



## **Terms and Conditions**

## 1. Agreement

- 1.1 "Agreement" means the terms and conditions set out in this document (the "General Terms and Conditions") together with all orders in the form of the IRACK order or authorisation form for services under this Agreement completed by the Customer and accepted by IRACK ("Order"); and:
- 1.1.1 the applicable IRACK Service Schedule current at the date of the Order; and
- 1.1.2 the applicable IRACK Service-Specific Terms current at the date of the Order; and
- 1.1.3 the IRACK Tariff Schedule, being the list of IRACK's charges for the provision of the Service as may be provided by IRACK to the Customer from time to time; and
- 1.1.4 the Ancillary Charges Table, being the list of ancillary charges for the provision and support of the Services payable in connection with the Services, as may be provided by IRACK to the Customer from time to time; and
- 1.1.5 IRACK's Acceptable Use Policy posted at IRACK's website (currently at [iRacknet.com](http://iRacknet.com)) as IRACK may change this policy without notice from time to time ("AUP")
- 1.1.6 (the documents listed at clause 1.1.1 to 1.1.5 above collectively, the "Service Literature").

1.2 The order of precedence to resolve any inconsistency between different parts of the Agreement shall be (i) the Order; (ii) the Tariff Schedule; (iii) the Service Schedule; (iv) the Service-Specific Terms; (v) the AUP; (vi) the Ancillary Charges table; (vii) these General Terms and Conditions.

## 2. Provision of the Services

- 2.1 IRACK shall advise the Customer in writing (which may be via e-mail) of its acceptance of an Order.
- 2.2 IRACK shall provide, or where necessary for regulatory reasons will procure that IRACK Party (being each of IRACK, IRACK Affiliates (being IRACK or any of its subsidiaries from time to time (as defined by Sections 736 and 736A of the Companies Act 1985)), its suppliers, subcontractors and licensors taken together) holding the relevant licence will provide, communications and related services in accordance with this Agreement (the "Services"). The service levels for each Service shall be as specified in the Service Literature ("Service Levels").
- 2.3 IRACK shall, as soon as reasonably possible following its acceptance of an Order, notify the Customer of the date by which it plans to commence the Services under the Order.
- 2.4 IRACK shall, where applicable, carry out acceptance tests prior to commencement of a Service.
- 2.5 Provision of each Service shall start on the date on which IRACK first makes the Service available to the Customer (the "Service Commencement Date").

2.6 From the Service Commencement Date, each Service shall, subject to clause Termination and Suspension:

- 2.6.1 continue for the period set out in the Order or Service Literature for that Service (which may be specified as an "Initial Period", "Initial Term" or "Minimum Service Period") or, if there is no such period set out in the Order or Service Literature, a period of one year (in either case, the "Initial Period"); and
- 2.6.2 automatically continue thereafter for successive 12 month periods unless otherwise specified in the Service Literature (each a "Renewal Period") following expiry of the Initial Term or a Renewal Period then in effect.
- 2.6.3 2.7 Without prejudice to clause 8, either party may give not less than three months' prior written notice to terminate this Agreement such notice to expire at the end of the Initial Term or a Renewal Period.

## 3. Compliance with laws and regulations

- 3.1 IRACK will comply with all applicable laws and regulations regarding the provision of Service, and the Customer will comply with the AUP and all applicable laws and regulations regarding the use of Service. The Customer shall also obtain any relevant consents and approvals for the installation and use of any equipment associated with the Services.
- 3.2 IRACK will provide the Services on the condition that IRACK is able to keep in place the necessary licenses, authorisations, permissions, ministerial determinations, directions and declarations and other governmental approvals. IRACK will use all reasonable endeavours to keep these in place.

## 4. Sites

- 4.1 The Customer shall prepare those of its location(s) at which the Services are to be provided ("Site(s)") and co-operate with IRACK in accordance with IRACK's instructions and timescales so that any equipment which IRACK provides for the provision of the Services can be installed and maintained by or on behalf of IRACK. IRACK shall be entitled to charge the Customer for any costs incurred by IRACK as a result of any failure by the Customer to satisfy such requirements. The Customer shall meet the costs of preparing any Site(s) and shall provide to IRACK free of charge adequate electricity supply, suitable earth connection and an adequate environment for the operation of any such equipment.
- 4.2 IRACK shall normally carry out installation and maintenance work at the Site(s) during Working Hours (being 9.00 am to 5.00pm Monday to Friday, excluding public holidays ("Working Days")) where such work does not involve any suspension of the Services but may, on reasonable notice (which shall not be less than 12 hours except in an emergency),

require the Customer to provide access at other times and/or on shorter notice. Where necessary, IRACK shall be entitled to suspend the Services in order to carry out such work. Except where suspension of the Services is involved, IRACK may, in response to the Customer's request, or where IRACK deems it necessary, carry out such work outside Working Hours and in so doing shall charge the Customer the out of hours premium fee as set out in the Ancillary Charges Table.

