

# General Terms and Conditions

**THIS GENERAL TERMS AND CONDITIONS FOR FIXED LINE SERVICES IS MADE BETWEEN:**

**SW Solutions (Pty) Ltd**, a company incorporated in South Africa (Registration number. \_\_\_\_\_) having its registered office at \_\_\_\_\_).

And

\_\_\_\_\_, a company incorporated in South Africa (Registration number. \_\_\_\_\_) having its registered office at \_\_\_\_\_ (the **Customer**)

## **SCOPE OF AGREEMENT**

**(A)** The Customer has appointed SW Solutions to render to it certain converged services;

**(B)** SW Solutions having the necessary competence and capacity to provide the services, wishes to accept such appointment.

**NOW THEREFORE** the parties agree as follows:

### 1. INTERPRETATION

1.1 In this Agreement unless the context indicates a contrary intention -

1.1.1 an expression which denotes any gender includes the other genders and a natural person includes an artificial person and vice versa;

1.1.2 the singular includes the plural and vice versa;

1.1.3 when any number of days is prescribed, 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 it shall be inclusive of the first day following the said Saturday, Sunday or public holiday;

1.1.4 if any provision in the definition clause is a substantive provision conferring rights or imposing obligations on a party, then notwithstanding that such provision is contained in this clause, effect shall be given thereto as if such provision were a substantive provision in the body of the agreement;

1.1.5 any reference in this agreement to legislation or subordinate legislation is to such legislation or subordinate legislation at the date of signature hereof and as amended and/or re-enacted from time to time;

- 1.1.6 the head notes to the clauses to this agreement are inserted for reference purposes only and shall not affect the interpretation of any of the provisions to which they relate; and
- 1.1.7 no provision herein shall be construed against or interpreted to the disadvantage of any party by reason of such party having or being deemed to have structured, drafted or introduced such provision.

## 2. DEFINITIONS

- 2.1 Unless otherwise determined by the context, the following words will bear the meanings assigned to them hereunder;
  - 2.1.1 this Agreement means these General Terms and Conditions together with all Service Schedules, the Acceptable Use Policy and any other annexures, schedules and/or amendments from time to time;
  - 2.1.2 Access Codes means usernames, passwords, email addresses and other unique identifiers allowing the Customer access to the Services;
  - 2.1.3 Acceptable Use Policy means SW Solutions Acceptable Use Policy, as amended from time to time by SW Solutions in its sole discretion;
  - 2.1.4 Applicable Law means law, regulation, binding code of practice, rule or requirement of any relevant government or governmental agency, professional or regulatory authority, each as relevant to (i) SW in the provision/receipt of the Services and/or (ii) Customer/Supplier in the receipt/provision of the Services or the carrying out of its business.
  - 2.1.5 Applicable Privacy Law means Applicable Law applicable to the Processing of Personal Data under the Customer Agreement, including but not limited to PoPiA;
  - 2.1.6 Authority means those governments, agencies, professional, and regulatory authorities that supervise, regulate, investigate, or enforce Applicable Law.
  - 2.1.7 Business Day means Monday to Friday, both days inclusive, but excluding officially promulgated South African public holidays that fall on or between a Monday and Friday;
  - 2.1.8 Business Hour means those hours between 08:00 to 17:00 Monday to Friday on any Business Day;
  - 2.1.9 Commencement Date means ..... notwithstanding the date of signature of this Agreement;

- 2.1.10 "ECNS provider" means electronic communications network services providers licensed to provide those services in terms of the Electronic Communications Act 36 of 2005, other than SW Solutions;
- 2.1.11 Equipment means equipment supplied by SW Solutions to the Customer, on the basis of a loan or rental, to enable the Customer to utilise the Services;
- 2.1.12 Group means any corporation, company, or other entity which is (i) controlled by a Party; (ii) controls a Party; or (iii) is under common control with a Party and control means that more than 50% (fifty percent) of the controlled entity shares or ownership interest representing the right to make decisions for such entity are owned or controlled, directly or indirectly, by the controlling entity;
- 2.1.13 the Network means the physical wireless and wired network operated and made available by SW Solutions as well as a virtual network (using Multi Packet Label Switching or related technologies) operated and made available by SW Solutions over its own network as well as the networks of ECNS providers;
- 2.1.14 Operator or Processor means the person that Processes data on behalf of the Responsible Party;
- 2.1.15 PoPIA means the Protection of Personal Information Act No 4 of 2013;
- 2.1.16 Privacy Authority means the Authority that enforces the Applicable Privacy Law in the relevant jurisdiction;
- 2.1.17 Process/Processed/Processing means obtaining, recording, or holding information or data or carrying out any operation or set of operations on it;
- 2.1.18 Responsible Party or Controller means the person that determines the purposes and means of Processing the data;
- 2.1.19 the Services means the converged solutions services provided by SW Solutions to the Customer pursuant to the conclusion of a Service Schedule;
- 2.1.20 Service Schedule means, in respect of each Service which SW Solutions provides to the Customer, the Service Schedule concluded between the parties setting out, *inter alia*, a description of the Service, the fees payable, the service levels applicable;
- 2.1.21 Sub-Operator means a sub-contractor that carries out Processing activities in the provision of the Services or fulfils certain obligations of SW Solutions under a Customer Agreement;

- 2.1.22 the System means, collectively, the Network, any network provided by an ECNS provider (if applicable), the Equipment and the Customer's equipment;
- 2.1.23 Traffic Data means any data Processed for the purpose of the conveyance of a communication on an electronic communications network and for billing.

