



# Customer Terms and Conditions of Sale

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## **1. PARTIES**

The parties to this agreement are as follows:

- 1.1 Kibo Connect cc (Kibo) CK 2008/191954/23 as the service provider, and
- 1.2 Customer, being the end user and subscriber of the service/s provided by the service provider.

## **2. DEFINITIONS**

In this agreement, unless the context indicates the contrary intention, the following words and expressions will have the following meaning:

- 2.1 "Agreement" means the terms and conditions contained in this Agreement and any annexures and schedules attached hereto.
- 2.2 "Connection" means the activation of the Customer account to the system.
- 2.3 "Network" means the fibre optic network over which the Service is provided.
- 2.4 "Contract Period" means the time period, commencing on the commencement date, continuing thereafter for a period as stated on the Service Order, during which this Agreement cannot be cancelled by the Customer for any reason other than as may be provided by law.
- 2.5 "Service Order" means the Products and/or Service/s accepted by the Customer on the form attached hereto.
- 2.6 "Client Installation Sign Off Form" means the document where the Customer accepts the Service provided by Kibo.
- 2.7 "Commencement Date" means the cut over date on which the Service/s actually commenced or were deemed to have commenced as stipulated on the Client Installation Sign Off Form.
- 2.8 "Service" means the Service applied for by the Customer on the Service Order.
- 2.9 "Monthly Fees" means the monthly charges payable by the Customer as per the Service Order signed by the Customer.

## **3. ACCEPTANCE OF APPLICATION**

Acceptance will only take place if the Customer passes the credit checking performed by Kibo. These Terms and Conditions shall only apply to the exclusion of all others, whether implied or proposed, by the Customer orally or in writing unless expressly accepted in writing and signed by the Managing Director of Kibo.

## **4. TERM**

Subject to clauses 5.1 and 6 hereunder, this Agreement shall commence on the Commencement Date and shall continue for the Contract Period. After the Contract Period has passed, this Agreement shall continue indefinitely unless cancelled by either Party in terms of this Agreement by giving 90 days notice to the other Party. If the Customer wishes to terminate this Agreement, effective immediately upon the expiry of the Contract Period, then the Customer shall do this by giving Kibo written notification of such intention to terminate at least 90 (ninety) days prior to the end of the Contract Period.

## **5. PROVISION OF SERVICE**

Kibo will provide the Service to the Customer according to the Customer requirements on the Service Order. During the Contract Period or any future period of this Agreement, either Party may propose a change to the nature of the Services by giving the other Party notice in writing of the desired changes.

- 5.1. If the desired changes are made by the Customer, Kibo will investigate the impact of any proposed changes on the provision of the Services and will provide the Customer with a new Service Order including the amended monthly and once-off fees. If this new Service Order is acceptable to the Customer, the Customer will sign the new Service Order which will then replace the old original Service Order. If the Customer rejects this new Sales Order, Kibo will continue to provide the Service on the existing terms.
- 5.2. No Party may proceed with any change to the Service Order until the new Service Order has been signed by the Customer. Pending this sign-off by the Customer, the Parties will continue to perform their obligations in terms of this Agreement without taking account of the proposed changes. No Party may unreasonably delay or withhold their agreement to a proposed change.

## **6. USE OF THE SERVICE**

- 6.1. The Customer shall use the Service in accordance with the Acceptable Usage Terms of Kibo, a copy of which is available either on the Kibo website at <http://www.kiboconnect.co.za/legalpolicies/> or on request.
- 6.2. The Customer hereby agrees and undertakes fully and effectively to indemnify and keep Kibo indemnified before, during and after the expiry or termination of this Agreement for and against any and all loss (including legal and

professional expenses) which Kibo may at any time incur as a result of any use of the Service by the Customer which is not in accordance with the Acceptable Usage Terms of Kibo.