4.3 IRACK shall, when it undertakes installation and maintenance work under this clause, comply with any reasonable Site procedures notified in writing to IRACK in advance by the Customer.

- 5. Equipment**
- 5.1 If IRACK provides the Customer with any equipment which is owned by IRACK or by a third party (in each case the "Equipment"), the Equipment shall remain the property of IRACK or the third party at all times and shall be kept at the relevant Site and used in accordance with IRACK's instructions.
- 5.2 The Customer shall not deal with, modify or interfere with the Equipment or remove or alter any identification mark on the Equipment showing that it is owned by IRACK or a third party and shall not let any other third party have rights over the Equipment.
- 5.3 The Customer shall notify IRACK immediately of any loss of or damage to the Equipment and the Customer shall be liable to IRACK for any such loss or damage while it is in the Customer's custody except where it can be shown that IRACK or, where applicable, a third party owner of the Equipment was responsible for such loss or damage.
- 5.4 The Customer shall permit IRACK to inspect or test the Equipment remotely at such times as may be agreed between IRACK and the Customer, such agreement not to be unreasonably withheld or delayed.
- 5.5 The Customer acknowledges that IRACK is not a producer (as defined in the Waste Electrical and Electronic Equipment Regulations 2006, the "WEEE Regulations") of electrical and electronic equipment as defined in the WEEE Regulations.

**6. Provisions relating to the Services**

6.1 The Customer shall use the Services in accordance with any reasonable operating instructions IRACK may provide, and shall

reasonably co-operate with IRACK in IRACK's provision of the Services, including any diagnostic or other maintenance or upgrade activities.

6.2 The Customer shall be responsible for all charges incurred in connection with any use of the Services, whether or not it has authorised such use.

6.3 The Customer shall be responsible

6.3.1 for ensuring that the Services are not used for the sending, storage or reproduction of any defamatory, offensive, abusive, obscene or menacing material or in a manner which infringes the rights of any person (including rights of copyright or confidentiality) or violates the AUP, and

6.3.2 for access to and the use of its own networks and systems in conjunction with the Services, whether or not it has authorised such access or use,

6.4 and if any IRACK Party incurs any costs, either in connection with a liability to a person or in any other way, arising out of any such access or use then the Customer shall promptly reimburse such amounts to IRACK.

6.5 Where telephone numbers are to be allocated under an Order, IRACK shall notify the Customer of those telephone numbers as soon as is reasonably practicable after accepting the Order. Subject to the provisions of any applicable law, regulation or licence condition, telephone numbers allocated to the Customer and all rights in those numbers shall belong to IRACK and the Customer shall not sell or transfer, or attempt to sell or transfer, any telephone number to a third party. The Customer shall have no trade name right in any telephone number that IRACK allocates to it nor any trade name right that may develop in any telephone number allocated to it.

6.6 IRACK may change any telephone number allocated to the Customer after giving the Customer reasonable notice where such change is necessary in order for IRACK to comply with a law or regulation or for operational reasons.

6.7 After termination of any Service(s) or part of any Service, IRACK shall not issue any telephone number which has been allocated to the Customer to a third party for a period of 6 months after the date of termination applicable to that number.

6.8 IRACK may (at no charge to the Customer) modify a Service so long as this does not cause a materially adverse impact on the Customer's use of the Service.

6.9 If a Service requires the use of non-IRACK services and/or facilities in a location where local regulations do not permit IRACK to order these services and/or facilities directly from the

local provider, the Customer hereby appoints IRACK as its agent to place the order on the Customer's behalf ('Local Provider Order'), and to otherwise deal with the local provider as IRACK may reasonably consider necessary in order to provide the Service.

6.9 IRACK reserves the right to refuse or delay implementation of network changes, activities and Orders during the period when most demand is placed on its network (the "Freeze Period") if, in IRACK's reasonable opinion, such activities would cause disruption to the Services or services provided to its other customers. A Freeze Period shall commence on or around 1 December and expire on or around 15 January each year. IRACK may give notice of additional Freeze Periods if it deems it necessary to protect the integrity of its network.

