ECN to provide the Subscriber and/or End-User with access to the Services or Interim Services;
- 1.1.17 **“Numbers”** means numbers assigned to ECN by ICASA from the national numbering range;
- 1.1.18 **“Numbering Plan Regulations”** means the Numbering Plan Regulations in terms of section 68 of the Electronic Communications Act of 2005;
- 1.1.19 **“Operator”** has the meaning ascribed to it in POPIA;
- 1.1.20 **“Parties”** means collectively ECN and the Subscriber, and Party shall mean either one of them as the context requires;
- 1.1.21 **“Payment Method”** means either electronic funds transfer (“EFT”) or debit order, as set out in the Subscriber Application Form, into such account as nominated by ECN in writing, from time to time;
- 1.1.22 **“Payment Terms”** means either Pre-Paid or Post-Paid, as set out in the Subscriber Application Form;
- 1.1.23 **“POPIA”** means the Protection of Personal Information Act No.4 of 2013;
- 1.1.24 **“Post-paid”** means payment is made in arrears;
- 1.1.25 **“Premises”** means the premises of the Subscriber and/or End-User where the Equipment must be installed (where applicable), as set out in the Subscriber Application Form;
- 1.1.26 **“Pre-paid”** means payment is made in advance;
- 1.1.27 **“Port or Porting”** means the transfer of a telephone number, (made available to the Subscriber for the beneficial use of the Subscriber and/or End-User), to ECN or to any other registered service provider;
- 1.1.28 **“Responsible Party”** has the meaning ascribed to it in POPIA;
- 1.1.29 **“RICA”** means the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002;
- 1.1.30 **“Services”** means the provision of electronic communication services or electronic communication network services as set out in the Subscriber Application Form, together with such additional and ancillary services as may be made available by ECN to the Subscriber for the benefit of the End-User from time to time;
- 1.1.31 **“Signature Date”** means the date of signature of the Subscriber Application Form by the Subscriber ;
- 1.1.32 **“Subscriber”** means the ECN authorised service provider, wholesaler or reseller whose particulars are set out in the Subscriber Application Form;

- 1.1.33 **“Subscriber Application Form”** means the subscriber application form submitted by the Subscriber to ECN, which by reference incorporates the terms and conditions contained herein;
  - 1.1.34 **“Subscriber Equipment”** means any device, electronic communications connections or any other facility or equipment supplied by the Subscriber and/or End-User and used by the Subscriber and/or End-User to access, use or receive the Services or Interim Services;
  - 1.1.35 **“Suppliers”** means any other network operators, or facilities providers, including but not limited to fixed line operators, cellular operators, wireless operators, facilities lessors, or any other provider of electronic communication services, infrastructure, or electronic communication network services used by ECN in the provisioning of the Services; and
  - 1.1.36 **“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 for 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. In respect of each such service, the Initial Period shall commence on the date of activation of such service (the "Deemed Commencement Date"). This Agreement shall remain binding on the Parties in respect of such additional 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.
- 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 End-User 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, the Subscriber Equipment and accessories used with the Equipment, atmospheric conditions, radio frequency disturbances, Supplier facilities and networks 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 or End-user as a result of any faults or interruptions in the provision of the Services or Interim Services. 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, harmless from any claims from the End-User or any other third party, as a result of the Services, or Interim Services, or 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 and/or End-User-
  - 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 and fair 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 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 Supplier network, 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 ECN shall have the right to remove any content hosted by the Subscriber on the ECN Network, in the event that ECN considers such content illegal, or in respect of which ECN was served with a takedown notice.

- 3.7 **The Subscriber agrees to defend, indemnify and hold ECN, its directors, employees, agents and other members of its group of companies, harmless from any use of the Services or Interim Services by the Subscriber or End-User, that is not in accordance with the terms and conditions of this Agreement.**
- 3.8 **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 End-User, or whether such use is with or without the authority, knowledge or consent of the Subscriber.**
- 3.9 The Subscriber warrants that that it shall at all times strictly comply with RICA, . ECN will not commence the provision of the Services or Interim Services until ECN is satisfied that the Subscriber have 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 RICA compliance.

