

The German Association for Information Technology, Telecommunications and New Media [Bundesverband Informationswirtschaft, Telekommunikation und Neue Medien e.V.] - BITKOM - recommends on a non-binding basis that its members use these General Terms and Conditions for transactions that do not involve consumers. It is left to the addressees' discretion to follow this recommendation or to use other General Terms and Conditions.

BITKOM General Terms and Conditions - AV BITKOM -

1. Remuneration, payments, reservations, premature termination, deadlines

- 1.1** Unless otherwise agreed, the remuneration shall be charged on an as incurred basis at the supplier's generally valid prices at the time the agreement is concluded. Remunerations are always prices net plus statutory value added taxes.

The supplier can invoice on a monthly basis. If services are remunerated on an as incurred basis, the supplier shall document the nature and duration of the activities and submit this documentation with the invoice.

- 1.2** All invoices are due and payable at the latest 14 calendar days after receipt free payment office without deduction.
- 1.3** The customer can exercise offset or retention only against undisputed or legally final and binding claims.

In the event of faults the customer can retain payments only to an extent that is reasonable with respect to the fault in question and if there is no doubt about the presence of the fault. Clause 4.1 shall apply accordingly. The customer has no right to retain payment (*Zurückbehaltungsrecht*) when the claim is barred.

- 1.4** The supplier reserves ownership and rights to be granted to the services until complete payment of the remuneration owed, for which the justified warranty retentions as per Clause 1.3. sentence 2 are to be taken into consideration. Furthermore, the supplier reserves ownership until satisfaction of all its claims under the business relationship with the customer.

The provider is entitled to prohibit further usage of the services to the customer during the duration of the delay of payment (*Zahlungsverzug*). The provider can exercise this right only for an adequate period, normally not more than for 6 months. This is no cancellation of the contract. § 449 para. 2 BGB (German Civil Code) remains unaffected.

When the customer or its buyer hand the service back, the receipt of the services is no cancellation of the provider, except he has expressly stated the cancellation. The same applies for the pledge of items under reserved ownership (*Vorbehaltsware*) or rights on items under reserved ownership (*Vorbehaltsware*) through the provider. The customer may not attach or assign collateral items under reserved ownership or rights. The customer as a reseller shall be permitted only to resell such items in the normal course of business subject to the condition that the customer effectively and bindingly assigns to the supplier its claims against its customers in conjunction with the resale and the customer transfers ownership to its customers subject to the condition of payment.

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Upon concluding the agreement, the customer assigns its claims in conjunction with such transactions with its customers as collateral to the supplier who hereby accepts such assignment.

In so far as the value of the supplier's existing collateral rights exceeds the value of the secured claims by more than 20%, the supplier can choose which goods to release when requested to do so by the customer.

- 1.5** In the event that the customer is financially unable to meet its obligations towards the supplier, the supplier can terminate existing replacement agreements with the customer by rescission, long-term obligation relationships by termination without notice, also in the event of application of insolvency for the customer. This shall be without prejudice to Section 321 German Civil Code (*BGB*) and Section 112 German Insolvency Act (*InsO*). The customer shall inform the supplier in good time in writing about imminent insolvency.
- 1.6** Fixed performance dates are to be agreed only expressly and in a documented form. The agreement of a fixed performance date is subject to timely and contractually compliant performance to the supplier by its suppliers and subcontractors.

2. Cooperation, Obligation to cooperate, Confidentiality

- 2.1** The customer and the supplier shall each nominate an authorized contact person. Unless otherwise agreed, communication between the customer and the supplier takes place via this contact person. This person shall promptly (*unverzöglich*) bring about all decisions related to the accomplishment of the contract. The decisions shall be bindingly documented.
- 2.2** The customer undertakes to support the supplier in so far as required and to provide all necessary measures in its premises for a proper accomplishment of the contract. In particular the customer will provide the necessary information and on demand enable remote access to the customer system. Moreover, the customer shall ensure that there is expert personnel available for the support of the supplier.

As far as agreed upon in the contract that the services will be performed at the premises of the customer, the customer shall provide sufficient workplaces, tools and equipment free of charge at the supplier's request.