### 3. COMMENCEMENT AND DURATION

- 3.1 This Agreement will commence on the Commencement Date and shall continue for an indefinite period unless terminated by either party on not less than 90 (ninety) days written notice of its intention to so terminate. For the avoidance of doubt, it is recorded that upon termination of all Service Schedules, this Agreement shall *ipso facto* terminate.
- 3.2 Notwithstanding any termination of this Agreement in terms of clause 3.1 above, such termination shall not affect the validity of any Service Schedule in force at the time of termination which shall continue to be of full force and effect and subject to the terms and conditions herein contained until such time as all obligations of each party *vis-À-vis* the other have been discharged in full.
- 3.3 Each Service Schedule shall commence on the date provided for therein and shall continue for the period provided for therein subject to termination as provided for therein.
- 3.4 Notwithstanding the provisions of clause 3.1 above, the Customer may, on not less than 1 (one) calendar month's written notice to SW Solutions, cancel any Service Schedule during the initial period provided for therein, subject to payment by the Customer of the then-applicable early termination penalty. For clarity and the avoidance of doubt, individual services comprising of a Service Schedule may not be terminated without written agreement between the parties and terms applicable to such termination.
- 3.5 Any notice of termination by the Customer pursuant to the provisions of this clause shall not be valid where the Customer is in arrears with its payment obligations to SW Solutions.

### 4. SERVICE SCHEDULES

- 4.1 Each Service Schedule shall be deemed to be a separate agreement on the terms and conditions set out herein and the termination of any specific Service Schedule shall not be deemed to constitute a termination of any other Service Schedule or this Agreement, all of which shall continue to be of full force and effect.

- 4.2 In the event of any conflict or inconsistency between a Service Schedule and the main body of the Agreement, then the provisions of the Service Schedule shall prevail.
- 4.3 Each Service Schedule shall be catalogued numerically for identification purposes and shall provide:
- 4.3.1 a description of the Service to be rendered;
  - 4.3.2 the effective date, initial period and termination period particular to the Service;
  - 4.3.3 the pricing and payment terms as well as any discounts applicable to the Service;
  - 4.3.4 the Key Performance Indicators (KPI's), means of measurement thereof and required service levels;
  - 4.3.5 escalation procedure in the event of a fault;
  - 4.3.6 particular undertakings and terms and conditions not contained in this Agreement which pertain to the Service; and
  - 4.3.7 any other information required as provided for in this Agreement.

## **5. CHARGES AND FEES AND PAYMENT TERMS**

- 5.1 The charges and fees payable by the Customer in respect of a Service shall be specified in the relevant Service Schedule as shall the applicable payment terms and any discounts.
- 5.2 Where any Service is activated by SW Solutions on any day of a month other than the first day, the Customer shall be charged a pro-rata portion of the monthly fees in respect of that month.
- 5.3 Save as expressly stated to the contrary, all prices specified in any Service Schedule shall be exclusive of:
- 5.3.1 value-added tax and any other taxes, duties and other imposts of whatsoever nature which shall likewise, be payable by the Customer. If SW Solutions is required to be registered for value added tax and any other taxes (including without limitation instances where reverse tax is applicable), duties or imports, in the territory where the Customer is a tax resident, then the Customer shall attend to such registration and make the required payments on behalf of SW Solutions. The Customer shall be liable for and hereby fully indemnifies SW Solutions against any penalties and/or interest levied against SW Solutions in respect of delayed payments or non-compliance by the Customer with the provisions of this clause; and

- 5.3.2 service fees relating to any ECNS provider which are procured by the Customer directly and not by SW Solutions either on its own or on the Customer's behalf and which are not specified in a Service Schedule, for which the Customer agrees to make payment directly to the ECNS provider on such terms as are agreed between the ECNS provider and the Customer
- 5.4 If SW Solutions is required to pay any withholding taxes imposed by the government or taxing authority of any country, state, province, municipality or any other government jurisdiction arising as a result of this Agreement, in the territory where the Customer is a tax resident, then the Customer shall attend to make the required payments on behalf of SW Solutions. The Customer shall be liable for and hereby fully indemnifies SW Solutions against any penalties and/or interest levied against SW Solutions in respect of delayed payments or non-compliance by the Customer with the provisions of this clause.
- 5.4.1 Upon payment of withholding tax costs by the Customer in terms of this clause 5.4, the Customer shall, provide SW Solutions with a valid tax receipt certificate issued by the relevant tax authority as evidence that the Customer has accounted to the relevant tax authority for withholding tax costs.
- 5.4.2 In the event that a double taxation treaty applies which provides for a reduced withholding tax rate, the Customer shall pay the reduced tax rate subject to the issuance of a valid exemption certificate by the competent tax authority.
- 5.5 The computerised accounts of SW Solutions or any certificate signed by any credit manager of SW Solutions shall be *prima facie* proof of all payments made by the Customer and the validity of all charges and fees payable by the Customer pursuant to this Agreement and of the amounts outstanding at any time by the Customer.
- 5.6 SW Solutions may, in its sole discretion, levy interest equal to 2% (two per centum) above the prime rate of one of the 4 (four) large banks in South Africa, selected by SW Solutions on any unpaid or overdue amount. In addition, should any payment instrument tendered by the Customer or amount drawn by SW Solutions in terms of a debit order authority not be met by the Customer's bankers, SW Solutions reserves the right, in its sole discretion, to levy a fee in regard thereto.