## 7. Charges and Payment

- 7.1 The Customer shall pay each charge owing under the Agreement ("Charges") in the currency shown on the Order, in the manner described in the Service Literature or as IRACK may reasonably specify. Subject to clause In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) co-operates with IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute., the Customer shall pay the full amount due (both Charges and Fees and Taxes) within 30 days of the invoice date or as otherwise stated in the Service Literature and/or the Order (the "Due Date") without any set-off, deductions or withholding.
- 7.2 Except for installation, maintenance or service charges which are payable on acceptance of an Order by IRACK, as set out in the relevant Service Literature, charges for each Service shall start to accrue on the Service Commencement Date and IRACK shall be entitled to invoice the Customer for those charges in the month following the Service Commencement Date irrespective of whether any traffic has been routed through the Service.
- 7.3 In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK

will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) co-operates with IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute.

- 7.4 The Charges are exclusive of (and the Customer will pay) any applicable taxes, fees and surcharges (including, but not limited to, any applicable Value Added Tax or other tax of a similar nature in any jurisdiction) that apply to the Charges and/or a Service (taken together, 'Fees & Taxes'), except to the extent that the Customer gives IRACK proper proof of exemption.
- 7.5 For Services for which usage or maintenance charges are paid by the Customer, IRACK may modify the charges from time to time by giving the Customer written notice at least 28 days before it is to take effect. IRACK may give such notice (which may refer to a IRACK web site detailing the change to the charges) by email, in statements added to or included with monthly invoices, or by other reasonable means selected by IRACK. If any change in usage or maintenance charges would result in an increase in the aggregate charges for the Services provided to the Customer under an Order, within 28 days of receiving the change notice the Customer may request IRACK to demonstrate that the cost of providing the Services to the Customer has increased or that the charges remain competitive with charges for substantially similar services offered by a substantially similar provider. If IRACK is unable to demonstrate this within 30 days of the Customer's request, the Customer may terminate that Order by giving IRACK 30 days' written notice.
- 7.6 Upon IRACK's request, the Customer will promptly give IRACK information describing the Customer's current financial condition.
- 7.7 If the Customer experiences a materially adverse change in its financial condition or the Customer orders or uses more Services, IRACK may require the Customer to agree to provide a (or increase its existing) security deposit or other form of payment security.

## 8. Termination and Suspension

- 8.1 Without prejudice to any other rights or remedies either party may terminate or suspend any or all of the Services or part of any of the Services immediately by serving written notice on the other if:
- 8.1.1 the other party becomes Insolvent (as defined in clause In this clause "Insolvent" means, in respect of a party to this Agreement, when that party is unable to pay its debts when due, or any of the following happens to it under its national laws for the protection of debtors (or like circumstances arise or like actions are taken): (a) the party is determined to be bankrupt or insolvent or the process to make this determination has started; (b) the party has a receiver, administrator or liquidator appointed for it; (c) the party makes an arrangement or composition with, or an assignment for the benefit of, its creditors; or (d) the party goes into either voluntary (other than for reconstruction or amalgamation) or compulsory liquidation. below); or
- 8.1.2 the other party commits a material breach of the Agreement and (in the case of a remediable breach) fails to remedy the breach after receiving 30 days' written notice to do so from the other; or
- 8.1.3 the other party's telecommunications authorisation(s) or licence(s) are revoked or amended (and not replaced by an equivalent right) so that IRACK is not permitted by law to provide the Services; or
- 8.1.4 the other party acts in, or is reasonably believed to have acted in, a fraudulent manner in any way in relation to this Agreement.
- 8.2 Notwithstanding clause the other party commits a material breach of the Agreement and (in the case of a remediable breach) fails to remedy the breach after receiving 30 days' written notice to do so from the other; or, and without prejudice to clause In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) co-operates with IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute., IRACK may terminate or suspend any or all of the Services or part of any of the Services by serving 7 days' written notice on the Customer if the Customer does not pay an undisputed amount when due, and if the Customer still does not pay the amount within 10 days after receiving written notice from IRACK of this non- payment..
- 8.3 Without prejudice to any other rights or remedies, IRACK may suspend or block access to any or all of the Services or part
- of any of the Services if
- 8.3.1 such action is required in response to or in compliance with any law, statute, legislation, order, regulation or guidance issued by government, a court of law, an emergency service or any other regulatory authority; or
- 8.3.2 to prevent interference with, damage to, or degradation of IRACK's network; or
- 8.3.3 to eliminate a hazardous condition; or
- 8.3.4 the Service is used in a manner that violates the AUP or any applicable law or regulation, or otherwise exposes IRACK to legal liability, whether this use is by the Customer or any other entity or person using the Service and whether or not this use is authorised or consented to by the Customer (each such circumstance, 'Service Misuse').
- 8.4 Any exercise by either party of any right to terminate or suspend the Services or parts of the Services pursuant to clause Without prejudice to any other rights or remedies either party may terminate or suspend any or all of the Services or part of any of the Services immediately by serving written notice on the other if., Notwithstanding clause the other party commits a material breach of the Agreement and (in the case of a remediable breach) fails to remedy the breach after receiving 30 days' written notice to do so from the other; or, and without prejudice to clause In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) co-operates with IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute., IRACK may terminate or suspend any or all of the Services or part of any of the Services by serving 7 days' written notice on the Customer if the Customer does not pay an undisputed amount when due, and if the Customer still does not pay the amount within 10 days after receiving written notice from IRACK of this non- payment.. or Without prejudice to any other rights or remedies, IRACK may suspend or block access to any or all of the Services or part of any of the Services if shall not prevent that party from subsequently exercising a right to terminate or suspend the same or other Services or parts of the Services or affect any entitlement to damages in respect of the