- 2.3** The customer shall report faults in a clear and detailed manner stating in writing all the information that is useful for identifying and analyzing the fault. It shall state in particular the work steps that led to the occurrence of the fault, how it manifested itself and also the effects of the fault.
- 2.4** The contractual partners are mutually obligated to keep confidential for an unlimited period of time all business and operating secrets and also information marked confidential made or becoming known to them in conjunction with the carrying out of the Agreement. The disclosure of such confidential information to persons not involved in the carrying out of the commission is only permitted with the written consent of the other contractual partner. Unless otherwise agreed this contract ends after the expiration of 5 years after the respective information has become known; when it deals with continuing obligations the contract does not end before the termination of those.

The contractual partners shall also impose these obligations on their employees and third parties they engage.

- 2.5** The contractual partners are aware that electronic and unencrypted communication (e.g. via email) is afflicted with security risks. Therefore, they will not assert claims for this type of communication which are founded in a lack of encryption, unless beforehand encryption was agreed upon.

3. Interruptions to the rendering of performance

- 3.1** If a cause, for which the supplier is not answerable, including strike or lockouts impairs punctual performance ("Interruption" - *Störung*), the deadlines shall be prolonged for the duration of the Interruption, where necessary including a reasonable restart phase. A contractual partner shall promptly (*unverzüglich*) inform the other contractual partner about the cause of an Interruption in its scope of responsibility and the duration of the postponement.
- 3.2** If the workload is increased owing to an interruption, the supplier can also demand remuneration of the additional expense, unless the customer is not answerable for the interruption and its cause is beyond its scope of responsibility.
- 3.3** If the customer rescinds the agreement owing to non-compliant performance by the supplier and/or demands damages instead of performance or asserts suchlike, the customer shall state in writing at the supplier's request within a reasonable period whether it is claiming such rights or wishes the performance to be rendered. In the case of rescission, the customer shall pay the supplier the value of past opportunities of use; the same shall apply for deteriorations through proper use. If the supplier is in default with the rendering of the performance, the customer's damages and compensation of expenses (*Schadens- und Aufwendersatz*) with respect to the said default shall be limited for each complete week of default to 0.5% of the price for that part of the performance that cannot be used owing to the default. The default liability (*Verzugshaftung*) is limited to a total not exceeding 5% of this price. This shall not apply in so far as the default is due to the supplier's gross negligence (*grobe Fahrlässigkeit*) or intention (*Vorsatz*).
- 3.4** In the case of a delay in performance, the customer shall have a right of rescission under statutory provisions only if the supplier is answerable for the delay. If the customer justifiably claims damages or compensation of expenses instead of the performance because of the delay, it shall be entitled for each complete week of the delay to 1% of the price for the part of the performance that cannot be used because of the delay, but not more than 10% of this price. Clause 3.3 paragraph 2 sentence 3 shall apply accordingly.

4. Material faults (*Sachmängel*) and compensation of expenses (*Aufwandsersatz*)

- 4.1** Where the supplier's services deviate only marginally from the contractually agreed nature, this shall not entitle the customer to claims under material faults.

Furthermore, claims because of faults shall not arise in the event of excessive or improper use, natural wear and tear, failure of components in the system environment, software faults not reproducible or otherwise demonstrable by the customer or in the event of damage caused by particular external influences not expected under the Agreement. This shall also apply for subsequent change or repair by the customer or third party, unless this does not impede the analysis and rectification of a material fault.

Claims for damages and compensation of expenses shall also be governed by Clause 6.

- 4.2** Claims because of a material fault shall be time-barred within one year from the statutory start of the warranty period. This shall be without prejudice to the statutory periods for recourse under Section 478 German Civil Code (*BGB*), the same shall also apply in so far as the law under Section 438 Subsection 1 No. 2 German Civil Code (*BGB*) (buildings and items for buildings) stipulate longer periods, in the case of intentional or grossly negligent breach of duty by the supplier, in the case of wilful non-disclosure of a fault and also in the event of fatalities, injury and impairment of health.

The supplier's handling of warranty claim from the customer shall stay the warranty period only in so far as the statutory preconditions for this have been met. The warranty period shall not commence anew.

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A subsequent performance (*Nacherfüllung*) (replacement delivery or repair) can influence the time bar of the fault triggering the subsequent performance.

4.3 The supplier can demand additional remuneration of its efforts in so far as

- a) it acts in response to a report without there actually being a fault, unless the customer could not determine that there was no fault without making unacceptable efforts or
- b) a reported fault is not reproducible or otherwise demonstrable by the customer as a fault or
- c) additional effort is incurred because the customer has not properly complied with its duties (see also Clauses 2.2, 2.3 and 5.2).

5. Legal faults (*Rechtsmängel*)

5.1 The supplier shall be only liable for breach of third-party rights by its performance in so far as the performance is used as contractually agreed and in particular in the contractually envisaged use environment.

