

# Software Clause for the Provision of Standard Software Forming an Integral Part of Supplies\*

Amending the "General Conditions for the Supply of Products and Services of the Electrical and Electronics Industry" ("GL")\*\*

as of: January 2018

## 1. Scope of Application of the Software Clause

- (a) This Software Clause shall apply exclusively to the provision of standard software for a limited or unlimited period as a part of or in connection with related hardware (such software hereinafter referred to as "Software"), as well as to the entire Supplies, to the extent that a breach of contract has its cause in the Software. Furthermore, hardware shall be solely subject to the conditions of the GL.
- (b) Firmware is not "Software" within the meaning of this Software Clause.
- (c) The GL shall apply to those matters not specifically covered by this Software Clause.
- (d) The Supplier does not assume any obligation to perform services by virtue of this Software Clause. Such services require a separate agreement.

## 2. Documentation

Article I No. 2 GL shall be supplemented as follows:  
The provision of documentation requires a separate agreement in writing. If documentation is to be provided, the term "Software" hereinafter shall also include the documentation.

## 3. Rights to Use

Article I No. 3 GL shall be replaced as follows:

- (a) The Supplier grants the Purchaser the non-exclusive right to use the Software in accordance with the Agreement. Unless otherwise agreed, the right to use refers to the country of destination of the hardware and within the territory of the European Union or of another signatory state to the Agreement on the European Economic Area. The right to use is limited to the agreed period of time, in the absence of such agreement, the right to use shall be unlimited in time.
- (b) The following supplementary conditions shall apply where the right to use is subject to a time limit:  
The Purchaser shall use the Software solely on the hardware referred to in the contract documents (e.g. software product sheet), in the absence of such reference, the use shall be limited to the respective hardware supplied together with the Software. The use of the Software on any other device shall require the express prior written consent of the Supplier and shall, if used on a more powerful device, entitle the Supplier to claim an appropriate additional remuneration; this does not apply, however, to the extent and for the period in which the Purchaser uses a temporary substitute device within the agreed scope of use because of a defect in the agreed device.
- (c) Where the contract documents refer to more than one device, the Purchaser shall not install or make useable the Software provided on more than one of these devices simultaneously (Single License), to the extent that it has not been granted a Multiple License pursuant to No. 3 (j) below. Where more than one workplace exists for a specific device on which the Software can be used independently, the Single License shall apply to only one workplace.
- (d) The Software shall exclusively be provided in machine readable format (object code).
- (e) The Purchaser shall be entitled to make only one copy of the Software and solely so for back-up purposes (back-up copy). Any other duplication on the part of the Purchaser shall be allowed only subject to a Multiple License pursuant to No. 3 (j) below.

- (f) Save as provided for in Sec. 69 (e) (decompilation) of the German Copyright Act, the Purchaser shall not be entitled to modify, decompile, translate, or isolate parts of the Software. The Purchaser shall not remove alphanumeric or other identifiers from the data medium and shall transfer such identifiers unchanged to any back-up copy.
- (g) The Supplier grants the Purchaser the right to assign the right of use granted to it for software which is provided permanently to a third party. The Purchaser to whom the Software has not been provided for commercial resale shall pass on the right to use the Software only together with the device it has bought in combination with the Software from the Supplier. If the right to use is transferred to a third party, the Purchaser shall ensure that the right to use granted to the third party does not exceed the scope of rights to the Software granted to the Purchaser under this Agreement, and the Purchaser shall ensure that the third party shall be obliged to comply with at least the same obligations as are imposed herein. When doing so, the Purchaser may not retain copies of the Software. The Purchaser shall not be entitled to grant sublicenses. Where the Purchaser provides the Software to a third party, the Purchaser shall ensure that any existing export requirements are observed and shall hold the Supplier harmless in this respect.
- (h) For Software for which the Supplier has only derived rights to use and that is no open source Software (third party software), the provisions of this No. 3 shall be amended and superseded by the conditions of use agreed between the Supplier and its licensor to the extent that they refer to the Purchaser (such as an end user license agreement); the Supplier shall notify the Purchaser of such conditions and make them available upon request.
- (i) For open source Software, the provisions of this No. 3 shall be superseded by the conditions of use underlying the open source Software. The Supplier shall make the source code available or accessible to the Purchaser only to the extent stipulated in the conditions of use underlying the open source software. The Supplier shall notify the Purchaser of the fact that open source Software and pertaining conditions of use exist and make such conditions of use accessible to the Purchaser or, if required according to the conditions of use, provide the Purchaser with them.
- (j) The use of the Software on more than one device or simultaneously at more than one workplace shall require a separate agreement on the right to use. The same shall apply if the Software is used in networks even if the Software is not copied for this purpose. In any of the afore-mentioned instances (hereinafter referred to as "Multiple License"), the following provisions (aa) and (bb) shall apply in addition to and superseding the provisions of this No. 3 (a) to (i):
  - (aa) Multiple License requires that the Supplier expressly confirms in writing the number of admissible copies that the Purchaser may make of the Software provided and the number of devices and/or workplaces where the Software may be used. No. 3 (g) second sentence shall be applicable to Multiple Licenses provided that they may be transferred by the Purchaser to third parties only if transferred in their totality and together with all devices on which the use of the Software is allowed.
  - (bb) The Purchaser shall observe the duplication rules provided by the Supplier together with the Multiple License. The Purchaser shall keep records on the whereabouts of all copies made and submit them to the Supplier upon request.

