



# TERMS AND CONDITIONS OF SALE

DATE OF LAST REVIEW: 19 August 2019

**IMPORTANT PLEASE NOTE:** This Terms and Conditions document will be updated intermittently. Please ensure that this document is reviewed from time to time to remain abreast of content and legalities.

## TABLE OF CONTENTS

Parties.....	3
Definitions And Interpretations.....	3
Acceptance Of Application .....	4
Term.....	4
Provision Of Service .....	4
Use Of The Service .....	4
Payment And Fees .....	4
Suspension Or Withdrawal Of Service.....	5
Term And Termination .....	6
Risk, Theft And Loss Of Equipment.....	6
Installation .....	7
Limitation Of Liability.....	7
Breach And Cancellation.....	8
Notices And Domicilium .....	8
Force Majeure .....	9
Cession And Assignment.....	9
Installation And Connection Penalty Fees .....	9
General .....	9

### PARTIES

- 1.1 “Kibo” is “Kibo Connect (Pty) Ltd” a company registered in terms of the company laws of the Republic of South Africa with registration number 2017/281018/07. Address: Sunrise Park, Sunrise Circle, Prestige Drive, Ndabeni, 7405 Email: [info@kiboconnect.co.za](mailto:info@kiboconnect.co.za).
- 1.2 “The Customer” or “You” is the end user and subscriber of the service(s) provided by the service provider.

### DEFINITIONS AND INTERPRETATIONS

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 Service Orders, annexures and schedules attached hereto. During which this Agreement cannot be cancelled by the Customer for any reason other than as may be provided by law.
- 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 Cut Over Date, continuing thereafter for a period as stated in the Service Order.
- 2.5 “Customer Premises Equipment” refers to all equipment owned by Kibo Connect or any of its carriers or suppliers.
- 2.6 “Service Order” means the Products and/or Service/s accepted by the Customer on the form attached hereto.
- 2.7 “Client Installation Sign Off Form” means the document where the Customer accepts the Service provided by Kibo.
- 2.8 “Cut Over Date” means the date on which the Service/s commenced or were deemed to have commenced as stipulated on the Client Installation Sign Off Form.
- 2.9 “Commencement Date” means the date when Kibo has processed the Client Installation Sign Off Form and notified the Customer that it has agreed to provide the Customer with the Products and/or Services contained in the Service Order.
- 2.10 “Installation” means the physical act and labour of providing a service to the Customer’s premises, and includes all physical work and materials required to provide such a service to the Customer’s premises.
- 2.11 “Installation Date” means the appointment date on which the Installation is booked to take place.
- 2.12 “Installation Window” means the period of time between the Commencement Date and the Cut Over Date.
- 2.13 “Service” means the Service applied for by the Customer on the Service Order.
- 2.14 “Monthly Fees” means the monthly charges payable by the Customer as per the Service Order signed by the Customer.

### ACCEPTANCE OF APPLICATION

- 3.1 Acceptance will only take place if the Customer passes the credit check 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.

### TERM

- 4.1 Notwithstanding the Cut Over Date, the Agreement shall start on the Commencement Date and continues until the end of 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 calendar 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 calendar days prior to the end of the Contract Period.

### PROVISION OF SERVICE

- 5.1 Kibo will provide the Service to the Customer according to the Customer requirements on the Service Order.
- 5.2 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.
- 5.3 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 Service Order, Kibo will continue to provide the Service on the existing terms.
- 5.4 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.
- 5.5 In the event that the Customer decides to move and/or relocate to a different location and/or premises, Kibo shall, provided the new location is in an area, where Kibo operates and/or is able to provide the necessary service and subject to the provisions of this agreement move the Customer's services to the new premises and/or location in which case the installation costs old and/or new to move the Customer's services to the new premises and/or location will be payable by the Customer.

### 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 [www.kiboconnect.co.za/legal](http://www.kiboconnect.co.za/legal) 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.

### 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, should the Customer be on a month to month contract, Kibo reserves its rights to increase the monthly fee annually in accordance with the CPI of South Africa.
- 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 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.
- 7.7 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.
- 7.8 In the event of the Customer disputing the correctness of any invoice or charge from Kibo pursuant to this Agreement:
  - 7.8.1 The Customer shall provide written notice of the existence of the dispute to Kibo within 5 (five) calendar days of receipt of the invoice.
  - 7.8.2 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.
  - 7.8.3 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.
  - 7.8.4 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.
  - 7.8.5 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.

### 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 below, 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.

## 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 above, 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.

## RISK, THEFT AND LOSS OF EQUIPMENT

- 10.1 Whenever any equipment is lost, stolen, damaged or destroyed, the Customer must immediately notify Kibo in writing that the equipment has been lost, stolen, damaged or destroyed.
- 10.2 Risk in and to the use of the Kibo services and equipment will pass to the Customer on the cut over date. Kibo reserves the right to hold the Customer liable for the cost to replace any equipment, regardless of the cause of any such loss, damage or destruction.

