

# Node4 Limited

## Reseller Terms & Conditions

Node4 Limited

10/01/2009

## Reseller Terms and Conditions

These are Node4's Reseller Terms and Conditions of business and should be read in conjunction with the Agreement Schedule and Order Forms agreed between Node4 and the Reseller and the applicable Service Schedules for the services required.

### 1. Definitions and Interpretation

1.1 In the Agreement the following expressions will have the following meanings unless inconsistent with the context:

**"Acceptable Use Policy"** - the acceptable and fair use policies of Node4 and any Third Party Services Providers from time to time applicable

**"Agency Services"** - as defined in paragraph 2.5

**"Agreement"** - the agreement between Node4 and the Reseller for the provision of Deliverables formed by these conditions, the Agreement Schedule, the terms of each Order Form accepted by Node4 in accordance with paragraph 3.2 and the Service Schedule

**"Business Day"** - a day which is not a Saturday or Sunday or Public or Bank Holiday

**"Business Hours"** - 9am to 5pm on each Business Day

**"Confidential Information"** - all information in respect of the business of a party including any ideas; business methods; finance; prices, business, financial, marketing, development or manpower plans; customer lists or details; computer systems and software; products or services, including know-how or other matters connected with the products or services manufactured, marketed, provided or obtained by a party, and information concerning a party's relationships with actual or potential clients, customers or suppliers and any other information which, if disclosed, will be liable to cause harm to that party

**"Contract Year"** - the period of 12 months from the Effective Date and each successive period of 12 months during the continuance in force of the Agreement or, in respect of the final Contract Year under the Agreement, the period from the end of the penultimate Contract Year to the date of termination of the Agreement, if shorter

**"Reseller"** - as identified in the Agreement Schedule

**"Reseller Personnel"** - all employees and other personnel of the Reseller and the End-User and all agents, contractors and other users of the Deliverables

**"Deliverables"** - Reseller Services, Services and Products

**"Effective Date"** - the date set out in the Agreement Schedule

**"End-User"** - according to the context, either a person who is seeking to contract with the Reseller for the purchase of Services and / or Products, or a person who has contracted with the Reseller for Services and / or Products, in respect of whom an End-User Order is in effect under this Agreement;

**"End-User Order"** - the agreement between Node4 and the Reseller for the provision of Services and / or supply of Products, in respect of a specific End-user formed by these conditions, the terms of the Agreement Schedule, relevant Order Form and the Service Schedule

**"Fees"** - the charges due to Node4 as set out in the [Service Schedule and] Order Form, as may be amended from time to time pursuant to [these conditions or the Service Schedule]

**"Initial Term"** - the initial term of the Agreement as set out in [the Agreement Schedule]

**"Minimum Service Period"** - in respect of an End-User Order, the minimum period in respect of which the relevant Services are to be provided by Node4 and purchased and paid for by the Reseller, as specified in the relevant Order Form

**"Node4"** - Node4 Ltd registered in England, No. 04759927, whose registered address is at Millennium Way, Pride Park, Derby DE24 8HZ

**"Node4 Equipment"** - any hardware, software, cabling and/or other products or equipment provided by Node4 to the Reseller or End-Users in connection with the provision of the Deliverables or otherwise used by Node4 to provide the Deliverables

**"Order Form"** - the order form signed by the Reseller detailing the Services and/or Products to be supplied by Node4 to the Reseller in respect of a specific End-User, in such form as Node4 shall prescribe from time to time

**"Products"** - any hardware, software, cabling and/or other products or equipment sold or licensed by Node4 to the Reseller, as may be amended from time to time pursuant to paragraph 4.5 of these conditions

**"Reseller Services"** - the Reseller specific services provided by Node4, as may be amended from time to time pursuant to paragraph 4.5 of these conditions

**"Services"** - the services provided by Node4, as may be amended from time to time

pursuant to paragraph 4.5 of these conditions

**“Service Schedule”** - any service schedule applicable to the particular Services and Products, as identified in the applicable Order Form

**“Service Levels”** - any service levels applicable to the Services as set out in the Service Schedule

**“Third Party Services”** - any part of the Services which Node4 procures from a third party, and any third party hosting services, telecommunications services and/or equipment which Node4 uses in order to provide the Services

**“Third Party Services Provider”** - the provider of any Third Party Services

1.2 If there is a conflict between any of these conditions, the Agreement Schedule, Order Form and the Service Schedule, the conflict will be resolved according to the following order of priority:

1.2.1 the Agreement Schedule,

1.2.2 the Order Form

1.2.3 these conditions, and

1.2.4 the Service Schedule.