#### **4 CHARGES AND PAYMENT**

- 4.1 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 If the Subscriber's Payment Terms are Post-paid:
- 4.2.1 the Connection Charge, Monthly Access Charge and all other charges excluding Call Charges and usage based charges referred to in 4.2.2, shall be paid in advance within 14 days from the date of ECN's invoice;
- 4.2.2 Call Charges and all other usage based charges shall be paid, within 14 days after the date of ECN's invoice in respect thereof.
- 4.3 Failure by the Subscriber to pay ECN's Charges within the time period as set out in in this clause 4 shall constitute a material breach.
- 4.4 Charges shall be paid in accordance with the Payment Method.
- 4.5 ECN shall have the right to vary the Payment Terms, from time to time and communicate the amended Payment Terms to the Subscriber.
- 4.6 All Charges, unless otherwise stated, are exclusive of value added tax, which shall be borne and paid for by the Subscriber together with the Charges in question.
- 4.7 The Subscriber shall be liable for Monthly Access Charges irrespective of the use made of the Equipment or the Services or Interim Services.
- 4.8 ECN shall from time to be entitled to adjust the Charges on 30 days written notice to the Subscriber. The adjustment shall be based upon:
- 4.8.1 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; and/or
- 4.8.2 any increase in ECN's direct costs of rendering the Services, including, but not limited to any increase in the rates, fees, charges and related costs of Suppliers.
- 4.9 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, until the contrary is proved.
- 4.10 ECN will submit statements to the Subscriber monthly. The statement reflects all transactions until date thereof. The Subscriber accepts responsibility to ensure that the statement is received and checked.
- 4.11 **ECN reserves the right to include and activate destination and Charges limits in respect of calls made by the Subscriber and/or End-User. ECN will make reasonable endeavours to notify the Subscriber of such limits and may review such limits from time to time.**
- 4.12 ECN shall be entitled, without detracting from its other rights, to charge the Subscriber interest on any 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 Standard Bank, from time to time.

- 4.13 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 NUMBERS**

Save as otherwise provided by legislation to the contrary, telephone numbers, codes and other identification numbers allocated by ECN to the Subscriber for the benefit of the Subscriber or End-User shall not become the property of the Subscriber or End-User and the use thereof shall be subject to regulation 6 of the Numbering Plan Regulations

## **6 EQUIPMENT**

- 6.1 **Ownership of the Equipment will remain vested in ECN.**
- 6.2 **The Subscriber hereby indemnifies ECN and holds it harmless against any claim by the End-User or any third party relating to the use of the Equipment and/or the connection thereof to the System.**
- 6.3 **The Equipment shall be delivered at such address as may be mutually agreed between the Parties, in writing. All risk in and to the Equipment shall pass to the Subscriber upon delivery thereof at the mutually agreed address.**
- 6.4 The Equipment will be returned to ECN on termination of this Agreement for any reason whatsoever.
- 6.5 The Subscriber and/or End-User 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.
- 6.6 The Subscriber shall notify ECN immediately in the event of the Equipment being stolen or damaged.
- 6.7 The Subscriber shall ensure that 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 and/or End-User, enter the Subscriber's and/or End-User's premises to inspect the Equipment, or to perform any other lawful function in the bona fide interest of ECN in respect of the Equipment.
- 6.8 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.
- 6.9 The Subscriber and/or End-User may not make any alteration or modification to the Equipment.
- 6.10 The Subscriber must ensure that any Subscriber Equipment used does not interfere with or degrade the operation of the System, Supplier network, or any component thereof.