## 6. **ADJUSTMENT OF CHARGES**

- 6.1 Notwithstanding anything to the contrary herein contained, SW Solutions shall have the right, on each anniversary of the effective date of a Service Schedule, by written notice to the Customer, to vary the charges and fees

payable by the Customer thereunder, on 1 (one) month's notice to the Customer, provided that:

- 6.1.1 in the case of Service which are not regulated by a regulatory authority, any increase levied by SW Solutions in terms of this clause 6 shall not exceed the latest published Consumer Price Index excluding interest rates on mortgage bonds (CPI) as published from time to time by Statistics South Africa, or any other relevant Government Agency on the anniversary date. For the avoidance of doubt, the latest officially published CPI figures immediately preceding the anniversary date will be used in the determination of such increase; and
- 6.1.2 in the case of Services which are regulated by a regulatory authority, any increase levied by SW Solutions in terms of this clause 6 shall not exceed those charges and fees lodged with and approved by the regulatory authority.
- 6.2 Without in any way derogating from the provisions of this clause 6, SW Solutions undertakes to the Customer that it shall review its charges to the Customer in the event of a downward adjustment of its tariffs in respect of the Services, to ensure that its charges to customers in respect of like Services are, in aggregate, comparative.

## **7. THE CUSTOMER'S OBLIGATIONS**

- 7.1 The Customer shall, at all times, comply strictly with all restrictions imposed on computer networks by legislation through which any information and/or data transmitted by the Customer passes. In particular, the Customer shall at all times comply with the Acceptable Use Policy.
- 7.2 The Customer shall not commit nor attempt to commit any act or omission which directly or indirectly:
  - 7.2.1 in any manner damages SW Solutions' technical infrastructure or the Network or any part thereof;
  - 7.2.2 impedes, impairs or precludes SW Solutions from being able to provide the Services in a reasonable and business-like manner; and/or
  - 7.2.3 constitutes an abuse or misuse, whether malicious or otherwise, of the Services.
- 7.3 The Customer shall not:
  - 7.3.1 allow any person other than its personnel and authorised parties, access to the Services; and/or

- 7.3.2 use or allow others to use the Services for any improper, immoral or unlawful purpose.
- 7.4 The Customer acknowledges that all or any Access Codes allocated to or created by the Customer are personal to the Customer. The Customer undertakes to maintain the security and confidentiality of Access Codes and hereby indemnifies SW Solutions against any loss or damage suffered by SW Solutions arising out of the disclosure by the Customer of any Access Code.
- 7.5 Notwithstanding the provisions of clause 7.4 above, the Customer acknowledges that all Access Codes allocated to the Customer by SW Solutions are and shall at all times remain the property of SW Solutions and are provided to the Customer for its use for the duration of the Service Schedule in terms of which they are allocated or created. The Customer shall not be entitled to sell, lease, transfer, assign, encumber or otherwise alienate its rights in and to such Access Codes.
- 7.6 The Customer acknowledges that any third party services and products accessible or used in conjunction with any Services are provided subject to the terms and conditions specified by the third party providers thereof.

## 8. THE EQUIPMENT

- 8.1 The Customer acknowledges and agrees that all rights of ownership in and to the Equipment shall, at all times, remain vested in SW Solutions and accordingly, the Customer shall not hold itself out as the owner of the Equipment, nor sell, transfer, dispose of, mortgage, charge or pledge the Equipment or permit the possession of the Equipment to be taken away from the Customer.
- 8.2 Notwithstanding the provisions of clause 8.1 above, all risk in and to the Equipment shall pass to the Customer on delivery thereof to the Customer and the Customer shall be liable for any and all loss, theft or destruction of or damage thereto, howsoever arising.
- 8.3 The Customer shall:
- 8.3.1 display in relation to the Equipment no lesser degree of care than it would had same belonged to it and shall take all reasonably necessary precautions to avoid loss, theft or destruction of or damage to the Equipment;
- 8.3.2 not procure repair or maintenance of the Equipment by any third party without the prior written consent of SW Solutions or in any other manner tamper with the Equipment;



- 8.3.3 not make any alteration or modification to the Equipment nor use the Equipment or permit the Equipment to be used for any purpose for which it is not designed or in contravention of any applicable law or regulation;
- 8.3.4 not affix the Equipment to any land or building in such a manner as to become a fixture;
- 8.3.5 allow SW Solutions to affix or to cause to be affixed to the Equipment plates or the markings indicating the ownership of the Equipment; and
- 8.3.6 subject to the Customer's reasonable security restrictions, allow SW Solutions and persons authorised by it, at all reasonable times during Business Hours, access and entry to any premises where the Equipment is situated for purposes of inspecting the Equipment.
- 8.4 SW Solutions shall be entitled to recover from the Customer any costs relating to repairs, replacements, adjustments or error corrections arising out of a failure by the Customer to abide by the provisions of this clause 8 and the Customer shall make payment to SW Solutions in respect of such costs upon demand.

## 9. **WARRANTIES**

- 9.1 SW Solutions warrants unto and in favour of the Customer that:
  - 9.1.1 it has the necessary competency to fulfil its obligations as set out in this Agreement read together with the relevant Service Schedule;
  - 9.1.2 the Services shall be of the industry standards in terms of quality and service and shall be rendered in a proper, professional and workman-like manner by appropriately qualified personnel;
  - 9.1.3 to the best of its knowledge, no claim, lien or action exists or is threatened against SW Solutions which will interfere with the Customer's rights under this Agreement; and
  - 9.1.4 all regulatory licenses, permits, approvals, authorisations and consents required to perform the Services have been obtained and are valid as at the Commencement Date.
- 9.2 Save as expressly otherwise stated in this Agreement or any Service Schedule, SW Solutions does not make any representations nor gives any warranties or guarantees of any nature whatsoever in respect of the Services (whether express, implied or tacit, by statute, common law or otherwise).
- 9.3 Where any equipment is purchased by the Customer from SW Solutions, SW Solutions undertakes to cede to the Customer all warranties and/or

guarantees on the equipment provided by the manufacturer and shall provide the Customer with all documentation detailing the terms and conditions thereof as well as any exclusions therefrom.