#### 4. Transfer of Risk

Article V GL shall be amended as follows:

If the Software is provided via electronic communication media (e.g. via the internet) the risk shall pass when the Software leaves the sphere of influence of the Supplier (e.g. when making a download).

#### 5. Additional Obligations to Co-operate on the Part of the Purchaser and Liability

Article VI GL shall be supplemented as follows:

The Purchaser shall take all required and reasonable measures to prevent or limit damage attributable to the Software. In particular, the Purchaser shall make regular back-up copies of the programs and data. To the extent the Purchaser negligently breaches this obligation, the Supplier shall not be liable for any consequences arising therefrom; this shall apply in particular to the replacement of lost or damaged data or programs. The above provision does not imply a change in the burden of proof.

#### 6. Defects as to Quality ("the Defects")

(1) In the case of Software provided permanently, Article VIII GL shall be replaced by the following:

- (a) Contractual claims based on Defects of the Software are subject to a limitation period of 12 months from the start of the statutory statute of limitations. The statutory limitation period shall apply to claims for damages based on intent and gross negligence and in the case of culpable injury to life, body or health. Insofar as longer periods are prescribed by law according to Sec. 438 para. 1 No. 2 (buildings and things used for a building), and Sec. 634a para. 1 No. 2 (defects of a building) German Civil Code ("BGB") and in the case of intent, the fraudulently conceals the Defect or non-compliance with guaranteed characteristics ("Beschaffheitsgarantie") the longer statutory periods shall apply. Claims for the reimbursement of expenses on the part of the Purchaser in accordance with Sec. 445a BGB (entrepreneur's right of recourse) shall be subject to a limitation period of 12 months from the start of the statutory statute of limitations, provided the last contract in the supply chain is not a sale of consumer goods. The legal provisions regarding suspension of the statute of limitations ("Ablaufhemmung", "Hemmung") and recommencement of limitation periods shall remain unaffected.
- (b) Software is considered to be defective only if the Purchaser can prove that there are reproducible deviations from the specifications. A Defect shall not be deemed to exist if it does not occur in the latest version supplied to the Purchaser, and the Purchaser can be reasonably expected to use it.
- (c) Notifications of Defect by the Purchaser shall be given in written form without undue delay. Defects and the relevant data processing environment shall be described as precisely as possible therein.
- (d) Claims based on Defects do not exist in the case of any of the following:
  - insignificant deviations from the agreed characteristics;
  - only minor impairment of usability;
  - damage from faulty or negligent handling;
  - damage from particular external influences not assumed under the contract;
  - modifications or amendments made by the Purchaser or third parties, and any consequences resulting therefrom; or
  - incompatibility of the Software provided with the data processing environment of the Purchaser.
- (e) In the case of defective Software, the Supplier shall be first given the opportunity to repair or replace the Software ("Nacherfüllung") within a reasonable period of time. The

Supplier shall be entitled to choose between repair and replacement.