1.3 The headings to these conditions and in the Agreement Schedule, Order Form and Service Schedule are for convenience only and will not affect their construction or interpretation.

1.4 Any phrase in the Agreement introduced by the term “include”, “including” “in particular” or any similar expression will be construed as illustrating and will not limit the sense of the words proceeding that term.

## 2 Appointment

2.1 Node4 appoints the Reseller to act as a non-exclusive reseller of the Services and Products for Node4 on the basis described in this paragraph 2 and the Reseller agrees to act in that capacity upon the terms and conditions of the Agreement.

2.2 The Reseller agrees:

2.2.1 to act diligently and in good faith in all its dealings with Node4, the End-Users and the Third Party Services Providers;

2.2.2 to re-sell, promote, market, distribute and increase sales of the Services and Products;

2.2.3 to observe all reasonable directions and instructions given by Node4 in relation to the promotion, marketing and use of the Services and Products;

2.2.4 to seek to enhance the reputation of Node4; and

2.2.5 not to purport to act on behalf of Node4 or any of the Third Party Services Providers.

2.3 The Reseller shall not use any trade marks, trade names, logos or other branding (“Branding”) of Node4 without the express prior written consent of Node4. Where such consent is given the Reseller shall only use such Branding to the extent authorised by Node4 and in accordance with such guidelines and instructions as Node4 shall issue to the Reseller from time to time.

2.4 For the avoidance of doubt, subject only to paragraph 2.5, the Reseller shall enter into all contracts with End-Users that include the supply of Services and / or Products on its own account as principal and not as agent for Node4. The Reseller shall assume the credit risk of any non-payment by End-Users under such contracts. The Reseller appoints Node4 as its sub-contractor to provide the Services to End-Users in accordance with this Agreement and the applicable End-User Order.

2.5 Where agreed between the parties and expressly set out in the Agreement Schedule, but only in such eventuality, the Reseller may also act as a marketing agent of Node4, in which case the Reseller shall

promote and market Node4 and the Services and Products, identify and refer to Node4 prospective customers for the Services and / or the Products and assist Node4 (as reasonably required by Node4) in entering into contracts with such prospective customers for the Services and / or the Products (“Agency Services”). In such eventuality Node4 shall, where it chooses to accept the referral, enter into contracts directly with relevant prospective customer on its own account as principal and the Reseller shall have no contractual relationship with relevant prospective customer. The provisions in these Conditions relating to End-Users shall not apply in respect of such customers.

- 2.6 The provision of the Services and supply of the Products by Node4 is dependent on the capacity and resources of Node4, the Third Party Services Providers and Node4’s other suppliers. Accordingly, Node4 shall be entitled to decline to accept or to delay acceptance of any End-User Order, or any referral pursuant to paragraph 2.5, where Node4 does not consider it, or the relevant Third Party Services Provider, has the necessary capacity or resources, or on any other reasonable grounds. Node4 shall not be obliged to invest in new resources or increased capacity, unless in Node4’s reasonable opinion the investment is supported by reasonable demand and is likely to result in a reasonable return on investment, in accordance with reasonable business practice.

### 3 Formation of the Agreement and End-User Orders

- 3.1 These conditions, together with the other terms set out in the Agreement, will apply to all contracts and agreements between the parties to the exclusion of all other terms and conditions and all previous oral or written representations, including any terms or conditions which the Reseller purports to apply under any purchase order, confirmation of order or similar document, whether or not such document is referred to in the Order Form.
- 3.2 Each order for Services or Products must be submitted by the Reseller on an Order Form and will be deemed to be an offer by the Reseller to purchase the specific Services and / or Products referred to therein upon these conditions. The End-User Order is

formed when the Order Form is accepted by Node4, by way of e-mail confirmation or any other written acknowledgement. No End-User Order will come into existence until such written acknowledgement of the Order Form is issued by Node4.