## 10. MONITORING OF CONTENT AND COMMUNICATIONS

- 10.1 The Customer acknowledges and agrees that in the event that SW Solutions, in consultation with the Customer and in its reasonable discretion or if obliged by any applicable law, determines that any content hosted by SW Solutions, published by SW Solutions on the Customers behalf or transmitted by the Customer by means of the Service (**Content**) is in violation of any law or the Acceptable Use Policy, SW Solutions shall be entitled to:
  - 10.1.1 request the Customer to forthwith remove such Content;
  - 10.1.2 require the Customer to forthwith amend or modify such Content;
  - 10.1.3 terminate the Customer's access, to any Service and/or suspend or terminate any Service with notice that is practicable in the circumstances; and/or
  - 10.1.4 delete, the offending Content with notice that is practicable in the circumstances;
- 10.2 The Customer acknowledges that any exercise by SW Solutions of its rights in terms of clause 10.1 above shall not be construed as an assumption of liability by SW Solutions for the Content and/or the publication thereof whether or not SW Solutions has knowledge of such Content, having cognisance of the fact that SW Solutions has no general obligation in law to monitor Content. The Customer hereby indemnifies SW Solutions and holds it harmless against any liability, claims, fines or other penalties of whatsoever nature imposed on SW Solutions by any person arising either directly or indirectly out of the Content or the publication or hosting or transmission thereof.
- 10.3 The Customer further acknowledges that SW Solutions has certain obligations in terms of the Regulation of Interception of Communications and Provision of Communications-related Information Act concerning the lawful interception of communications and provision of information. The Customer hereby indemnifies SW Solutions and holds it harmless against any liability, claims, fines or other penalties as a result of SW Solutions complying with such obligations.
- 10.4 Sanctions and Trade/Export Control
  - 10.4.1 Each Party shall, in the context of the Services:

- 10.4.1.1 comply with all economic, trade and financial sanctions laws, regulations, - embargoes or restrictive measures administered (Sanction), as well as all trade control laws and regulations (Trade Control Law) enacted or enforced by the governments of the United Kingdom, European Union, United States of America and any other relevant country;
- 10.4.1.2 not knowingly do anything which may cause the other Party or members of its Group to breach Sanctions;
- 10.4.1.3 provide such assistance, documentation and information to the other party as that Party may reasonably request, including but not limited to, end customer information, destination and intended use of goods or services;
- 10.4.1.4 notify the other Party in writing as soon as it becomes aware of an actual or potential investigation/breach in relation to the Applicable Laws (and in particular, Sanctions and Export controls restrictive measures) or any material change in the status of any of the parties to this agreement in respect of:
  - 10.4.1.4.1 Sanctions status e.g. the inclusion on a Sanctions list in any applicable jurisdiction (as stated in 10.4.1.1 above);
  - 10.4.1.4.2 Licence or authorisation status e.g. a loss of licence/authorisation in respect of Sanctions or Trade Controls;
- 10.4.1.5 have the right to terminate this agreement if any of the provisions of this clause are breached; and
- 10.4.1.6 have the right to seek indemnities from the Party which has breached the relevant provisions for any direct losses incurred.

## **11. CHANGE CONTROL PROCEDURE**

- 11.1 Should either party wish to propose any change or amendment to any Service Schedule, such party shall address a written proposal to the other party detailing the desired changes or amendments.
- 11.2 Should the written proposal envisaged in clause 11.1 above be made by:
  - 11.2.1 SW Solutions, SW Solutions shall detail, in such proposal, the technical impact of the proposed changes or amendments, delivery dates, cost variations, if any, and the effect on the terms and conditions of the Agreement and the applicable Service Schedule and the Customer shall revert with a written response to SW Solutions's proposal within a 30 (thirty) day period;

11.2.2 the Customer, SW Solutions shall, within a 30 (thirty) day period, revert to the Customer with a written response detailing the technical impact of the proposed changes or amendments, delivery dates, cost variation, if any, and the effect on the terms and conditions of the Agreement and the applicable Service Schedule.

11.3 No alteration or variation of this Agreement or any Service Schedule shall be of any effect unless and until agreed upon between the parties in writing. Pending agreement between the parties in respect of any variation or alteration of this Agreement or any Service Schedule, SW Solutions shall provide the Services in accordance with such agreed terms and conditions that have been reduced to writing and signed by or on behalf of the parties.

## 12. **NEW TECHNOLOGIES AND ADDITIONAL SERVICES**

12.1 SW Solutions shall provide the Services using such up-to-date technology which is made generally available to its other customers. SW Solutions shall promptly notify the Customer of potential enhancements and improvements that it believes the Customer may wish to consider implementing. If the Customer learns of a potential service enhancement or improvement to an existing Service (**New Technologies/Additional Service**), provided that such enhancement or improvement is offered by SW Solutions to its customers, the Customer may request information from SW Solutions in order to evaluate its interest in implementing such enhancement or improvement.

12.2 Upon the Customer's request, SW Solutions shall provide the indicative price, performance specifications, installation interval, or effects then known to SW Solutions of any New Technologies/Additional Service. The provision of the new technology or additional services shall be subject to SW Solutions standard charges and the then applicable standard terms and conditions.

## 13. **DISCONTINUATION OR SUBSTITUTION OF TECHNOLOGY**

13.1 SW Solutions reserves the right in its sole discretion, without cost or penalty to itself, to substitute or discontinue (in whole or in part) the technology in terms of which the Services are delivered to the Customer, provided that SW Solutions shall be obliged to furnish the Customer with 6 (six) months prior written notice of such substitution or discontinuation .