## **7 UNAUTHORISED TRAFFIC**

- 7.1 **The Subscriber and/or End-User is responsible for the security of its network and equipment, as well as the Equipment and the Subscriber Equipment and for taking the necessary steps to prevent unauthorized or fraudulent use of the Services or Interim Services perpetrated using the Subscriber or End-user Equipment and network, or the Equipment including, but not limited to, keeping all username and passwords used to access the System secret.**
- 7.2 **The Subscriber shall inform the End-User that the Subscriber is ultimately responsible for the security of its own network and equipment, as well as the Equipment and the Subscriber Premises Equipment.**

- 7.3 **The Subscriber shall therefore ensure that the End-User is informed of the necessity to take steps to secure its network and equipment, as well as the Equipment and the Subscriber Equipment, to prevent unauthorised or fraudulent use of the Services (including, but not limited to, keeping all username and passwords used to access the System secret) and to assist the End-User to the extent necessary to secure its network and equipment, as well as the Equipment and Subscriber Equipment against unauthorised or fraudulent use.**
- 7.4 **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 EARLY TERMINATION**

- 8.1 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 9.2, 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.
- 8.2 Should the Subscriber terminate this Agreement after the Signature Date, but before the Commencement Date, the Subscriber shall be liable for the payment of any fees, costs, penalties and charges levied by any Supplier resulting from such early termination as well as 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).

## **9 SUSPENSION OF SERVICES OR INTERIM SERVICES**

- 9.1 **ECN may at any time on such notice as may be reasonable in the circumstances, suspend the Services or Interim Services, in whole or in part to the Subscriber and without incurring any liability whatsoever -**
- 9.1.1 **should ECN be unable to provide the Services or Interim Services, in whole or in part, whether due to force majeure or otherwise through no fault of its own; or**
  - 9.1.2 **should ECN suspect that the Services or Interim Services are being used improperly under circumstances as detailed in clause 7; or**
  - 9.1.3 **should an agreement in terms of which ECN derives its rights to provide the Services or Interim Services, be suspended, cancelled or terminated; or**
  - 9.1.4 **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**
  - 9.1.5 **should the Subscriber not comply with ECN's acceptable or fair use policies; or**
  - 9.1.6 **should the Subscriber and/or End-User fail to comply with any term of this Agreement;**
- 9.2 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.
- 9.3 Should the Services or Interim Services be suspended by reason of default of the Subscriber, the Subscriber shall be liable to ECN:



- 9.3.1 for its then applicable Connection Charges, payable on cessation of the suspension; and
- 9.3.2 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.

## **10 BREACH**

- 10.1 Should the Subscriber breach any term of this Agreement and fail to remedy such 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 placed in business rescue, or allow any judgement against it to remain unsatisfied for a period of 10 (ten) 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 -
  - 10.1.1 terminate this Agreement with or without claiming any damages it may have suffered; or
  - 10.1.2 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
  - 10.1.3 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 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
  - 10.1.4 claim specific performance with our without claiming damages.
- 10.2 Notwithstanding the provisions of clause 10.1, ECN shall have the right to terminate this agreement with immediate effect for material breach, without prejudice to its right to claim damages.
- 10.3 In the event of termination of this Agreement for any reason whatsoever ECN shall be entitled to disconnect and retake possession of the Equipment.

## **11 DATA PROTECTION**

- 11.1 In performing its obligations under this Agreement, Each Party shall comply with the provisions of POPIA and any applicable data protection legislation.
- 11.2 To the extent that a Party acts as an Operator as defined in terms of POPIA, the Operator shall:
  - 11.2.1 ensure that Personal Information is collected, used, and processed strictly in accordance with the provisions of POPIA;
  - 11.2.2 not process Personal Information for any purpose other than to perform its obligations under this Agreement;
  - 11.2.3 only act on the instructions of the Responsible Party in collecting, processing, and utilising the Personal Information;
  - 11.2.4 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 the Operator 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;

- 11.2.5 in compliance with section 19 of POPIA, 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;
- 11.2.6 immediately notify the Responsible Party in case of possible infringement of POPIA, or any applicable data protection legislation, the terms of this clause or other irregularities in relation to Personal Information; and
- 11.2.7 at the Responsible 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.