- 3.3 Any quotation provided by Node4 is valid for a period of 7 days only from its date, provided Node4 has not previously withdrawn it.
- 3.4 All orders are non-cancellable. Without prejudice to this, no Products may be returned by the Reseller or End-User following delivery unless they fail to comply with their specification due to defects in material or workmanship, and then only in accordance with the provisions of paragraph 8.1.
- 3.5 Node4 will be entitled to make changes to these conditions at any time and the Reseller will be subject to any such amended conditions from the date that such changes are made. The most recent version of these conditions from time to time will be found at [www.node4.co.uk](http://www.node4.co.uk) and the Reseller shall check periodically for changes. Posting changes to these conditions at [www.node4.co.uk](http://www.node4.co.uk) shall be deemed to be sufficient notice to the Reseller of such changes.

### 4 Node4 Rights and Obligations

- 4.1 The Services and the Products to be provided to the Reseller for each specific End-User are as described or referred to on the applicable Order Form and the Service Schedule. Node4 shall in addition provide to the Reseller any Reseller Services identified in the Agreement Schedule, which, for the avoidance of doubt, are not provided for resale.
- 4.2 Time for performance or delivery is not of the essence and any timescales for performance or delivery given by Node4 are estimates only. Node4 will use its reasonable endeavours to provide the Reseller Services and the Services and deliver the Products in accordance with any timescale set out on the Order Form, but will not be liable to the Reseller or any End-Users where it fails to meet any timescale.
- 4.3 Node4 will not be liable for any failure to provide the Reseller Services and the Services and / or deliver the Products resulting from any breach by the Reseller of the Agreement.

- 4.4 Node4 will not be obliged to provide any Deliverables not referred to on the Agreement Schedule or Order Form.
- 4.5 Node4 may at any time and from time to time improve, correct or otherwise modify all or any of the Deliverables (including substituting software and/or Products with software or equipment of similar specification) provided that such modification does not materially adversely affect provision of the Reseller Services or Services to the Reseller or any End-User or the functionality of the Products. Node4 will endeavour to give the Reseller reasonable notice of any such modification, where this is reasonably practicable.
- 4.6 Node4 shall use its reasonable endeavours to provide the Services in accordance with the Service Levels. However, the Reseller acknowledges that, given the nature of the Services, Node4 cannot guarantee that the Services will be uninterrupted or error free.
- 4.7 Where service credits are provided for in the Service Schedule these shall be the sole and exclusive remedy of the Reseller for the failure to meet the applicable Service Levels. Node4 shall have no additional liability to the Reseller in respect thereof.
- 4.8 Risk of damage to or loss of the Products will pass to the Reseller on delivery.
- 4.9 Ownership of the Products will not pass to the Reseller until Node4 has received in full (in cash or cleared funds) all sums due to it in respect of:
  - 4.9.1 the Products; and
  - 4.9.2 all other sums which are or which become due to Node4 from the Reseller on any account.
- 4.10 Until ownership of the Products has passed to the Reseller, the Reseller must hold the Products on a fiduciary basis as Node4's bailee and maintain the Products in satisfactory condition insured on Node4's behalf for their full price against all risks to the reasonable satisfaction of Node4.
- 4.11 The Reseller's right to possession of the Products will terminate immediately if any of the circumstances set out in paragraph 10.2 occur.
- 4.12 Node4 will be entitled to recover payment for the Products notwithstanding that title in any of the Products has not passed from Node4.
- 4.13 On termination of the Agreement, howsoever caused, Node4's rights contained in this paragraphs 4.9 to 4.12 will remain in effect.