13.2 In the event that SW Solutions elects to substitute the technology or to discontinue in part the technology in terms of which the Services are delivered to the Customer and the new technology and the partially discontinued technology has no lesser functionality or features than the substituted or partially discontinued technology, the Customer shall not be entitled to resile from this Agreement. In all other instances, the Agreement in respect of the affected Services shall ipso facto terminate upon the expiry

of the 6 (six) month written notice furnished by SW Solutions to the Customer pursuant to clause 13.1 above and SW Solutions shall render all reasonable assistance to the Customer in respect of the migration to an alternate provider of the affected Services.

- 13.3 Network Sunset: Customer hereby acknowledges and accepts that (a) certain Network technologies used to provide the Service on SW Solutions Device Hardware or Customer Device Hardware may retire prior to the expiry of the contract; (b) Current Networks may be replaced by further advanced Network technologies during the term of the contract. As a result, Customer agrees that maintaining compatibility of its devices with the available Networks from time to time shall be its responsibility and any associated costs shall be borne by Customer.

#### 14. **SUSPENSION OF THE SERVICES**

- 14.1 SW Solutions shall be entitled, without prejudice to any right it may have in terms of this Agreement or at law, at any time and on such notice as may be reasonable in the circumstances to suspend provision of the Services or any part thereof in any of the following circumstances:
- 14.1.1 for so long as the Customer remains in breach of its obligations under this Agreement;
- 14.1.2 in the event that the quality of the Services, the System or the operation of the Network is adversely affected due to any act or omission on the part of the Customer; and/or
- 14.1.3 in the event that the Customer infringes the intellectual property rights of any third party in relation to the provision of the Services.
- 14.2 All liability on the part of SW Solutions for any loss or damage (whether direct or consequential) incurred or for any costs, claims, or demands of any nature arising out of the suspension of the Services as contemplated in clause 14.1 above, is excluded.
- 14.3 Notwithstanding anything to the contrary contained herein, the Customer shall be obliged to continue to pay all charges and fees due under each Service Schedule during the period during which the Services is/are suspended and acknowledges and agrees that under no circumstances shall it be entitled to resile from this Agreement or withhold or defer payment or be entitled to a reduction in any charge or have any other right or remedy against SW Solutions, its servants, its agents or any other persons for whose acts and omissions SW Solutions is vicariously liable in law (and in whose favour this provision constitutes a *stipulatio alteri*).

## 15. INTELLECTUAL PROPERTY

- 15.1 The Customer acknowledges that any and all of the trademarks, trade names, copyrights, patents and other intellectual property rights used or embodied in or in connection with the Services belong exclusively to and shall be and remain the sole property of SW Solutions and save as set out herein, nothing contained in this Agreement shall be construed so as to confer on the Customer any copyright or other intellectual property rights in respect of any particular Services provided by SW Solutions to the Customer.
- 15.2 The Customer acknowledges that all rights in any copy, translation, update, upgrade, adaptation or derivation of the Services including without limitation any improvement or development thereof belong exclusively to and shall be and remain the sole property of SW Solutions.
- 15.3 The Customer shall not, in any manner, remove, alter or in any manner whatsoever, tamper with any copyright and/or other proprietary notice or legend of SW Solutions, its vendors or suppliers.
- 15.4 Nothing contained in this Agreement shall be construed so as to confer on the Customer any copyright or other intellectual property rights in respect of any particular Services provided by SW Solutions to the Customer.

## 16. INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

- 16.1 SW Solutions hereby indemnifies the Customer against any damages (including costs) suffered or sustained by the Customer or any third party in respect of a claim that possession or use of the Service or any part thereof (**the infringing Service**) supplied by SW Solutions to the Customer infringes any patent, copyright or other intellectual property rights of any third party, provided that:
- 16.1.1 the infringement or alleged infringement has not arisen by virtue of the Customer's failure to use the infringing Service in accordance with instructions given by SW Solutions or from any modifications or adaptation to or alteration of the infringing Service by a third party without the prior written consent of SW Solutions;
- 16.1.2 the Customer shall have notified SW Solutions as soon as practicably possible of any actual, alleged or suspected infringement and shall have made no admission of liability in respect of any such claim;
- 16.1.3 SW Solutions shall have sole control of all aspects of the defence of such a claim and sole rights to any damages or any counterclaim; and
- 16.1.4 the Customer shall provide SW Solutions with all such documentation, information and assistance as SW Solutions may reasonably require to

assist it in relation to such claim provided that SW Solutions shall reimburse the Customer its reasonable costs in providing same.

- 16.2 If any such claim for which SW Solutions is liable to indemnify the Customer under clause 16.1 above is upheld by law or in the reasonable opinion of the Customer is likely to be upheld by law, then SW Solutions shall be obliged to either:
  - 16.2.1 modify or replace the infringing Service or Product any part thereof to the extent that same is rendered non-infringing provided that such modification or replacement does not materially alter the performance or functionality of the infringing Service; or
  - 16.2.2 to procure the right for the Customer to continue using the infringing Service.

## 17. **LIMITATION OF LIABILITY**

- 17.1 The maximum liability of SW Solutions under this Agreement in respect of any claim for direct damages by the Customer in respect of any wilful misconduct and/or negligent act or omission of SW Solutions or any person for whose acts and omissions SW Solutions is vicariously liable in law, for any event or series of connected events, whether as a result of breach of contract, delict or any reason whatsoever, shall be limited to the total fees, excluding Value Added Tax, paid by the Customer to SW Solutions in the 12 (twelve) month period immediately preceding the month in which the incident arose which gave rise to the claim.
- 17.2 Under no circumstances whatsoever shall any party shall be liable for any indirect, incidental or consequential damages, (including, but not limited to, damages for loss of business, profits, revenue, data, use, or other economic advantage) incurred by the other party, arising out of or relating to this Agreement and/or any Service Schedule.