- 10.3 Any equipment that is damaged whilst in the possession of the Customer and after the risk and use of the equipment passes to the Customer, all such equipment becomes the responsibility of the Customer. Any damage to Kibo's equipment will be for the Customer's account. The loss suffered by Kibo due to the damage of the equipment will be determined by the fair market value of the equipment at the time of damage.
- 10.4 It is the Client's responsibility to provide stable utility power (and redundancy if required) for all Kibo Connect Client Premises Equipment

## INSTALLATION

- 11.1 Kibo shall make reasonable endeavours to complete the installation by the cut over date as requested by the Customer. However, Kibo gives no undertakings that it will be able to meet any cut over date requested by the Customer, the Customer accepting that Kibo will install the services when it is able to do so, which will depend on the availability of equipment and service providers or contractors, whatever the case may be.

## Limitation of Liability

- 12.1 To the extent permitted by law:
- 12.1.1 Conditions, warranties implied by custom, the general law or statute are excluded:
- 12.1.2 Neither Party shall be liable to the other for any consequential loss.
- 12.1.3 To the extent permitted by law, Kibo's liability under this Agreement or in relation to:
- 12.1.3.1 Any breach of clause 5 is limited to supplying the service again; and
- 12.1.3.2 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.
- 12.2 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.
- 12.3 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:
- 12.3.1 Any act or omission of the Customer;
- 12.3.2 Any claim by any person relating to the use of the Service by the Customer including any delay or failure to provide the service;

- 12.3.3 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.
- 12.4 Nothing in this agreement excludes or restricts a party's liability for death or personal injury resulting from negligence or intent of that party.
- 12.5 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.

#### BREACH AND CANCELLATION

- 13.1 Should the Customer breach any term of this agreement including any failure to pay Kibo any monies due on due date, Kibo shall notify the Customer of the breach and give the Customer 7 (seven) business days' notice to rectify the breach. Should the Customer neglect or fail to rectify the breach within the 7 business days' notice period, then Kibo will have the right to either suspend or cancel the Agreement and/or stop the supply of services to the Customer and/or terminate current services held by the Customer, without prejudice to Kibo's rights to claim all and any damages which Kibo has suffered in the consequence of such breach.
- 13.2 Should the Customer be sequestrated or liquidated, Kibo shall be entitled to immediately cancel this Agreement upon notice to the Customer.
- 13.3 The Customer acknowledges that should it fail to remedy the breach in terms of clause 13.1 or the Customer is sequestrated or liquidated in terms of clause 13.2, Kibo may immediately, without further notice to the Customer, suspend or stop the supply of any service which Kibo supplies to the Customer.
- 13.4 In the event that Kibo should institute legal proceedings against the Customer to recover any amounts owing to it or as a result of any breach of any of the terms of this agreement, the Customer shall be liable for and shall pay all legal costs incurred as a result thereof. The term "all legal costs" is to include costs on an attorney and own client scale as well as all pre-litigation costs, costs of any letter of demand, tracing agents' fees, collection commission and advocates fees.
- 13.5 Kibo shall be entitled, at its sole discretion, to institute proceedings arising from any issue between the parties in respect of this agreement in any Magistrate's Court having jurisdiction, despite the fact that the subject matter and/or the amount outstanding may exceed the jurisdiction of the Magistrate's Court and the Customer hereby consents to the jurisdiction of the Magistrate's Court; or

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.

#### NOTICES AND DOMICILIUM

- 14.1 The Customer chooses as its address for the purpose of the giving of any notice or for the service of any process or pleading, the physical address as stipulated in the Service Order under the heading "Physical



Address". The Customer shall be entitled, by written notice to Kibo, to vary the address to any other physical address in the Republic of South Africa.

### FORCE MAJEURE

- 15.1 Except as specifically provided under the Agreement, Kibo shall not be liable to the Customer for any breach of these conditions or failure to perform any obligation as a result of any force majeure (event beyond its reasonable control) event, including but not limited to technical problems relating to the Kibo Network, acts of God, Government controls, restrictions or prohibitions or any other Government act or omission, whether local or national, any act or default of any supplier, agent or sub-contractor, industrial disputes, strikes, lockouts or work stoppages of any kind or any other similar or dissimilar cause, in so far as these are beyond Kibo's reasonable control.

### CESSION AND ASSIGNMENT

- 16.1 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.

### INSTALLATION AND CONNECTION PENALTY FEES

- 17.1 Kibo reserves the right to charge the Customer the full installation and connection fees should the Customer cancel this Agreement, lawfully or unlawfully from the commencement date until the expiration of the contract period. Installation and connection fees may differ based on Fibre provider, purchase date and line speed.
- 17.2 Routers provided on a free to use basis are subject to either of the following penalties should the Customer cancel the associated service or become suspended for 30 days or more:
- 17.2.1 Provided the router is in a good working condition, return the router to Kibo with its original packaging; or
- 17.2.2 Pay Kibo the full retail price for the router.

### 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.