The supplier shall be liable for breaches of third-party rights only within the European Union and the European Economic Area and also at the location of the contractually agreed use of the performance. Clause 4.1 sentence 1 shall apply accordingly.

5.2 If a third party claims against the customer that a performance by the supplier breaches its rights, the customer shall immediately notify the supplier. The supplier and where appropriate its sub-suppliers shall be entitled but not obliged to defend such claims at their expense in so far as permitted.

The customer is not entitled to accept claims of any third party before he has given the supplier the opportunity to defend the claims of the third party in another manner

5.3 If a performance by the supplier breaches third-party rights, the supplier shall at its own discretion and expense

- a) obtain for the customer the right to use the performance or
- b) render the performance such that it does not breach any rights or
- c) take back the performance and reimburse the remuneration rendered by the customer (less a reasonable deduction for use), if the supplier cannot provide any other remedy without unreasonable effort and expense.

The interests of the customer shall be duly taken into consideration when the choice is made.

5.4 The customer's claims under legal faults shall be time-barred as per 4.2. Claims for damages and compensation of expenses shall also be governed by 6 additional efforts of the provider are governed by Clause 4.3.

6. Supplier's general liability

6.1 The supplier shall always be liable to the customer

- a) for the losses caused by it and also its statutory representatives or agents intentionally or through gross negligence,
- b) under the German Product Liability Act (*Produkthaftungsgesetz*) and
- c) for losses relating to fatalities, injuries and impairment of health for which the supplier, its statutory representatives or agents are answerable.

6.2 The supplier shall not be liable in the event of slight negligence unless and in so far as it has breached a material duty (cardinal duty - *Kardinalpflicht*).

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In the case of damage to property and financial losses, this liability is limited to typical losses foreseeable under such contracts. This shall also apply for foregone profit and savings not achieved. Liability for other more remote consequential damage is hereby excluded.

The liability for an individual incident is limited to the contract value, in the case of continuous remuneration to the amount of remuneration per contract year, however to not less than € 50,000. The time bar shall be governed by Clause 4.2 *mutatis mutandis*. The parties can negotiate and agree greater liability against separate remuneration. This shall be without prejudice to liability as per Clause 6.1.

In addition and overriding the above, the supplier's liability because of minor negligence under the contract in question and its execution shall be limited altogether to damages and compensation of expenses - regardless of the legal grounds - to the percentage rate agreed in this contract of the remuneration agreed when the Agreement is signed. This shall be without prejudice to liability as per Clause 6.1 b).

- 6.3** The supplier shall be liable for damages under a guarantee (*Garantieerklärung*) only if this has been expressly agreed in the guarantee. In the event of slight negligence, this liability shall be governed by the limitations as per Clause 6.2.
- 6.4** In the event of data loss, the supplier shall be liable only for that effort and expense for restoring the data that would be necessary if the customer carried out proper data backup. In the case of slight negligence by the supplier, this liability shall only apply if the customer properly backed up data immediately before the action leading to the loss of data.
- 6.5** Claims for compensation of expenses and other liability claims of the customer against the supplier shall be governed by Clauses 6.1 to 6.4 *mutatis mutandis*.

7. Miscellaneous

- 7.1** The customer itself shall be responsible for complying with import and export regulations for the deliveries or services, in particular those of the USA. In the case of cross-border delivery or performance, the customer shall bear any customs duties, fees and other charges. The customer itself shall be responsible for completing statutory or government procedures in conjunction with cross-border deliveries or services, unless otherwise expressly agreed.
- 7.2** German law shall apply. The United Nations Convention on Contracts for the International Sale of Goods shall not apply.
- 7.3** The supplier performs its services taking as a basis its General Terms and Conditions (GTC - *AGB*). GTC of the customer do not apply, also if the provider has not expressly disagreed.

The acceptance of the services of the supplier by the customer is regarded as the acceptance of the GTC of the provider and not those of the customer.

Other terms and conditions are only binding, if the provider has accepted them in writing; in that case the GTC of the supplier apply additionally.

- 7.4** Changes and additions to this Agreement are to be made only in writing.
- 7.5** Legal forum with respect to a merchant, a legally independent statutory body or a special fund under public law is the supplier's registered offices. The supplier can also sue the customer within its jurisdiction.

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The contractual terms and conditions are based on non-binding terms recommended by BITKOM e.V. and approved by the Federal Cartel Office.

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