## 5 Reseller Obligations

- 5.1 The Reseller will provide Node4 with all information, instructions and assistance that Node4 may reasonably require in order to carry out its obligations under the Agreement. The Reseller shall co-operate fully and in good faith with Node4 and any applicable Third Party Services Provider. The Reseller shall provide all reasonably necessary physical access to Reseller premises and other sites at all reasonable times as required (including access for the purposes of installation, inspection, maintenance, replacement, upgrade, or removal of the Products, Node4 Equipment and any other equipment associated with the Reseller Services or Services), facilities at such premises and sites, assistance with testing and other assistance to Node4 that Node4 shall reasonably require to perform its obligations under the Agreement, and the Reseller shall comply with any reasonable operating instructions issued by Node4 from time to time.
- 5.2 If Node4 is provided with any incorrect information or instructions in connection with the Deliverables, then the Reseller shall pay any reasonable additional and wasted costs and expenses incurred or suffered by Node4 as a result in setting-up and/or providing any Services.
- 5.3 Where Node4 or any Third Party Services Provider are working on Reseller or End-User premises, the Reseller shall ensure a safe working environment in compliance with all applicable health and safety laws.
- 5.4 Node4 reserves the right to refuse access to its premises and servers to anyone.
- 5.5 All Services are subject to the Acceptable Use Policy. The Reseller shall, at all times in connection with its and the End-Users' use of the Services, comply with the Acceptable Use Policy. Node4 shall publicise the Acceptable Use Policy on its website (the current url being [www.node4.co.uk](http://www.node4.co.uk)) and it shall be the responsibility of the Reseller to ensure that it checks the same periodically and that it is aware of the current policies. The Reseller shall ensure that the Acceptable Use Policy is communicated to End-Users and Reseller Personnel in a timely manner.
- 5.6 Without prejudice to paragraph 5.5, the Reseller shall not use the Services, any Node4 Equipment or any Reseller equipment which is located on Node4 premises:

- 5.6.1 to provide, store, host, link to or connect to illegal content, content designed to offend or cause needless anxiety to others, any material which is abusive, indecent, defamatory, obscene, threatening, menacing or likely to cause harassment or which is in breach of any copyright, confidence, privacy or any other rights or scanning software;
- 5.6.2 to distribute illegal, copyright infringing, indecent or offensive material;
- 5.6.3 to send or procure the sending of any unsolicited e-mail; or
- 5.6.4 in an unlawful manner or for any illegal purpose.
- 5.7 Whether or not express reference is made to Reseller Personnel or End-Users in the relevant provision, the Reseller will procure that all Reseller Personnel and End-Users comply with all the duties, obligations and restrictions imposed on the Reseller by the Agreement, to the extent such duties, obligations and restrictions are applicable to the Reseller Personnel and End-Users. Any act or omission of any Reseller Personnel or End-Users which, if it had been committed or omitted by the Reseller, would have been a breach of the Agreement by the Reseller will be deemed to be a breach of the Agreement by the Reseller who will be liable to Node4 accordingly.
- 5.8 Where the Products include any software, the same is provided on a licensed basis in accordance with the licence terms and conditions applicable thereto, which the Reseller agrees that it will comply with.