## **12 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.

## **13 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.

## **14 FORCE MAJEURE**

- 14.1 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, pandemics 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 ("force majeure"), will not be deemed to be a breach of this Agreement, nor will it subject either Party to any liability to the other. For the avoidance of doubt the inability to make payment shall not constitute an event of force majeure.
- 14.2 Should a Party's performance of an obligation become temporarily impossible owing to force majeure, that Party shall:
  - 14.2.1 as soon as reasonably possible after the force majeure sets in notify the other Party in writing of the incidence of force majeure;
  - 14.2.2 be released from performance or observance of the affected obligation for so long as the force majeure prevails;
  - 14.2.3 use commercially reasonable efforts to recommence performance or observance of the affected obligation to the extent possible; and
  - 14.2.4 co-operate with the other Party in implementing such contingency measures as the other Party may reasonably require.
- 14.3 Should the circumstances of force majeure continue for longer than 30 (thirty) days, either Party shall be entitled to terminate the Agreement forthwith by written notice to the other Party.

## **15 LIMITATION OF LIABILITY AND INDEMNITY**

- 15.1 **Neither Party shall be liable to the other for any 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 that may be suffered by the other even if advised of the possibility of such damages and regardless of the form in which any action is brought.**
- 15.2 **Neither Party's aggregate liability to the other for any claim or claims for damages, out of or in connection with any cause arising from this Agreement, whether in contract or delict or any other cause of action, will in any event exceed 100% (one hundred percent) of the value of the Charges paid or payable in respect of the specific Subscriber Application Form where the cause of action arose, during the 12 (twelve) months immediately prior to the events leading to the cause of action.**
- 15.3 **Nothing contained in clauses 15.1 and 15.2 above shall limit either Party's liability to the other in respect of:**
- 15.3.1 **death or injury of any person, or damage to property;**
  - 15.3.2 **infringement of intellectual property rights;**
  - 15.3.3 **breach of confidentiality;**
  - 15.3.4 **direct fines, penalties and costs resulting from a breach of protection of Personal Information obligations;**
  - 15.3.5 **any provision in terms of which it indemnifies the other Party; or**
  - 15.3.6 **intentional, fraudulent or criminal acts.**

## **16 DISPUTE RESOLUTION, GOVERNING LAW**

- 16.1 Subject to ECN's right in each instance to elect to institute action for payment of the Charges 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.
- 16.2 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 latest rules for the conduct of arbitrations ("rules") of the Association of Arbitrators (Southern Africa) NPC (<https://www.arbitrators.co.za>), by one or more arbitrator/s appointed in accordance with the rules.
- 16.3 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.
- 16.4 The decision of the arbitrator/s may be made an order of court. For these purposes and those of clause 17 the Parties irrevocably submit to the non-exclusive jurisdiction of the High Court of South Africa, Gauteng Division, Pretoria.
- 16.5 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 Hardware (CISG) of April 11, 1980, shall be excluded.
- 16.6 This clause 16 is severable from the rest of this Agreement and shall survive the expiry or termination for whatsoever reason of this Agreement.

## **17 URGENT RELIEF**

The provisions of clause 16 shall not preclude any party from access to a competent court of law for relief in the form of:

- 17.1 an interdict, including a mandatory interdict; or
- 17.2 an order for specific performance.

## **18 COMPLIANCE WITH LAWS AND ANTI-CORRUPTION**

- 18.1 Each Party shall in all matters arising from or relating to the fulfilment of this Agreement conform at its own expense with all laws and legislation relevant hereto.
- 18.2 The Parties shall not be entitled to claim or receive any benefits or rewards arising from the Agreement, other than specifically provided for in this Agreement.
- 18.3 Each Party warrants that neither it nor any of its employees, associates or agents have committed, or admitted to, or have been convicted of, any Corrupt Act in relation to the Agreement and that it has ensured that all anti-corruption laws, internal processes and anti-corruption preventative measures have been complied with and will continue to be complied with for the duration hereof.
- 18.4 Failure by a Party to comply with this clause 18 shall constitute a material breach of contract.