- (f) Unless the Supplier chooses otherwise, the Supplier will correct the Defect in the Software as follows:
  - (aa) The Supplier will provide a replacement by way of an update or an upgrade of the Software if available to the Supplier or obtainable with reasonable efforts by the Supplier. If the Purchaser has been granted a Multiple License, it may make a corresponding number of copies of the update, or, as the case may be, upgrade.
  - (bb) Until an update, or, as the case may be, upgrade is provided, the Supplier will make available to the Purchaser an interim solution bypassing the Defect, provided that this does not result in unreasonable expenditures and that the Purchaser would otherwise, due to the Defect, be unable to complete work that cannot be delayed.
  - (cc) If a data medium or documentation supplied proves to be defective, the Purchaser's right shall be limited to demanding that the Supplier replace it with a non-defective version.
  - (dd) The Supplier shall have the right to choose whether it corrects the Defect at the location of the Purchaser or at its own location. If the Supplier chooses to correct the Defect at the Purchaser's location, the Purchaser shall assure that the required hardware and software as well as the required operating conditions (including the required computing time) and qualified operating personnel are available. The Purchaser shall submit to the Supplier the documents and information available to it and required for Defect correction.
  - (ee) The Purchaser shall enable the Supplier access for remote maintenance if so requested.
  - (ff) The Purchaser shall have no claim with respect to expenses incurred in the course of supplementary performance, to the extent that expenses are increased because the subject matter of the Supplies has subsequently been brought to another location than the Purchaser's branch office, unless doing so complies with the normal use of the Supplies. This applies accordingly to claims for the reimbursement of expenses on the part of the Purchaser in accordance with Sec. 445a BGB (entrepreneur's right of recourse), provided the last contract in the supply chain is not a sale of consumer goods.
  - (gg) The Purchaser's right of recourse against the Supplier pursuant to Sec. 445a BGB (entrepreneur's right of recourse) is limited to cases where the Purchaser has not concluded an agreement with its customers exceeding the scope of the statutory provisions governing claims based on Defects.
- (g) If the Defect cannot be corrected, the Purchaser shall be entitled to rescind the contract or reduce the remuneration, irrespective of any claims for damages it may have according to Article XII GL.
- (h) In the case of claims for Defects, the Purchaser may withhold payments to an amount that is in a reasonable proportion to the Defect. The Purchaser has no right to withhold payments to the extent that its claim of a Defect is time-barred. Unjustified notifications shall entitle the Supplier to reimbursement of its expenses by the Purchaser.
- (i) Claims for damages shall furthermore be subject to Article XII GL. Any other claims of the Purchaser against the Supplier or its agents or any such claims exceeding the claims provided for in this No. 6, if based on a Defect, shall be excluded.

(2) In the case of Software not provided permanently, Article VIII GL shall be replaced by the following:

- (a) Software is considered to be defective only if the Purchaser can prove that there are reproducible deviations from the specifications. A Defect shall not be deemed to exist if it does not occur in the latest version supplied to the Purchaser, and the Purchaser can be reasonably expected to use it.
- (b) Notifications of Defect by the Purchaser shall be given in written form without undue delay. Defects and the relevant data processing environment shall be described as precisely as possible therein.
- (c) Claims based on Defects do not exist in the case of any of the following:
  - insignificant deviations from the agreed characteristics;
  - only minor impairment of usability;
  - damage from faulty or negligent handling;
  - damage from particular external influences not assumed under the contract;
  - modifications or amendments made by the Purchaser or third parties, and any consequences resulting therefrom; or
  - incompatibility of the Software provided with the data processing environment of the Purchaser.
- (d) In the case of Defective Software, the Supplier shall be first given the opportunity to repair or replace the Software ("Nacherfüllung") within a reasonable period of time. The Supplier shall be entitled to choose between repair and replacement.
- (e) Unless the Supplier chooses otherwise, the Supplier will correct the Defect in the Software as follows:
  - (aa) The Supplier will provide a replacement by way of an update or an upgrade of the Software if available to the Supplier or obtainable with reasonable efforts by the Supplier. If the Purchaser has been granted a Multiple License, it may make a corresponding number of copies of the update, or, as the case may be, upgrade.
  - (bb) Until an update, or, as the case may be, upgrade is provided, the Supplier will make available to the Purchaser an interim solution bypassing the Defect, provided that this does not result in unreasonable expenditures and that the Purchaser would otherwise, due to the Defect, be unable to complete work that cannot be delayed.
  - (cc) If a data medium or documentation supplied proves to be defective, the Purchaser's right shall be limited to demanding that the Supplier replace it with a non-defective version.
  - (dd) The Supplier shall have the right to choose whether it corrects the Defect at the location of the Purchaser or at its own location. If the Supplier chooses to correct the Defect at the Purchaser's location, the Purchaser shall assure that the required hardware and software as well as the required operating conditions (including the required computing time) and qualified operating personnel are available. The Purchaser shall submit to the Supplier the documents and information available to it and required for Defect correction.
  - (ee) The Purchaser shall enable the Supplier access for remote maintenance if so requested.
- (f) If repair or replacement is unsuccessful, the Purchaser is entitled to terminate the contract without notice or reduce the remuneration, irrespective of any claims for damages it may have according to Article XII GL.

- (g) Furthermore, the provisions of Art. XII GL shall apply in respect of claims for damages. Any other claims of the Purchaser against the Supplier or its agents or any such claims exceeding the claims provided for in this No. 6, if based on a Defect, shall be excluded.

## 7. Industrial Property Rights And Copyright; Defects In Title

Article IX GL shall be replaced by the following:

- (1) Unless otherwise agreed, the Supplier shall provide the Supplies in the country of the place of delivery or within the territory of the European Union or of another signatory state to the Agreement on the European Economic Area without infringing any third-party industrial property rights and copyrights (hereinafter referred to as "IPR"). If a third party asserts a justified claim against the Purchaser based on an infringement of an IPR by the Supplies made by the Supplier and used in conformity with the contract, the Supplier shall be liable to the Purchaser - in the case of Software provided for an unlimited time period within the contractual limitation period stipulated for Defects; in the case of temporarily provided Software within the statutory limitation period - as follows:
  - (a) The Supplier shall choose whether to acquire, at its own expense, the right to use the IPR with respect to the Supplies concerned or whether to modify the Supplies such that they no longer infringe the IPR or replace them. If this would be impossible for the supplier under reasonable conditions, the Purchaser may rescind the contract or reduce the remuneration pursuant to the applicable statutory provisions.
  - (b) The Supplier's liability to pay damages is governed by Article XII GL.
  - (c) The above obligations of the Supplier shall apply only if the Purchaser (i) immediately notifies the Supplier of any such claim asserted by the third party in written form, (ii) does not concede the existence of an infringement and (iii) leaves any protective measures and settlement negotiations to the Supplier's discretion. If the Purchaser stops using the Supplies in order to reduce the damage or for other good reason, it shall be obliged to point out to the third party that no acknowledgement of the alleged infringement may be inferred from the fact that the use has been discontinued.
- (2) Claims of the Purchaser shall be excluded if it is itself responsible for the infringement of an IPR.
- (3) Claims of the Purchaser are also excluded if the infringement of the IPR is caused by specifications made by the Purchaser, by a type of use not foreseeable by the Supplier or by the Supplies being modified by the Purchaser or being used together with products not provided by the Supplier.
- (4) In addition, with respect to claims by the Purchaser pursuant to No. 7.1 (a) above, provisions of No. 6.1 (h) and No. 6.1 (e) first sentence shall apply *mutatis mutandis* in the event of an infringement of an IPR.
- (5) Where other defects in title occur, the provisions of No. 6 shall apply *mutatis mutandis*.
- (6) Any other claims of the Purchaser against the Supplier or its agents or any such claims exceeding the claims provided for in this No. 7, based on a defect in title, are excluded.