## 6 Suspension

- 6.1 Without prejudice to any other right or remedy that it may have in such circumstances, Node4 reserves the right to suspend provision of any part of the Services where:
  - 6.1.1 the Reseller or any End-User's use of any of the Services is found to be monopolizing the resources available (this policy is only implemented in extreme circumstances and is intended to prevent misuse of the Services); or
  - 6.1.2 the Reseller or any End-User is in breach of the Acceptable Use Policy, paragraph 5.6 or otherwise in material breach of the Agreement and fails to rectify such breach within 7 days of a written request from Node4 requiring the same to be rectified; or
  - 6.1.3 required for maintenance, repair or upgrade of any Node4 systems and/or the Services (Node4 shall use reasonable endeavours to give as much advance notice to the Reseller as is reasonably practicable in the circumstances); or
  - 6.1.4 dealing with any actual or suspected security breach, virus, or attack or any misuse by any person of any Node4 systems and/or the Services; or
  - 6.1.5 necessary because of an emergency; or
  - 6.1.6 required by any regulatory, governmental or other competent authority; or
  - 6.1.7 the Services depend on any Third Party Services and that Third Party Service is suspended by the relevant Third Party Services Provider; or
  - 6.1.8 the Reseller fails to pay any Fees in accordance with the provisions of the Agreement and fails to rectify such failure within 7 days of a written request from Node4 requiring the same to be rectified.
- 6.2 Node4 may from time to time close down the whole or part of the network for routine repair or maintenance work. Node4 shall give as much notice as in the circumstances is reasonable and shall endeavour to carry out such works during the scheduled maintenance periods as published by Node4 as appropriate.
- 6.3 Node4 may from time to time without notice close down or restrict the whole or part of the Services where necessary for emergency repair, to prevent overload of the network, or to preserve the safety, security or integrity of the Services and traffic conveyed. Node4 shall at its sole discretion decide when such action is necessary.
- 6.4 The Reseller and End-Users' internal network configuration and any equipment that either uses with the Services that is not a Product or Node4 Equipment remains the responsibility of the Reseller and End-User. Any interruptions to the Services that occur as a result of an internal configuration or equipment issue may not be deemed as an interruption or suspension of the formal provision of the Services and Node4 shall have no liability in this respect.
- 6.5 Where provision of any part of the Services is suspended by Node4 pursuant to paragraph 6.1.1, 6.1.2 or 6.1.8, Node4 shall be entitled to charge the Reseller its standard reconnection fee from time to time applicable which the Reseller shall pay to Node4 prior to Node4 recommencing provision of such part of the Services.

## 7 Payment

- 7.1 All Fees payable monthly or yearly as indicated in the Service Schedule and Order Form will be paid by the Reseller in advance and will not be refundable in whole or part if the Agreement or relevant part is terminated by the Reseller during the period to which the payment relates.
- 7.2 Node4 reserves the right to require the payment of such Fees as it shall specify in the Order Form upfront prior to the commencement of the provision of the Deliverables or before any order is progressed.
- 7.3 All other Fees (unless indicated otherwise in the Service Schedule or any Order Form) shall be payable by the Reseller following provision of the relevant Reseller Services or Services or delivery of the Products, or, where provision of the relevant Reseller Services or Services continues for more than one month, monthly in arrears.
- 7.4 Additional Fees will become payable if the Reseller or any End-User exceeds agreed or stipulated bandwidth or other use levels or restrictions set out in the Service Schedule or Order Form.
- 7.5 Any total sum for the Fees set out in any Order Form is (unless stated in the Order Form to be a fixed and firm amount) an estimate of the Fees only and not a fixed price quotation.
- 7.6 Node4 shall be entitled to increase the Fees at any time, but no such increase may take effect earlier than the end of the Initial Term except where the costs incurred by Node4 in the provision of the relevant Deliverables increase through factors that are outside of Node4's control, including electricity and bandwidth charges and charges levied by Third Party Services Providers. Node4 shall give the Reseller 30 day's notice of such increases.
- 7.7 Where the Reseller provides Agency Services to Node4, Node4 shall pay to the Reseller commission calculated as set out in the Agreement Schedule in respect of contracts that Node4 enters into directly with prospective customers referred to it by the Reseller, but subject always to the provisions of paragraph 2.5.
- 7.8 Any sums payable by the Reseller to Node4 under the Agreement are exclusive of value added tax or any similar taxes, levies or duties, which will be added to such sums and be payable by the Reseller at the appropriate rate.
- 7.9 The Reseller agrees to pay Node4 invoices within 7 days of invoice due date. If invoices are not settled in full by then, the Reseller will without prejudice to its other rights and remedies be liable to pay interest on any sum outstanding from the due date for payment on a daily basis until payment is made (whether before or after any judgment) in accordance with the provisions of the Late Payment of Commercial Debts (Interest) Act 1998.
- 7.10 Node4 may make a search in relation to the Reseller with a credit reference agency (and make other credit enquiries from time to time), keep a record of that search and enquiries, and share that information with third parties. Node4 may also make enquiries about the principle directors/proprietors of the Reseller with a credit reference agency.
- 7.11 All Fees shall be paid by such method as determined by Node4 from time to time (which may include payment by direct debit, BACS, cheque or credit card) to such account as Node4 may specify from time to time. Where the Reseller authorises payment of any of the Fees by credit card then Node4 may deduct other amounts becoming payable to it under the Agreement under that credit card without obtaining additional authorisation from the Reseller
- 7.12 All payment is in UK sterling.
- 7.13 All payments to be made by the Reseller will be made in full without any set-off, restriction or condition and without any deduction or withholding for or on account of any counterclaim or any present or future taxes, levies, duties, charges, fees, deductions or withholdings of any nature, unless the Reseller is required by law to make any such deduction or withholding.
- 7.14 Except in the circumstances set out in paragraph 2.5, Node4 shall have no responsibility for obtaining any payment from End-Users and the Reseller agrees that it takes all credit risk in respect of End-Users. For the avoidance of any doubt, the Reseller shall be obliged to make payment of all invoices in accordance with the provisions of these conditions irrespective of whether it has received payment from the relevant End-Users. Notwithstanding the foregoing, nothing in these conditions shall prevent Node4 from contacting the End-User directly in respect of payment or non-payment of Fees or otherwise.
- 7.15 Node4 shall have a lien over and be entitled to retain any equipment and property of the