relevant event. If the Customer cures the cause of a Service suspension, IRACK will resume the Service once the Customer pays any reconnection charge specified in the Service Literature or, if no such charge is so specified, the Customer shall reimburse IRACK for all reasonable costs and expenses incurred by IRACK in resuming the Service. IRACK may terminate the Agreement if the Customer does not cure the cause of a Service suspension or does not pay the associated additional charges for IRACK resuming the Service.

- 8.5 Subject to clause If any part of the Services are terminated by the Customer under clause 8.5 at any time prior to the end of the Initial Period or a Renewal Period, the Customer shall pay on demand the relevant termination charges specified in the Service Literature (the "Early Termination Charges") (as a Charge for early discontinuation of service and not as a penalty) in addition to any other Charges payable under this Agreement., the Customer may terminate any of the Services or parts of the Services for convenience by giving IRACK at least 90 days' written notice of termination.
- 8.6 This Agreement shall be automatically terminated three years after the last of the Orders in place under it has expired.
- 8.7 In this clause "Insolvent" means, in respect of a party to this Agreement, when that party is unable to pay its debts when due, or any of the following happens to it under its national laws for the protection of debtors (or like circumstances arise or like actions are taken): (a) the party is determined to be bankrupt or insolvent or the process to make this determination has started; (b) the party has a receiver, administrator or liquidator appointed for it; (c) the party makes an arrangement or composition with, or an assignment for the benefit of, its creditors; or (d) the party goes into either voluntary (other than for reconstruction or amalgamation) or compulsory liquidation.
- 8.8 The clauses of this Agreement which contain either express provisions which continue after termination or which are necessary to give effect to and/or regulate the rights and obligations of the parties after termination shall survive the termination of this Agreement.

## 9. After Termination

- 9.1 On termination by either party of any part of the Services, the

Customer shall:

- 9.1.1 immediately stop using the relevant Services and Equipment; and
- 9.1.2 allow IRACK and/or third parties acting on IRACK's behalf to enter any Sites during normal Working Hours to remove any relevant Equipment.
- 9.2 The Customer's obligations in respect of the Equipment shall continue until IRACK has removed the relevant Equipment.
- 9.3 If any part of the Services are terminated by the Customer under clause Subject to clause If any part of the Services are terminated by the Customer under clause 8.5 at any time prior to the end of the Initial Period or a Renewal Period, the Customer shall pay on demand the relevant termination charges specified in the Service Literature (the "Early Termination Charges") (as a Charge for early discontinuation of service and not as a penalty) in addition to any other Charges payable under this Agreement., the Customer may terminate any of the Services or parts of the Services for convenience by giving IRACK at least 90 days' written notice of termination. at any time prior to the end of the Initial Period or a Renewal Period, the Customer shall pay on demand the relevant termination charges specified in the Service Literature (the "Early Termination Charges") (as a Charge for early discontinuation of service and not as a penalty) in addition to any other Charges payable under this Agreement.
- 9.4 If any part of the Services are terminated by IRACK under clause Without prejudice to any other rights or remedies either party may terminate or suspend any or all of the Services or part of any of the Services immediately by serving written notice on the other if., Notwithstanding clause the other party commits a material breach of the Agreement and (in the case of a remediable breach) fails to remedy the breach after receiving 30 days' written notice to do so from the other; or, and without prejudice to clause In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) co-operates with

IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute., IRACK may terminate or suspend any or all of the Services or part of any of the Services by serving 7 days' written notice on the Customer if the Customer does not pay an undisputed amount when due, and if the Customer still does not pay the amount within 10 days after receiving written notice from IRACK of this non- payment.. or Any exercise by either party of any right to terminate or suspend the Services or parts of the Services pursuant to clause Without prejudice to any other rights or remedies either party may terminate or suspend any or all of the Services or part of any of the Services immediately by serving written notice on the other if:, Notwithstanding clause the other party commits a material breach of the Agreement and (in the case of a remediable breach) fails to remedy the breach after receiving 30 days' written notice to do so from the other; or, and without prejudice to clause In addition to any other remedy available to IRACK, IRACK may charge a late fee of 3% per annum above Barclays Bank plc's base lending rate then in effect on all past due amounts. IRACK will not charge interest on a disputed amount if the Customer disputes the amount in good faith and does all of the following: (a) pays all undisputed amounts on the invoice when they are otherwise due; (b) notifies IRACK in writing of the disputed amount by the time the payment would otherwise be due; (c) cooperates with IRACK to promptly resolve the dispute; and (d) pays the agreed-upon portion of the disputed amount by its new due date, that is, within 10 days of resolution of the dispute., IRACK may terminate or suspend any or all of the Services or part of any of the Services by serving 7 days' written notice on the Customer if the Customer does not pay an undisputed amount when due, and if the Customer still does not pay the amount within 10 days after receiving written notice from IRACK of this non- payment.. or Without prejudice to any other rights or remedies, IRACK may suspend or block access to any or all of the Services or part of any of the Services if shall not prevent that party from subsequently exercising a right to terminate or

suspend the same or other Services or parts of the Services or affect any entitlement to damages in respect of the relevant event. If the Customer cures the cause of a Service suspension, IRACK will resume the Service once the Customer pays any reconnection charge specified in the Service Literature or, if no such charge is so specified, the Customer shall reimburse IRACK for all reasonable costs and expenses incurred by IRACK in resuming the Service. IRACK may terminate the Agreement if the Customer does not cure the cause of a Service suspension or does not pay the associated additional charges for IRACK resuming the Service. at any time, the Customer shall pay on demand the Early Termination Charges (as a Charge for early discontinuation of service and not as a penalty) in addition to any other Charges payable under this Agreement. The parties agree that the Early Termination Charges are a genuine pre-estimate of the minimum loss likely to be suffered by IRACK as a result of termination of a Service prior to expiry of the applicable Initial Period or Renewal Period.

9.5 On termination by either party of any part of the Services, the Customer shall comply with its obligations in respect of intellectual property rights pursuant to clause Upon termination for whatever reason of the Services in respect of which any intellectual property licence or right of use is granted under this clause Intellectual Property Rights, that licence or right of use shall terminate immediately and the Customer shall, as specified by IRACK, immediately return to IRACK or destroy all copies of any documents, material, drawings and information in the Customer's possession or control which describe or contain the relevant intellectual property and are not in the public domain which have been received directly or indirectly from IRACK..

## **10. Liabilities, warranties and indemnities**

10.1 Subject to clause Nothing in this Agreement shall exclude or restrict a party's liability for:, IRACK shall have no liability to the Customer in contract, tort (including but not limited to negligence) or otherwise arising out of or in connection with the Agreement for:

10.2 10.1.1 direct or indirect loss of: profits; revenue; business; contracts; anticipated savings;