## **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  
E:mail –  
Copy to: legal@reunert.co.za
  - 19.1.2 the Subscriber: at its physical and e-mail 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.
- 19.3 Either Party may by written notice to any other Party change the physical or e-mail address chosen as its domicilium citandi et executandi vis-à-vis that Party to another physical or e-mail address, provided that the change shall become effective vis-à-vis that addressee on the 5th business day after receipt of the notice by the addressee.
- 19.4 Any notice to a Party delivered by hand to a responsible person or via e-mail during ordinary business hours at the physical or e-mail 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 GENERAL**

### **20.1 Validity and Severability**

If any provision of this Agreement is found or held to be invalid or unenforceable, the validity of all the other provisions hereof will not be affected thereby and the Parties agree to meet and review the matter and if any valid and enforceable means is reasonably available to achieve the same objective as the invalid or unenforceable provision, to adopt such means by way of variation of this Agreement.

## 20.2 Contra Proferentem

The rule of construction that in the event of any uncertainty in any provision in any agreement, such agreement shall, in construing/interpreting the uncertainty, be construed, or interpreted against the drafter of such agreement, shall not be applicable to this Agreement.

## 20.3 Variation

No variation of or addition to of this Agreement will be of any force or effect unless reduced to writing and signed by the Parties.

## 20.4 Waiver

No waiver on the part of a Party of any rights arising from a breach of any provision of this Agreement will constitute a waiver of rights in respect of any subsequent breach of the same or any other provision.

## 20.5 Cession and Delegation

20.5.1 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.

20.5.2 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.

20.5.3 **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.**

## 20.6 Warranties

No Party has given any warranty or made any representation to the other Party, other than as expressly set out in this Agreement.

## 20.7 No Agency

ECN is an independent contractor to the Subscriber and nothing in this Agreement constitutes a relationship of employment, agency, joint venture, or partnership between the Parties. A Party shall not hold itself out as being an agent or partner of the other Party, or as being in a joint venture with the other Party. A Party shall not assume or create or attempt to assume or create directly or indirectly any obligation on behalf of or in the name of the other Party.

## 20.8 Arrangements under section 37(2) of the Occupational Health and Safety Act,1993

Each Party is an employer in its own right, a specialist in its own field of operations, performs work using its own employees and/or agents and its activities, methodologies and work are not directly supervised by the other Party. Each Party shall comply with the Occupational Health and Safety Act,1993 accordingly.

## 20.9 Co-operation and Support

Each Party undertakes at all times to use commercially reasonable efforts to co-operate, to perform all such actions and take such steps and to procure the cooperation, the performance of all such actions and taking of all such steps as may be open to it and necessary for and incidental to the putting into effect and maintenance of the provisions of this Agreement.

## 20.10 Non Solicitation

A Party shall not without the prior written consent of the other Party, either during, or within 12 (twelve) months after termination or cancellation of this Agreement for whatsoever reason, engage, employ, or otherwise solicit for employment, whether directly or indirectly, any person who during the currency of this Agreement was engaged in the performance of thereof as an employee, or temporary employee of the other Party, or of the other Party's suppliers under this Agreement. A Party in breach of this clause shall pay to the other Party as liquidated damages an amount equal to the gross annual salary as calculated immediately prior to the breach (including any commissions and other payments) of the person so engaged, employed, or solicited.

## 20.11 Inclusion of electronic documents and signature

Any reference in this Agreement to “writing” or “signed” shall include any form of electronic communication, or electronic signature.

#### 20.12 Entire Agreement

The terms contained in this Agreement constitute in each instance the entire agreement between the Parties with respect to the subject matter thereof, superseding all contemporaneous oral agreements and prior oral and written quotations, communications, agreements, and understanding of the Parties.

#### 20.13 Costs

Any legal costs incurred by a Party arising out of or in connection with a breach by the other Party, shall be borne by the Party in breach on a scale as between attorney and client.

#### 20.14 Counterparts

A Subscriber Application Form may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

### **21 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**.