Reseller and End-Users in Node4's possession pending satisfaction in full of the Reseller's payment obligations under the Agreement, including following any termination of the Agreement. This shall include the right to sell the same and set off the proceeds of sale against any sums owing.

## 8 Liability

- 8.1 Node4 will, free of charge, within a period of [12] months from the date of delivery of the Products which are proved to the reasonable satisfaction of Node4 to not comply with specification due to defects in material or workmanship, repair, or at its option replace, such Products. Provided that Node4 complies with this obligation it shall have no further liability to the Reseller in connection with such non-compliance. This obligation will not apply where:
- 8.1.1 the Products has been improperly altered in any way whatsoever, or has been subject to misuse or unauthorised repair;
- 8.1.2 the Products has been improperly installed or connected (other than by Node4);
- 8.1.3 any maintenance requirements relating to the Products has not been complied with (other than where Node4 is responsible for such maintenance under the Agreement); and
- 8.1.4 the Reseller has failed to notify Node4 of any defect or suspected defect within [14] days of the same coming to the knowledge of the Reseller, and in any event no later than [12 months] from the date of delivery.
- 8.2 Node4 warrants that the Reseller Services and Services will be provided with reasonable care and skill.
- 8.3 Node4 does not (and nothing in the Agreement shall be construed so as to) exclude its liability (if any) to the Reseller:
- 8.3.1 for breach of Node4's obligations arising under section 12 Sale of Goods Act 1979 or section 2 Supply of Goods and Services Act 1982;
- 8.3.2 for personal injury or death resulting from Node4's negligence;
- 8.3.3 under section 2(3) Consumer Protection Act 1987;
- 8.3.4 for any matter for which it would be illegal for Node4 to exclude or to attempt to exclude its liability; or
- 8.3.5 for fraud.
- 8.4 Except as provided in paragraph 8.3, Node4 will be under no liability to the Reseller whatsoever (whether in contract, tort (including negligence), breach of statutory

duty, restitution or otherwise) for any indirect or consequential loss or for any loss of profits, loss of business, loss of anticipated savings, depletion of goodwill and like loss howsoever caused arising out of or in connection with the Agreement.

- 8.5 Subject to paragraphs 8.3 and 8.4, Node4's aggregate liability in any Contract Year under the Agreement whatsoever (whether in contract, tort (including negligence), breach of statutory duty, restitution or otherwise) for any injury, death, damage or loss howsoever caused will be limited to the greater of the liability cap set out in the Agreement Schedule or the aggregate of the Fees payable and any commission due pursuant to paragraph 7.7 in that Contract Year].
- 8.6 Except as set out in paragraph 8.3, Node4 hereby excludes to the fullest extent permissible in law, all conditions, warranties and stipulations, express (other than those set out in the Agreement) or implied, statutory, customary or otherwise which, but for such exclusion, would or might subsist in favour of the Reseller.
- 8.7 The Reseller acknowledges that the above provisions of this paragraph 8 are reasonable and reflected in the Fees which would be higher without those provisions, and the Reseller will accept such risk and/or insure accordingly.
- 8.8 The Reseller shall ensure that it includes in a written contract with each End-User provisions consistent with this paragraph 8 expressed for the benefit of Node4 with no restriction on Node4's ability to enforce the same under the Contracts (Rights of Third Parties) Act 1999 and the Reseller shall indemnify Node4 in respect of any claims that Node4 may receive from End-Users in connection with the Services or Products.