## **7. PAYMENT AND FEES**

- 7.1. Payment for the Service will be in accordance with the payment terms stipulated on the Service Order for the monthly fees and once-off fees respectively.
- 7.2. VAT is payable on all charges at the VAT rate ruling at the time of invoicing.
- 7.3. The price of the Service will be in accordance with the prices agreed to by the Customer on the Service Order.
- 7.4. Interest will be charged on all overdue accounts at the prime overdraft rate plus 5% as quoted by Kibo's bankers from time to time, or 15%, whichever is the higher.
- 7.5. The Customer shall be responsible for all costs incurred by Kibo (including legal costs on the scale as between attorney and own client) in the collection of any payment not received from the Customer by due date.
- 7.6. To the extent allowed by law, if the Customer fails to object to any item appearing on Kibo's statement or invoice in writing within 5 days of the date of the statement or invoice, the account shall be deemed to be correct and payable by the Customer, and the Customer shall be deemed to have agreed to the charges thereon until the contrary is proved.
- 7.7. Invoicing from Kibo will be monthly in advance on the first working day of each month and are payable either via debit order or within 7 days of the invoice date according to the Service Order accepted by the Customer.
- 7.8. If a debit order or EFT payment is dishonoured, cancelled or reversed, the Customer shall pay Kibo any resulting bank charges and/or reasonably associated administration charges to secure a successful re-payment from the Customer.
- 7.9. In the event of the Customer disputing the correctness of any invoice or charge from Kibo pursuant to this Agreement,
  - 7.9.1 The Customer shall provide written notice of the existence of the dispute to Kibo within 5 (five) calendar days of receipt of the invoice.
  - 7.9.2 Such notice shall include sufficient details and all necessary documentation for Kibo to understand the nature of the dispute and respond thereto, and shall clearly set out the portion of the invoice that is disputed and the portion that is not disputed.
  - 7.9.3 Kibo shall respond to such notice in writing within 5 (five) calendar days of receipt thereof and shall justify its position with sufficient details and all necessary documentation for the Customer to understand such justification.
  - 7.9.4 In the event that the dispute persists, representatives of the Parties with the authority to make binding decisions on their respective businesses shall meet, either electronically or in person, within a further 5 (five) calendar days from receipt of the responding notice from Kibo in order to resolve the matter.

## **8. SUSPENSION OR WITHDRAWAL OF SERVICE**

- 8.1 Kibo may suspend, withdraw or restrict all or part of the Service at any time until further notice to the Customer if:
  - 8.1.1 Kibo has grounds for terminating the Service under clause 9 and has exhausted all avenues under this Agreement for the resolution of a dispute or breach;
  - 8.1.2 the provision of the Service would cause Kibo to be in breach of any applicable law;
  - 8.1.3 in the reasonable opinion of Kibo, it is necessary to suspend the Service in order for Kibo to carry out planned or unplanned maintenance, repair or upgrading of the Network, or to protect the integrity of the Network. Kibo will give the Customer as much notice as is reasonably practicable in the circumstances, either orally and/or via email.
- 8.2 If the Service is suspended, withdrawn or restricted under this clause 8 through no fault of Kibo and for reasons set out in clause 8, Kibo will endeavour to ensure that there is minimum disruption to the Service and shall use its best endeavours to promptly reinstate the same.
- 8.3 Without limiting the exclusions or limitations of liability in clause 9, Kibo shall not be liable to the Customer nor any third party for any loss resulting from or in connection with a suspension, withdrawal or restriction of the Service implemented under and in compliance with this clause 8.

## **9. TERM AND TERMINATION**

- 9.1 This agreement shall endure indefinitely unless terminated in accordance with its applicable provisions but shall terminate without need for further formality in the event that no Service has been provided under this Agreement for a period of 6 (six) months and all payment obligations of the Customer have been discharged.

- 9.2 Either party may immediately terminate this agreement with written notice if any Force Majeure event continues for more than 90 days.
- 9.3 Kibo may immediately terminate this Agreement by giving written notice to the Customer if the Customer defaults in respect of two or more payment obligations within a 12 (twelve) month period.
- 9.4 On termination of this Agreement:
- 9.4.1 all fees and amounts owing by the Customer to Kibo will become immediately due and payable, and
- 9.4.2 the Customer shall cease to use the Service.
- 9.5 Termination of this Agreement shall not affect the rights of the Parties which have accrued prior to the date of termination of this Agreement.
- 9.6 Without limiting the exclusions or limitations of liability in clause 8, Kibo shall not be liable to the Customer nor any third party for any loss resulting from or in connection with the termination of this Agreement under this clause 9.