10.3 10.1.2 any loss of data; or

- 10.4 10.1.3 any other indirect, consequential or special loss or damage.
- 10.5 Nothing in this Agreement shall exclude or restrict a party's liability for:
- 10.5.1 death or personal injury resulting from its negligence; or
- 10.5.2 fraud; or
- 10.5.3 any other event or occurrence arising out of any act or omission of that party the exclusion or restriction of liability for which is expressly prohibited by law.
- 10.6 Unless otherwise expressly stated, IRACK's liability in contract, tort or otherwise including any liability for negligence howsoever arising out of or in connection with the performance of its obligations under this Agreement in respect of any one event or series of related events shall be limited to 125% of the Charges paid by the Customer in the twelve months immediately prior to the month in which the liability for that incident or series of incidents arose, subject to a total limit of (a) £1,000,000 in aggregate for all events arising in any twelve month period, and (b) £2,000,000 in aggregate during the term of this Agreement.
- 10.7 Service Level credits as set out in the Service Literature shall be the Customer's sole and exclusive remedy against IRACK in respect of any failure in Service performance even where IRACK is made aware of the likely loss incurred by the Customer for such failure.
- 10.8 IRACK shall not be liable for any failure of the Services to meet the specified Service Levels to the extent that such failure is due to the access referred to in clause Sites not being granted, or any other act or omission by the Customer which prevents IRACK from performing the Services, or is a direct result of any interruptions or maintenance activities agreed with the Customer.
- 10.9 IRACK warrants that it will provide a Service in accordance with the terms of the Agreement. However, all other warranties and conditions (whether implied by statute, common law or otherwise, including, but not limited to fitness for purpose) are excluded to the extent permitted by law.
- 10.10 IRACK has no liability whatsoever for or in connection with any merchandise, information, products or services provided or accessed through the Internet.
- 10.11 The Customer will indemnify, defend and hold harmless each IRACK Party from and against any liabilities, actions, losses, judgements, payments made in settlement, costs, suits, proceedings, demands or claims from third parties, including IRACK's other customers
- (each, a 'Third Party Claim') incurred by any IRACK Party resulting from any of the following, except to the extent due to IRACK being in breach of its obligations to the Customer under this Agreement:
- 10.11.1 use of the Services;
- 10.11.2 use of non-IRACK furnished services, facilities, equipment and/or software with any Service;
- 10.11.3 the Customer's unauthorised modification of the Services;
- 10.11.4 Fees & Taxes not paid promptly by the Customer;
- 10.11.5 breach of any Customer representation or warranty in this Agreement; or
- 10.11.6 Local Provider Order or IRACK's other dealings with a local provider.
- 10.12 IRACK will indemnify, defend and hold harmless the Customer and the Customer's Affiliated Companies (including their directors, officers, employees and agents) from and against any Third Party Claims incurred by the Customer or its Affiliated Companies resulting from any claim that the Customer's use of a Service is infringing upon or misappropriating any copyright, trademark, US or UK patent or similar proprietary right of a third party. This type of Third Party Claim is referred to here as an "Infringement Claim". Each of the Customer's Affiliated Companies is a beneficiary of this Agreement for the purposes of this clause.
- 10.13 The party requesting to be indemnified, defended and/or held harmless from a Third Party Claim (the "Protected Party") will promptly notify the other party (the "Protecting Party") in writing of the situation giving rise to the Third Party Claim. The Protecting Party will control the defence against the Third Party Claim, including any negotiation, settlement and appeal of the Third Party Claim. The Protected Party will (at the Protecting Party's request and cost) reasonably assist the Protecting Party in its defence of the Third Party Claim.
- 10.14 IRACK will (in addition to its obligations under clause IRACK will indemnify, defend and hold harmless the Customer and the Customer's Affiliated Companies (including their directors, officers, employees and agents) from and against any Third Party Claims incurred by the Customer or its Affiliated Companies resulting from any claim that the Customer's use of a Service is infringing upon or misappropriating any copyright, trademark, US or UK patent or similar proprietary right of a third party. This type of Third Party Claim is referred to here as an "Infringement Claim". Each of the Customer's Affiliated Companies is a beneficiary of this Agreement for the purposes



of this clause. above) do one of the following as its sole obligation to the Customer and as the Customer's sole remedy against IRACK if a Service has become (or in IRACK's reasonable judgement is likely to become) the subject of an Infringement Claim:

- 10.14.1 at IRACK's cost, obtain for the Customer the right to continue using the Service;
  - 10.14.2 at IRACK's cost, replace or modify the Service so that it no longer is subject to the Infringement Claim; or
  - 10.14.3 after giving the Customer notice in writing, stop providing the Service or terminate the Agreement without incurring any liability to the Customer as a result.
- 10.15 IRACK is not liable to the Customer if an Infringement Claim is based on:
- 10.15.1 the Customer's unauthorised modification of the Service; or
  - 10.15.2 the use of the Service in combination with any service, facilities, equipment or software not furnished by a IRACK Party.

10.16 If any employee of the Customer (or any employee of a previous provider of the same or similar services to the Customer) is found, claims or alleged to be an employee of IRACK or of any IRACK Party the Customer agrees that within seven Working Days of being requested by IRACK, it shall make to that individual an offer in writing to employ him or her under a new contract of employment to take effect immediately. Upon that offer of employment being made by the Customer or at any time after the expiry of seven Working Days from a request by IRACK for the Customer to make that offer, IRACK shall, or shall procure that the relevant IRACK Party shall, terminate the employment of such individual, and the Customer shall indemnify IRACK for an amount equal to all losses, costs, claims, demands, actions and expenses incurred or sustained by IRACK or the relevant IRACK Party arising from or in respect of the employment or termination of employment of such individual.