## 18. **CONFIDENTIAL INFORMATION**

- 18.1 For the duration of this Agreement and a period of 1 (one) year thereafter, each party hereby undertakes to the other to:
  - 18.1.1 keep confidential all information (written or oral) concerning the business and affairs of the other that it shall have obtained or received as a result of the discussions leading up to or entering into or to performance of this Agreement ("the information");

- 18.1.2 not without the other party's written consent to disclose the information in whole or in part to any other person save those of its employees, agents and sub-contractors involved in the implementation, of this Agreement and who have a need to know the same;
- 18.1.3 to use the information solely in connection with the implementation of this Agreement and not for its own or the benefit of any third party; and
- 18.1.4 protect the confidential information of the providing party using the same standard of care used to safeguard its own confidential information and agrees further to store and handle the confidential information in such a way as to prevent any unauthorised disclosure thereof.
- 18.2 The provisions of clause 18.1 above shall not apply to the whole or any part of the information to the extent that it is:
  - 18.2.1 trivial or obvious;
  - 18.2.2 already in the other's possession other than as a result of a breach of this clause;
  - 18.2.3 independently developed by one party prior to the execution of this Agreement;
  - 18.2.4 in the public domain through no fault of the receiving party; or
  - 18.2.5 is disclosed by the receiving party to satisfy the order of a court of competent jurisdiction or to comply with the provisions of any law or regulations in force from time to time; provided that in these circumstances, the receiving party shall, to the extent permitted by law, advise the disclosing party in writing prior to such disclosure to enable the disclosing party to take whatever steps it deems necessary to protect its interest in this regard; provided further that the receiving party will disclose only that portion of the information which it is legally required to disclose and the receiving party will use its reasonable endeavours to protect the confidentiality of such information to the widest extent possible in the circumstances.
- 18.3 Each party hereby undertakes to the other to make all relevant employees, agents and sub-contractors aware of the confidentiality of the information and the provisions of this clause 18 and without prejudice to the generality of the foregoing, to take all such steps as shall from time to time be necessary to ensure compliance by its employees, agents and sub-contractors with the provisions of this clause 18.

## 19. **CESSION, ASSIGNMENT AND SUB-CONTRACTING**



- 19.1 The Agreement is specific to the Customer and the Customer shall not be entitled to cede or assign its rights and/or delegate its obligations, either partially or entirely, to a third party without the prior written consent of SW Solutions.
- 19.2 SW Solutions shall be entitled, at any time, to cede or transfer its rights and interest under this Agreement to any of its Affiliates and/or its financiers (including but not limited to banks) in terms of sale of account receivables or sale of book debt. Any assignment, encumbrance or delegation of any of its *rights, title, interest* or obligations in terms of this Agreement, wherein the Customer is required to perform its payment obligations or liaise with a transferee, shall be with written notice to the Customer. For the purposes of this clause 19.2, Affiliate(s) means any corporation, company, or other entity which is (i) controlled by SW Solutions; (ii) controls SW Solutions; or (iii) is under common control with SW Solutions and control means that more than 50% (fifty percent) of the controlled entity's shares or ownership interest representing the right to make decisions for such entity are owned or controlled, directly or indirectly, by the controlling entity.
- 19.3 SW Solutions shall be entitled to sub-contract any or all of its obligations under this Agreement without the prior written consent of the Customer. Notwithstanding that any obligations may have been sub-contracted by SW Solutions under this clause 19.3, SW Solutions shall be, and at all times remain, fully responsible and liable for the fulfilment of all SW Solutions' obligations so sub-contracted.

20. **DATA PROTECTION - WHEN SERVICE TERMS IDENTIFY SW SOLUTIONS IS RESPONSIBLE PARTY OR DATA CONTROLLER**

- 20.1 SW Solutions may Process User Personal Information or Personal Data for the following purposes: (a) account relationship management; (b) sending bills; (c) order fulfilment / delivery; and (d) customer service (e) provision of products and services.
- 20.2 As an electronic communications services provider, SW Solutions may Process Traffic Data for the following purposes: (a) delivering User communications; (b) calculating Charges for each User; (c) identifying and protecting against threats to the Network or Services; and (d) internal use for development and improvement of Network or Services.
- 20.3 SW Solutions may disclose User Personal Data and Traffic Data: (a) to SW Solutions and SW Group Companies or suppliers and/or (b) if required by Applicable Law, court order, Information Regulator or Privacy Authority, or any Authority.