## 9 Force Majeure

- 9.1 Neither party is under any liability to the other party in respect of anything which, apart from this provision, may constitute a breach of the Agreement arising by reason of force majeure which means, in relation to either party, circumstances beyond the reasonable control of that party including acts of God, acts of any governmental or supra-national authority, war or national emergency, riots, civil commotion, fire, network failure, systems fault, unauthorised use or access to the IT systems of Node4 or the Reseller, explosion, flood, epidemic,

lock outs (whether or not by that party), strikes and other industrial disputes (in each case, whether or not relating to that party's workforce), restraints or delays affecting shipping or carriers, inability or delay in obtaining supplies of adequate or suitable materials and currency restrictions, to the extent outside of its reasonable control.

## 10 Term and Termination

- 10.1 The Agreement shall commence on the Effective Date and shall continue in force for the Initial Term and thereafter shall continue in force unless or until terminated by one party giving to the other not less than one month's notice in writing to expire at any time after the end of the Initial Term. Where a reseller is terminating a Node4 service a cancellation form will be raised which will need to be signed by both parties. The notice period will not commence until this is completed.
- 10.2 Node4 may by written notice served on the Reseller terminate the Agreement immediately if the Reseller:
- 10.2.1 either is in material breach of any of the terms of the Agreement and such breach is incapable of remedy or, where the breach is capable of remedy, fails to remedy such breach within 14 days after service of a written notice from Node4 specifying the breach and requiring it to be remedied;
- 10.2.2 is unable to pay its debts within the meaning of section 123 Insolvency Act 1986, makes a proposal for a voluntary arrangement or convenes a meeting of its creditors to consider such a proposal, becomes subject to any voluntary arrangement, has a receiver, manager, or administrative receiver appointed over any of its assets, undertaking or income, passes a resolution for its winding-up, is subject to a petition presented to any court for its winding-up, has a provisional liquidator appointed, has a proposal made for a compromise or arrangement under Part 26 Companies Act 2006, has an administrator appointed in respect of it or is the subject of an application for administration filed at any court or a notice of appointment of an administrator filed at any court or a notice of intention to appoint an administrator filed at any court by any person or is the subject of a notice to strike off the register at Companies House;
- 10.2.3 has any distraint, execution or other process levied or enforced on any of its property; or
- 10.2.4 ceases to trade.
- 10.3 Each End-User Order shall commence on the relevant effective date therefore set out in the End-User Order and shall continue in force for the Minimum Service Period and thereafter shall continue in force unless or until terminated by one party giving to the other not less than one month's notice in writing to expire at any time after the end of the Minimum Service Period.
- 10.4 Any termination of the Agreement shall, for the avoidance of doubt, have the effect of terminating all End-User Orders, but without prejudice to the provisions of paragraphs 10.7 and 10.8, where applicable.
- 10.5 The termination of the Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either party accrued prior to termination. The clauses in the Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.
- 10.6 Subject to the provisions of paragraph 7.15, on termination of this Agreement howsoever arising each party will return to the other any property of the other in its possession or control.
- 10.7 Without prejudice to any other of its rights and remedies:
- 10.7.1 Node4 will be entitled to remove the Reseller and any End-User's data from its systems and any Node4 Equipment and/or put the Node4 Equipment to any use other than the Reseller's following termination of the Agreement. Node4 is not required to back up such data or return the same to the Reseller prior to any such removal; and
- 10.7.2 In the event of any termination by Node4 pursuant to paragraph 10.2, or by the Reseller pursuant to any provision of these conditions, the Reseller shall be liable to pay or reimburse Node4 for any cancellation charges that may be due to any Third Party Services Provider or otherwise due as a consequence of such termination.
- 10.8 Notwithstanding the foregoing provisions of this paragraph 10, and without prejudice to any other rights or remedies that Node4 may have under the Agreement or otherwise, where the Agreement is terminated by Node4 pursuant to paragraph 10.2, Node4 shall be entitled to require that the Reseller (at no cost to Node4) transfer to Node4 the Reseller's contracts with End-Users who are the subject of End-User Orders and the Reseller shall forthwith:

- 10.8.1 use its best endeavours to procure the assignment of the benefit of each of its contracts with End-Users for Services or Products to Node4;
- 10.8.2 notify all End-Users in writing that in future all the Services and Products will be provided and invoiced by Node4 direct to the End-Users; and
- 10.8.3 Provide such details of the End-Users as Node4 shall require (in such format as Node4 shall require), including full name and address and such information as is necessary to enable Node4 to bill the End-Users directly for the Services and Products.

## 11 Data and Confidential Information

- 11.1 Node4 reserves the right to hold the names and other information provided by and relating to Resellers and End-Users in a computerised database. This data will be used to enable the provision and maintenance of the Deliverables, and may in certain circumstances be supplied Node4 to Third Party Service Providers and any other suppliers to Node4 to enable the provision or maintenance of the Deliverables.
- 11.2 Resellers who request an address assignment will have their contact details added to the RIPE database
- 11.3 Where Node4 is processing any personal data relating to the Reseller or End-Users in connection with the provision of the Deliverables, it is doing so on behalf of the Reseller as a "data processor" under the Data Protection Act 1998, and the Reseller is the "data controller". Node4 will comply with its obligations under the Data Protection Act 1998 as data processor.
- 11.4 In particular Node4 will maintain and comply with reasonably appropriate technical and organisational measures against unauthorised or unlawful processing of that personal data and against accidental loss or destruction of, or damage to that personal data.
- 11.5 Each party will keep confidential:
  - 11.5.1 the terms of the Agreement; and
  - 11.5.2 any and all Confidential Information that it may acquire in relation to the other party.
- 11.6 Neither party will use the other party's Confidential Information for any purpose other than to perform its obligations under the Agreement. Each party will ensure that its officers and employees comply with the provisions of paragraphs 11.5 and 11.6.

- 11.7 The obligations on a party set out in paragraphs 11.5 and 11.6 will not apply to any Confidential Information which:
  - 11.7.1 either of the parties can demonstrate is in the public domain (other than as a result of a breach of paragraph 11.5 or 11.6); or
  - 11.7.2 a party is required to disclose by order of a court of competent jurisdiction but then only to the extent of such required disclosure.
- 11.8 The provisions of paragraphs 11.5 and 11.6 will survive any termination of the Agreement for a period of [5] years from termination.

## 12 Miscellaneous

- 12.1 Each right or remedy of Node4 under any Agreement is without prejudice to any other right or remedy of Node4 under the Agreement.
- 12.2 If any condition or part of the Agreement is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision will, to the extent required, be severed from the Agreement and will be ineffective without, as far as is possible, modifying any other provision or part of the Agreement and this will not affect any other provisions of the Agreement which will remain in full force and effect.
- 12.3 No failure or delay by Node4 to exercise any right, power or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.
- 12.4 Node4 may assign, delegate, license, hold on trust or sub-contract all or any part of its rights or obligations under the Agreement.
- 12.5 The Contract is personal to the Reseller who may not assign, delegate, license, hold on trust or sub-contract all or any of its rights or obligations under the Agreement without Node4's prior written consent.
- 12.6 The parties to the Contract do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.
- 12.7 The Agreement contains all the terms which Node4 and the Reseller have agreed in relation to the Deliverables and supersedes any prior written or oral agreements, representations or understandings between the parties relating thereto. The Reseller acknowledges that it has not relied on any statement, promise or representation made

or given by or on behalf of Node4 which is not set out in the Agreement. Nothing in this paragraph 12.7 will exclude any liability which one party would otherwise have to the other party in respect of any statements made fraudulently.

### **13 Applicable Law and Jurisdiction**

The construction, performance and validity of the Agreement will be governed by English law and the English courts have jurisdiction to settle any disputes which may arise out of or in connection with it.