- 10.16.1 Each IRACK Party is a beneficiary of this Agreement for the purposes of this clause 10.

#### 11. Force Majeure

11.1 A Party is excused from performance and is not liable for any failure due to a cause beyond its reasonable control, including, but not limited to, acts of God, inclement or severe weather, industrial disputes other than between the affected Party and its employees, failure or shortage of power supplies, lightning or fire, acts of local or central government or other competent authorities, war, civil disorder, acts or omissions of other telecommunications operators, or events beyond the reasonable control of its suppliers. The affected Party will promptly notify the other of

any circumstance covered by this paragraph.

#### 12. Information and Confidentiality

12.1 Subject to clause IRACK may use non-Customer specific information about traffic routed through any Equipment for the purposes of maintaining or improving its communications services including for the purposes of network and business planning. and except to the extent necessary for the provision of the Services, neither party shall use, copy, adapt, alter, disclose or part with possession of any information of the other which is disclosed or otherwise comes into its possession under or in relation to this Agreement and which is of a confidential nature, including the prices or any other terms of this Agreement ("Confidential Information"), except that

- 12.1.1 either party may disclose Confidential Information as may be required by law, regulation or other governmental request or order so long as the party first notifies the other party of the situation and gives the other party adequate opportunity to intervene unless such notice is legally prohibited;
- 12.1.2 IRACK may disclose Confidential Information to a potential purchaser of all or a portion of IRACK, or to others working with IRACK in providing Service if these other parties have a need to know; and
- 12.1.3 IRACK may disclose Confidential Information to any IRACK Affiliate.

12.2 The obligation in clause Subject to clause IRACK may use non-Customer specific information about traffic routed through any Equipment for the purposes of maintaining or improving its communications services including for the purposes of network and business planning. and except to the extent necessary for the provision of the Services, neither party shall use, copy, adapt, alter, disclose or part with possession of any information of the other which is disclosed or otherwise comes into its possession under or in relation to this Agreement and which is of a confidential nature, including the prices or any other terms of this Agreement ("Confidential Information"), except that above shall not apply to information which the recipient can prove was in its possession (without restriction as to its disclosure) prior to the date it was received or obtained from the disclosing party or which the recipient obtains from some other person with good legal title to it or which is in or comes into the public domain otherwise than through the default or negligence of the recipient or which is independently developed by or for the recipient.

12.3 IRACK may use non-Customer specific information about traffic routed through any Equipment for the purposes of maintaining or

improving its communications services including for the purposes of network and business planning.

12.4 IRACK shall be entitled to use information received in connection with this Agreement for the purpose of detecting and preventing fraud.

12.5 Each party shall comply with applicable data protection regulations when dealing with information received from the other party under this Agreement. The parties acknowledge that in providing Service, IRACK may process Personal Data, including, without limit, transferring it outside the European Economic Area and/or disclosing it to third parties. IRACK will have in place adequate technical and organisational security measures so that the confidentiality of this processing complies with Applicable Data Protection Law, and the Customer will obtain adequate consents from its customers and employees, including for transfers of Personal Data and will be responsible for the instructions it may give to IRACK regarding the processing of Personal Data. IRACK will act on those instructions as reasonably necessary for the provision of Service. In this paragraph, "Personal Data" means information defined as such in the EU Data Protection Directive (95/46/EC) or information treated as personal data under any other law or regulation applicable to the information. 'Applicable Data Protection Law' means the EU Data Protection Directive (95/46/EC) or other applicable law or regulation as they may be amended from time to time.

12.6 Upon termination of the Services for whatever reason the Customer shall, as specified by IRACK, immediately return to IRACK or destroy all copies of any Confidential Information in the Customer's possession or control which are not in the public domain and have been received directly or indirectly from IRACK.

12.7 The confidentiality obligations contained in this clause Information and Confidentiality shall endure for a period of three years after termination of this Agreement.

### **13. Intellectual Property Rights**

13.1 All legal and beneficial intellectual property rights, whether registered or unregistered, including all copyrights, database rights, trade marks, patents, service marks, trade secrets and know-how, in whatever form in the Services or Equipment shall remain at all times

IRACK's property or the property of its licensor.

13.2 To the extent that it is so entitled, IRACK grants the Customer a non-exclusive non-transferable licence to use such intellectual property rights for the sole purpose of using the Services or Equipment. The Customer shall not reproduce any software provided by IRACK, save that the Customer shall be entitled to make a single back-up copy for security purposes only. The Customer shall not modify, adapt, translate, reverse engineer or disassemble the software.