21. **DATA PROTECTION WHEN SERVICE TERMS IDENTIFY SW SOLUTIONS IS THE OPERATOR OR DATA PROCESSOR**

- 21.1 Processing User Personal Data: SW Solutions may only Process User Personal Data for: (a) provision and monitoring of the Service; or (b) any other purpose agreed between the Parties in writing. Additional instructions from Customer require prior written agreement and may be subject to Charges.
- 21.2 De-identified Data: SW Solutions may use User Personal Data to create statistical data and information about service usage and devices that does not identify a User.
- 21.3 Sub-Operator: SW Solutions may engage Sub-Operators.
- 21.4 Sub-Operator Obligations: SW Solutions enters into binding agreements with its Sub-Operator that imposes upon the Sub-Operator substantially the same legal obligations for Processing activities as these terms. If a Sub-Operator fails to fulfil its data protection obligations under the agreement, SW Solutions remains liable to Customer for the performance of that Sub-Operators obligations.
- 21.5 Data Retention: SW Solutions may retain the User Personal Data for as long is permitted by law or as required to deliver the Service and will (at Customer's option) return User Personal Data in its possession upon termination of the Agreement, or delete such User Personal Data within a reasonable time after the termination of the Agreement, unless Applicable Law requires SW Solutions to retain it.
- 21.6 Data Access: SW Solutions limits access to User Personal Data to those persons necessary to meet SW Solutions' obligations in relation to the Service and takes reasonable steps to ensure that they: (a) are under a statutory or contractual obligation of confidentiality; (b) are trained in SW Solutions' policies relating to handling User Personal Data; and (c) do not process User Personal Data except as instructed by Customer unless required to do so by Applicable Law.
- 21.7 Security: As required by Applicable Privacy Law, SW Solutions shall: (a) provide appropriate technical and organisational measures for a level of security appropriate to the risks that are presented by Processing; (b) comply with the security requirements contained in the SW Solutions information security policies; (c) provide Customer with such information, assistance and co-operation as Customer may reasonably require to establish compliance with the security measures contained in Applicable Privacy Law; (d) notify Customer without undue delay of any unauthorised access to User Personal Data that SW Solutions becomes aware of and that results in loss, unauthorised disclosure, or alteration to the User Personal Data; (e) provide reasonable assistance to Customer in relation to any personal data breach notification that Customer is required to make under Applicable Privacy Law; and (f) provide Customer reasonable assistance, prior to any Processing: (A) with carrying out a privacy impact assessment

of the Services; and (B) with a consultation of the relevant Privacy Authority regarding Processing activities related to the Services.

- 21.8 Law Enforcement: SW Solutions: (a) may receive legally binding demands from a law enforcement Authority for the disclosure of, or other assistance in respect of, User Personal Data, or be required by Applicable Law to disclose User Personal Data to persons other than Customer (Demand); (b) is not in breach of any obligation to Customer in complying with a Demand to the extent legally bound; and (c) will notify Customer as soon as reasonably possible of a Demand unless otherwise prohibited.
- 21.9 User Enquiries: When Customer is required under Applicable Privacy Law to respond to enquiries or communications (including subject access requests) from Users, and taking into account the nature of the Processing, SW Solutions will: (a) pass on to Customer without undue delay any such enquiries or communications received from Users relating to their User Personal Data or its Processing; and (b) have reasonable technical and organisational measures to assist Customer in fulfilment of those obligations under Applicable Privacy Law.
- 21.10 Liability: Exclusions: Neither Party is liable to the other Party (whether in contract, tort (including negligence), breach of statutory duty, indemnity, or otherwise) for: (a) any loss (whether direct or indirect) of profit, revenue, anticipated savings, or goodwill; (b) any loss to or corruption of data; (c) any fines prescribed by any Authorities; (d) any loss arising from business interruption or reputational damage; or (e) any indirect or consequential loss, regardless of whether any of these types of loss were contemplated by either of the Parties at the time of contracting for the relevant Services. Notwithstanding the above exclusions, neither Party excludes or limits any liability: (i) that cannot be excluded or limited by Applicable Law; or (ii) for fines related to breach of Sanctions and Trade Laws.

## 22. TERMINATION

- 22.1 In the event of the Customer on the one hand or SW Solutions on the other (hereinafter referred to as **the defaulting party**):
- 22.1.1 committing or allowing the commission of any breach of this Agreement or any Service Schedule and failing to remedy that breach within a period of 10 (ten) days after receipt of written notice to that effect from the party not so in breach (the aggrieved party); and/or
- 22.1.2 repeatedly breaching any of the terms of this Agreement or any Service Schedule in such manner as to justify the aggrieved party in reasonably holding that the defaulting party's conduct is inconsistent with the intention or ability of the defaulting party to carry out the terms of this Agreement,

then and in any of such events the aggrieved party shall have the right, (but shall not be obliged), forthwith to cancel this Agreement or the applicable Service Schedule (either wholly or in relation to the affected portion) or to claim specific performance, in either event without prejudice to the aggrieved party's rights to claim damages. The aforesaid is without prejudice to such other rights as the aggrieved party may have at law.

22.2 Notwithstanding anything to the contrary contained herein, either party may, without prejudice to its rights in terms of the Agreement or at law, immediately terminate the Agreement, or any Service Schedule appended to the Agreement, in the event that the other party:

22.2.1 takes steps to place itself, or is placed in liquidation, whether voluntary or compulsory, or under judicial management, in either case whether provisionally or finally;

22.2.2 takes steps to de-register itself or is de-registered; or

22.2.3 commits an act which would be an act of insolvency as defined in the Insolvency Act, 1936 (as amended) if committed by a natural person, provided that the aggrieved party acting in good faith considers such event to be detrimental to it for sound business reasons.

22.3 Upon termination of this Agreement for whatsoever reason:

22.3.1 the Customer shall no longer be entitled to use of the Equipment and will forthwith tender return of the Equipment to SW Solutions who shall be entitled to enter any premises where the Equipment is located to recover same;

22.3.2 the Customer shall forthwith make payment to SW Solutions all arrear amounts as well as all current amounts due as at the date of termination.

## 23. **DISPUTE RESOLUTION AND ARBITRATION**

23.1 Any dispute arising out of or in connection with this Agreement shall, in the first instance, be referred for consideration and attempted resolution to the duly authorised senior management representatives of the Customer and SW Solutions.

23.2 Should the representatives referred to in clause 23.1 above be unable to resolve the dispute within 7 (seven) days of same being referred to them, then they shall appoint a third party to act as a mediator (and not an arbitrator) to mediate in the resolution of the dispute. Such mediator shall be selected by the President for the time being of the Association of Law Societies of South Africa.

23.3 Should the mediation referred to in clause 23.2 above fail to resolve the dispute within 7 (seven) days of appointment of the mediator, then such dispute shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator or arbitrators appointed by the Foundation.