## 10. **LIMITATION OF LIABILITY**

- 10.1 To the extent permitted by law:
- 10.1.1 conditions, warranties implied by custom, the general law or statute are excluded:
- 10.1.2 neither Party shall be liable to the other for any consequential loss.
- 10.2 To the extent permitted by law, Kibo's liability under this Agreement or for or in relation to:
- 10.2.1 any breach of clause 5 is limited to supplying the service again; and
- 10.2.2 Kibo shall not be liable for any loss or damage sustained by reason of any failure in or breakdown of the telecommunications facilities associated with the circuits used in providing the telecommunication services under this Agreement or for any interruption of the Service or delay in the provision or restoration of the Service howsoever long it shall last provided that such failure, breakdown, interruption or delay is not caused by the negligence of Kibo.
- 10.3 Information, applications and services that may be provided through the Service is provided by third party information providers. The Customer acknowledges that Kibo makes no warranties of any kind in relation to the information and accepts no responsibilities for its accuracy or completeness or any loss or damage whatsoever and howsoever suffered or incurred by the Customer in connection with such information or service. With the use of or access to the information or services, the Customer irrevocably and unconditionally accepts and agrees to be bound by this disclaimer.
- 10.4 The Customer shall indemnify Kibo, its employees and suppliers against any loss (including consequential loss) which the Customer suffers or incurs in connection with this Agreement, including but not limited to the loss resulting directly or indirectly from:
- 10.4.1 any act or omission of the Customer
- 10.4.2 any claim by any person relating to the use of the Service by the Customer including any delay or failure to provide the service
- 10.4.3 any claim by any person or liability of Kibo under any applicable law in relation to the supply of the Service including to any content transmitted using the Service including any claim for the infringement of any property right (including copyright or any right in any trade mark or design) or any claim arising directly or indirectly out of or relating to the use of the Service to carry material of illegal, obscene, indecent or defamatory nature;
- other than to the extent that it is a result of the wilful breach of this Agreement by KIBO.
- 10.5 Nothing in this agreement excludes or restricts a party's liability for death or personal injury resulting from negligence or intent of that party.
- 10.6 The provisions on limitation of liability apply for Kibo's benefit and that of third parties whose networks are connected to each other or to the Network, all companies directly or indirectly owned wholly or partly owned or controlled by any of these parties, all their officers, employees, contractors, agents or anyone else to whom the parties are responsible.

## 11. **BREACH**

Should either Party breach any of the terms and conditions of this agreement, then the aggrieved Party shall be entitled forthwith, if the defaulting Party has failed to remedy such breach within a period of 7 (seven) calendar days after receipt of written notice by the aggrieved Party requiring it to do so, to claim immediate payment and/or performance of all the defaulting Party's obligations, whether or not the due date for payment and/or performance shall have arrived, in either event without prejudice to the aggrieved Party's right to claim damages or cancel this agreement or any Service Order or any other rights as the aggrieved Party may have in law. Notwithstanding anything to the contrary, neither Party shall be liable to the other for any indirect or consequential losses.

## 12. COSTS

The costs of and incidental to the negotiation, preparation and drawing of this agreement incurred by each Party shall be borne by such Party.

## 13. DISPUTE RESOLUTION

- 13.1 In the event that any dispute of whatever nature arises under this agreement or its implementation, then the Parties must refer the dispute for resolution, first, by way of negotiation and failing that, by way of mediation, and failing that, by way of arbitration. The dispute may not be referred to arbitration unless the negotiation and mediation processes have been completed.
- 13.2 A dispute shall arise on the date on which one Party gives the other Party written notice of the details regarding any matter in dispute by the Parties in relation to the agreement.
- 13.3 Negotiation. Within 3 (three) calendar days of the dispute arising, the Parties shall seek an amicable resolution by referring the dispute to representatives of each of the Parties, who must have authority to resolve the dispute, and who must negotiate in good faith in an endeavour to resolve the dispute. The referral period may be varied by written agreement between the Parties.
- 13.4 If the dispute is not settled by negotiation, the Parties' representatives shall, in writing, record the reason for the failure and the issues that remain in dispute ("failed negotiation record") for the purpose of referring the dispute to mediation.
- 13.5 Mediation. In the event of the negotiation failing for any reason whatsoever, the Parties must, within 14 (fourteen) calendar days of the date of the failed negotiation record, refer the issues that remain in dispute for resolution by way of mediation. The referral period may be varied by written agreement between the Parties.
- 13.6 If the dispute is not settled by mediation, the mediator shall, in writing, record the reason for the failure and the issues that remain in dispute ("failed mediation record") for the purpose of referring the dispute to arbitration.
- 13.7 Arbitration. In the event of the mediation failing for any reason whatsoever, the Parties must, within 14 (fourteen) calendar days of the date of the failed mediation record, refer the issues that remain in dispute to arbitration in accordance with the following provision:
- 13.7.1 the arbitration will be held and finalised in Cape Town in accordance with the expedited arbitration rules of the Arbitration Foundation of Southern Africa ("AFSA");
- 13.7.2 one arbitrator will be appointed by agreement between the Parties;
- 13.7.3 if the parties cannot agree on the arbitrator within a period of 5 (five) calendar days after the dispute was referred to arbitration, the arbitrator shall be appointed by the Secretariat of AFSA.
- 13.8 General (relating to the dispute resolution). The provisions of this dispute resolution clause shall not preclude any Party from approaching any High Court of competent jurisdiction for an interdict or other injunctive relief of an urgent nature during the dispute resolution process.
- 13.9 The reference to :
- 13.9.1 AFSA shall include any institution or body that replaces or succeeds them or that they may nominate in writing to act in their stead if they are for any reason unable to act, and
- 13.9.2 The rules of AFSA means the rules that are in operation at the time when the dispute is referred for resolution.
- 13.10 The agreement contained in this dispute resolution clause is separate and divisible from the other provisions of this agreement and shall remain in effect even if the agreement is cancelled or terminated for any reason whatsoever.