13.3 Copyright, database rights and any other relevant intellectual property rights in all documents, material, drawings and information in whatever form, including if applicable any access or source codes supplied to the Customer in connection with this Agreement, shall remain vested in IRACK or the owner of the rights. Such documents, material, drawings and information are confidential and shall not be copied, disclosed or used (except for the purpose for which they were supplied) without IRACK's prior written consent.

13.4 Neither party may use the other party's names, logos, trademarks, trade names or other proprietary marks ('Marks') in any advertising or publicity without first obtaining the other party's written approval to do so. Unless the approval indicates otherwise, permission to use a party's Marks will last only for the duration of the Agreement.

13.5 Upon termination for whatever reason of the Services in respect of which any intellectual property licence or right of use is granted under this clause Intellectual Property Rights, that licence or right of use shall terminate immediately and the Customer shall, as specified by IRACK, immediately return to IRACK or destroy all copies of any documents, material, drawings and information in the Customer's possession or control which describe or contain the relevant intellectual property and are not in the public domain which have been received directly or indirectly from IRACK.

### **14. Notices**

14.1 A notice under this Agreement shall be written in English, and be hand delivered or sent by first class prepaid post, e-mail or facsimile transmission to the recipient's registered address recorded above or as varied by notice in writing from time to time. Notices to IRACK should be addressed to 'Head of Legal'.

14.2 A notice given in accordance with clause A notice under this

Agreement shall be written in English, and be hand delivered or sent by first class prepaid post, e-mail or facsimile transmission to the recipient's registered address recorded above or as varied by notice in writing from time to time. shall be taken to have been received, in the absence of evidence of earlier receipt, if hand delivered, on delivery; if sent by first class prepaid post, 3 days after the date of posting; or, if sent by e-mail or facsimile, on the next Working Day following transmission.

## 15. Assignment

15.1 The Customer may not assign or transfer the Agreement or any rights or obligations under the Agreement without first receiving written consent from the IRACK (which consent may not be unreasonably withheld), except that

15.1.1 the Customer may (by giving written notice to IRACK) assign or transfer the Agreement or any rights and obligations under the Agreement to its ultimate holding company or any subsidiary of such holding company from time to time (as defined by Sections 736 and 736A of the Companies Act 1985) provided that the Customer first demonstrates to the reasonable satisfaction of IRACK that such entity has the financial, technical and management capacity to perform all of the Customer's obligations under the Agreement.

15.1.2 IRACK may (i) (by giving written notice to Customer) assign or transfer the Agreement or (ii) assign or transfer any rights or obligations under the Agreement, to a IRACK Affiliate or any other third party.

## 16. General

16.1 Neither party waives its future or other rights just because it does not strictly enforce certain rights it may have.

16.2 Any clause or part of a clause of this Agreement that is unenforceable or illegal shall be severed from this Agreement and shall not affect the enforceability of the remaining provisions of this Agreement.

16.3 This Agreement is made in, governed by and subject to the laws of England and the parties submit to the exclusive jurisdiction of the courts of England.

16.4 This Agreement shall constitute the entire understanding between the parties relating to its subject matter unless any representation or warranty about this Agreement is shown to have been made fraudulently. Save as may be expressly referred to or referenced in this Agreement, this Agreement supersedes all prior representations, writings, negotiations or understandings with respect to this Agreement and neither party shall be entitled to rely on any such prior representations, writings, negotiations or understandings in determining the rights and obligations of the parties hereunder.

16.5 The parties are independent contracting parties, and nothing in this Agreement shall create,

or be construed as creating, any joint venture, partnership or similar arrangement between the parties.

16.6 The parties may modify the Agreement only if the parties agree to do so in writing. Purchase orders or similar documents which the Customer may issue to IRACK will not change or add to any of the terms of the Agreement.

16.7 Subject to clause IRACK will indemnify, defend and hold harmless the Customer and the Customer's Affiliated Companies (including their directors, officers, employees and agents) from and against any Third Party Claims incurred by the Customer or its Affiliated Companies resulting from any claim that the Customer's use of a Service is infringing upon or misappropriating any copyright, trademark, US or UK patent or similar proprietary right of a third party. This type of Third Party Claim is referred to here as an "Infringement Claim". Each of the Customer's Affiliated Companies is a beneficiary of this Agreement for the purposes of this clause. and save in respect of IRACK Affiliates, who shall each have the right to enforce the benefit of this Agreement as if they were a party to it, a person who is not a party to this Agreement shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement provided that this shall not affect any right or remedy which exists or is available apart from that Act. The parties shall have the right to amend this Agreement without the consent of the IRACK Affiliates.

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