23.4 Notwithstanding the provisions of this clause 23, neither party shall be precluded from obtaining relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.

## 24. **FORCE MAJEURE**

24.1 Neither party shall be liable to the other for inability to perform or delayed performance in terms of the Agreement, should such inability or delay arising from any cause beyond the reasonable control of such party, provided that the existence/happening of such cause has been drawn to the attention of the other party within a reasonable time of occurrence of such cause (hereinafter referred to as **Force Majeure Event**).

24.2 For the purposes of this clause a Force Majeure Event shall without limitation of the generality of the foregoing, be deemed to include strikes, lock outs, accidents, fires, explosions, theft, war (whether declared or not), invasion, foreign enemies, hostilities rights, civil insurrection, flood, earthquake, lightning, act of local or national Government, Martial Law or any other cause beyond the reasonable control of the party effected.

24.3 Should SW Solutions be unable to fulfil a material obligation under this Agreement or any Service Schedule, as the case may be, for a period of not less than 30 (thirty) days due to circumstances beyond its control more fully set out in clauses 24.1 and 24.2 above, and be unable to provide a suitable temporary alternative to the affected Service or Service Element, as the case may be, then the Customer may terminate this Agreement or the applicable Service Schedule.

24.4 Notwithstanding anything to the contrary herein contained, as an alternative to termination in terms of clause 24.3 above, in the event of a Force Majeure Event, the Customer may, at its option, extend this Agreement or the applicable Service Schedule (whichever is appropriate in the circumstances) for a period equal to the period during which the Force Majeure Event subsists.

## 25. **ANTI BRIBERY AND CORRUPTION**

SW Solutions: (a) has a comprehensive anti-bribery policy and programme; (b) shall comply with Applicable Law relating to anti-bribery and anti-corruption; and (c) shall not give or receive any bribes, including in relation to any foreign public official

26. **DOMICILIA AND NOTICES**

26.1 The parties choose *domicilium citandi et executandi* (**domicilium**) for the purposes of the giving of any notice, the serving of any process, the payment of any monies and for any other purpose arising from this Agreement, as follows:

26.1.1 **SW Solutions** \_\_\_\_\_

26.1.2 **The Customer** \_\_\_\_\_.

26.2 Each of the parties shall be entitled from time to time, by written notice to the other, to vary its domicilium to any other address which is not a post office box or poste restante.

26.3 Any notice given by either party to the other (**the Addressee**) which:

26.3.1 is delivered by hand during the normal Business Hours of the Addressee at the Addressee's domicilium for the time being shall be presumed, until the contrary is proved by the Addressee, to have been received by the Addressee at the time of delivery;

26.3.2 is posted by prepaid registered post to the Addressee at the Addressee's domicilium for the time being shall be presumed, until the contrary is proved by the Addressee, to have been received by the Addressee on the 4<sup>th</sup> (fourth) day after the date of posting.

27. **GOVERNING LAW**

This Agreement shall be governed, construed and interpreted in accordance with the laws of the Republic of South Africa.

28. **RELATIONSHIP**

Nothing in the Agreement shall constitute a partnership, joint venture, agency or employment between the parties hereto, and neither party shall have the authority or power to bind, or contract in the name of, or to create a liability against the other in any way for any purpose.

29. **BINDING ON SUCCESSORS AND RELATED PARTIES**

The terms and conditions of this Agreement shall be binding upon the assigns and/or other successors-in-title of the parties from time to time.

30. **NON-VARIATION**

No addition to, variation, or agreed cancellation of this Agreement shall be of any force or effect unless recorded in a written document and signed by or on behalf of the duly authorized representatives of both parties. For purposes hereof a "written document" shall exclude any written document that is in the form, either wholly or partly, of a data message as defined in the Electronic Communications and Transactions Act 25 of 2002, and "signed" shall mean a signature executed by hand with a pen and without any electronic process or intervention.

### **31. INVALIDITY AND SEVERABILITY**

If any provision of the Agreement shall be found by any Court or administrative body of competent jurisdiction to be invalid or unenforceable, the invalidity or unenforceability of the said provision shall not affect the other provisions of the Agreement and all provisions not affected by such invalidity or unenforceability shall remain in full force and effect. The parties hereby agree to attempt to substitute for any invalid or unenforceable provision a valid or enforceable provision, with the retention of the economic, legal and commercial objectives of the said invalid or unenforceable provision.

### **32. WAIVER**

32.1 The waiver by either party of a breach or default of any of the provisions of the Agreement by the other party shall not be construed as a waiver of any succeeding breach of the same or any provisions nor shall any delay or omission on the part of either party to exercise or avail itself of any right, power or provision that it has or may have hereunder operate as a waiver of that right or power or of any breach or default by the other party.

32.2 Any concession or relaxation of any of the terms of the Agreement that either party may make or allow the other party will not in any way compromise any or all of the rights contained herein or in law of the party making or allowing the said concession or relaxation to demand specific performance

### **33. WHOLE AGREEMENT**

This Agreement, together with all schedules, appendices, Service Schedules, annexures and/or amendments from time to time and any specifically referenced documents if applicable, constitutes the complete and exclusive statement of the Agreement between the Parties and supersedes all prior or contemporaneous agreements, promises, representations, understandings and negotiations between the Parties, whether written or oral, with respect to the subject matter hereof. The terms and conditions of any and all schedules, appendices, Service Schedules (including any specifically referenced documents, if applicable) to this Agreement, as amended from time to time by mutual agreement of the Parties or in accordance with the

terms of this Agreement, are incorporated herein by reference and shall constitute part of this Agreement as if fully set out herein.