## 14. LEGAL NOTICES

- 14.1 The Parties choose the addresses set out on the Service Order as their respective addresses ("domicilia") for the purposes of giving any notice, the payment of any sum (unless otherwise specified), the serving of any process and for any other purpose arising from this agreement.
- 14.2 Each of the Parties shall be entitled from time to time by written notice to the other, to vary its domicile to any other street address within the Republic of South Africa, which change will take effect on the date on which the notice is deemed to be received by the other party in terms of clause 14.3 below.
- 14.3 Any notice required to be given in terms of this agreement shall be valid and effective only if in writing.
- 14.4 Any notice given by one Party to the other ("the addressee") which:
- 14.4.1 is delivered by hand during normal business hours at the addressee's domicile shall be deemed to have received by the addressee at the time of delivery;
- 14.4.2 is given by fax or e-mail shall be deemed to have been received by the addressee on the first working day following the day of successful transmission of the fax or e-mail as the case may be;

14.4.3 is given by pre-paid registered post shall be deemed to have received by the addressee 10(ten) working days after the day of posting.

**15. APPLICABLE LAW AND JURISDICTION**

This agreement will be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with South African law by a South African Court having jurisdiction.

**16. FORCE MAJEURE**

Neither Party shall incur any liability by reason of any failure to fulfil any obligation in terms of this agreement(except an obligation to pay money) if such failure is occasioned by a Force Majeure consisting of acts of God, fire, accident, government acts, explosion, industrial dispute or any other act, omission or event beyond reasonable control of such Party.

**17. CESSION AND ASSIGNMENT**

Kibo may cede and assign this agreement to any of its finance institutions as security for the financial obligations that those financial institutions have against Kibo. Kibo shall in such instances remain responsible for all its obligations under this agreement.

**18. GENERAL**

- 18.1 Should any of the terms and conditions of this agreement be held to be invalid, unlawful or unenforceable, such terms and conditions will be severable from the remaining terms and conditions which will continue to be valid and enforceable.
- 18.2 This document constitutes the sole record of the agreement between Kibo and the Customer as regards the subject matter hereof.
- 18.3 No Party to the agreement shall be bound by any representation, express or implied term, warranty, promise or the like not recorded herein.
- 18.4 No addition to, variation, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the Parties.
- 18.5 No indulgence which any Party("the grantor") may grant to the other("the grantee") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which may have arisen in the past or which might arise in the future.
- 18.6 No amendment or consensual cancellation of this agreement or any provision or term thereof or of any agreement, bill of exchange or other document issued or executed pursuant to or in terms of this agreement shall be binding unless recorded in a written document signed by a duly authorised representative from both Parties.
- 18.7 No extension of time or waiver or relaxation of any of the provisions or terms of this agreement, bill of exchange or other document issued or executed pursuant to or in terms of this agreement, shall operate as an estoppel against either Party hereto in respect of its rights under this agreement, nor shall it operate so as to preclude either of the Parties thereafter from exercising its rights strictly in accordance with this agreement.