

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)

Recommended by the ZVEI - Zentralverband Elektrotechnik- und Elektronikindustrie e. V.

- July 2004 -

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 as far as not specifically covered in this Software Clause.
- (d) The Supplier does not assume any obligation to perform software services by virtue of this Software Clause. Such services requires 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. 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 use 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 (i) below. Where more than one workplace exists for a specific device where 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 (i) 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 – which shall be revocable for good cause – to assign the right to use granted to it 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) To the extent that Software is provided to the Purchaser for which the Supplier has only derived rights to use (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 the Purchaser is provided with open source Software, the provisions of this No. 3 shall be amended and superseded by the conditions of use underlying the open source Software. Upon request, the Supplier shall provide the Purchaser with the source code if the provision of the source code has been agreed in the conditions of use. The Supplier shall point out in the contract documents if third party software or open source Software and pertaining conditions of use exist and make the conditions of use available if so requested. Any breach of the conditions of use on the part of the Purchaser shall entitle not only the Supplier, but also its licensor, to assert claims and rights arising therefrom in their own name.
- (i) 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. With regard to the situations named above (hereinafter referred to as "Multiple License") the following provisions (aa) and (bb) shall apply in addition to and with priority over the provisions of this No. 3 (a) to (h):
 - (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.

* The original German text shall be the governing version.

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 for an unlimited period of time, Article VIII GL shall be replaced by the following:
 - (a) Claims based on Defects of the Software are subject to a statute of limitations of 12 months. This provision shall not apply where longer periods are prescribed by law according to Sec. 438 para. 1 No. 2 (buildings and items used for a building), Sec. 479 para. 1 (right of recourse), and Sec. 634 para. 1 No. 2 (defects of a building) German Civil Code ("BGB"), as well as in cases of loss of life, bodily injury or damage to health, or where the Supplier intentionally or as a result of gross negligence fails to fulfil its obligation or fraudulently conceals a Defect. The statute of limitations commences upon the transfer of risk to the Purchaser. The legal provisions regarding suspension of the statute of limitations ("Ablaufhemmung", "Hemmung") and recommencement of limitation periods 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 manifest itself in the latest version supplied to the Purchaser, and the use thereof by Purchaser can reasonably be required.
 - (c) Notification of Defects shall be given in writing 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 cases 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 made by the Purchaser or third parties, and any consequences resulting therefrom,
 - software extensions made by the Purchaser or a third party through the use of an interface provided by the Supplier,
 - 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.

- (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 XI GL.
 - (h) Upon notification of a Defect, the Purchaser may withhold payments to a reasonable extent taking into account the Defect involved. The Purchaser, however, may withhold payments only if the subject-matter of the notification is justified beyond doubt. Notification without cause shall entitle the Supplier to reimbursement of its expenses by the Purchaser.
 - (i) Claims for damages shall furthermore be subject to Article XI GL. Any other Defect claims or Defect claims beyond this No. 6 by the Purchaser against the Supplier or its agents shall be excluded.
- (2) For Software provided for a limited period of time only, letters (b), (c), (d), (e), (f) and (i) of para. 1 above shall apply mutatis mutandis instead of Article VIII. Letter (g) shall apply except that the right of rescission shall be replaced by the right to termination without notice.

7. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT; DEFECTS IN TITLE

Article IX GL shall be amended as follows:

- (1) Article IX No. 1 GL shall apply as follows:

Unless otherwise agreed, the Supplier shall provide the Supplies free from third parties' industrial property rights and copyrights (hereinafter referred to as "IPR") with respect to the country of the place of delivery only. 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) (unchanged)
 - (b) (unchanged)
 - (c) (unchanged)
- (2) Article IX.2 GL shall apply unchanged.
- (3) Article IX.3 GL shall apply unchanged.
- (4) Article IX.4 GL shall be replaced by:

In addition, with respect to claims by the Purchaser pursuant to No. 1 (a) above, No. 6 para. 1 lit. (h) and (e) first sentence of this Software Clause shall apply mutatis mutandis in the event of an infringement of an IPR.
- (5) Article IX.5 GL shall be replaced by:

The provisions of No. 6 of this Software Clause shall apply where other defects in title occur.

8. OTHER CLAIMS FOR DAMAGES

Article XI GL shall be amended as follows:

- (1) Article IX.1 GL shall apply unchanged.
- (2) Article XI.2 GL shall apply unchanged.
- (3) Article X.3 GL shall apply as follows:

To the extent that the Purchaser has a valid Claim for Damages according to Article XI GL, it shall be time-barred upon expiration of the statute of limitations applicable to Defects pursuant to No. 6 (1) of this Software Clause. In the case of claims for damages under the German Product Liability Act, the statutory provisions governing limitation periods shall apply.