

### Software clause

for the provision of standard software as part of deliveries

Addition and amendment of the "General Terms and Conditions of Delivery"  
for products and services of the electrical industry" (GL)\*

Dated: January 2018

### 1. Scope of application of the software clause

- a. This software clause applies exclusively to the temporary and unlimited cession of standard software, which is made available for use as part of or in connection with a delivery of the associated hardware (hereinafter referred as "software"), as well as to the entire delivery, insofar as a breach of duty or disruption of performance has its cause in the software. In all other respects, the GL shall apply exclusively to the hardware.
- b. Firmware is not "software" within the meaning of this Software Clause.
- c. Insofar as this software clause does not contain any provisions, the GL shall apply.
- d. With this software clause, the supplier assumes no obligation to provide services. These require a separate agreement.

### 2. Documentation

In addition to Article I No. 2 GL:

The provision of documentation requires a separate written agreement. If documentation is provided, the term "software" in the following also includes the documentation.

### 3. Rights of use

Instead of Article I(3) GL:

- a. The supplier grants the customer the non-exclusive right to use the software. Unless otherwise agreed, the right of use applies in the country of delivery of the hardware and in the territory of the European Union or another state party to the Agreement on the European Economic Area. The right of use is limited to the agreed period, in the absence of such an agreement, the right of use is indefinite.

- b. Insofar as the right of use is granted for a limited period of time, the following provisions shall also apply: The customer may only use the software with the hardware specified in the contract documents (e.g. software product certificate), in the absence of such a mention with the associated hardware supplied together with the software. The use of the software with another device requires the express written consent of the supplier and, in the case of the use of the software with a more powerful device, results in the supplier's claim to an appropriate additional fee; this does not apply if and as long as the customer uses the software temporarily with a replacement device to the agreed extent due to a defect of the agreed device.
- c. If several devices are mentioned in the contract documents, the customer may only install or make use of the software provided at the same time on one of these devices (single license), unless the customer is granted a multiple license in accordance with Section 3 (j). If there are several workstations on a device where the software can be used independently, the single license extends only to one workstation.
- d. The software is provided exclusively in machine-readable form (object code).
- e. The customer may only create a reproduction of the software, which may only be used for backup purposes (backup copy). In all other respects, the customer may only reproduce the software within the framework of a multiple license in accordance with Section 3 (j).
- f. Except in the cases of § 69e of the Copyright Act (decompilation), the customer is not entitled to change, reverse engineer, translate or remove parts of the software. The customer may not remove alphanumeric and other identifiers from the data carriers and must transfer them unchanged to each backup copy.
- g. The supplier grants the customer the right – revocable if there is an important reason – to transfer the right of use granted to him to third parties. However, the customer, to whom the software is not provided for commercial resale purposes, may only pass on the right to use the software to third parties together with the device that he has acquired from the supplier together with the software. In the event of a transfer of the right of use to third parties, the customer must ensure that the third party is not granted any further rights of use to the software than the customer is entitled to under this contract, and that at least the obligations existing with regard to the software under this contract are imposed on the third party. In doing so, the customer may not retain any copies of the software. The customer is not entitled to grant sublicenses. If the customer leaves the software to a third party, the customer is responsible for compliance with any export requirements and must indemnify the supplier from obligations in this respect.
- h. For software for which the Supplier only has a derived right of use and which is not open-source software (third-party software), the terms of use agreed between the Supplier and its Licensor shall apply in addition and take precedence over the provisions of this Section 3, insofar as they concern the Customer (e.g. End User License Agreement); the Supplier shall draw the Purchaser's attention to these and make them available to him upon request.

- i. For Open-Source Software, the Terms of Use to which the Open-Source Software is subject shall take precedence over the provisions of this Section 3. The Supplier shall only issue or make available the source code to the Purchaser to the extent required by the Terms of Use of the Open-Source Software. The supplier shall inform the customer of the existence and terms of use of open-source software provided and make the terms of use accessible to him or, insofar as required by the terms of use, provide them.
  
- j. In order to use the software on several devices or simultaneously at several workstations, the customer requires a separately agreed right of use. The same applies to the use of the software in networks, even if the software is not reproduced. In the aforementioned cases (hereinafter uniformly referred to as "multiple license"), the following letters (aa) and (bb) apply in addition and primarily to the provisions of Section 3 (a) to (i):
  - aa. A prerequisite for a multiple license is an express written confirmation by the supplier of the number of permissible reproductions that the customer may make of the software provided and the number of devices or workstations at which the software may be used. For multiple licenses, however, Section 3 (g) sentence 2 applies with the proviso that the multiple licenses may only be transferred by the customer to third parties if they are transferred in total and with all devices on which the software may be used.
  
  - bb. The purchaser shall observe the reproduction instructions provided to him by the supplier together with the multiple license. The customer must keep records of the whereabouts of all reproductions and present them to the supplier on request.

### 4. Transfer of risk

In addition to Article V GL:

If software is made available by means of electronic communication media (e.g. via the Internet), the risk shall pass when the software leaves the supplier's sphere of influence (e.g. when downloading).

### 5. Further obligations of the customer to cooperate and liability

In addition to Article VI GL:

The customer must take all necessary and reasonable measures to prevent or limit damage caused by the software. In particular, the customer must ensure the regular backup of programs and data. Insofar as the customer culpably violates this obligation, the supplier shall not be liable for any resulting consequences, in particular not for the replacement of lost or damaged data or programs. A change in the burden of proof is not associated with the above provision.

### 6. Material defects

1. For software provided for an indefinite period of time, the following applies instead of Article VIII GL:
  - a. The limitation period for claims due to material defects in the software is 12 months from the beginning of the statutory limitation period. For claims for damages in the event of intent and gross negligence as well as culpable injury to the life of the body and health, the statutory limitation period applies. This does not apply if the law prescribes longer deadlines in accordance with §§ 438 (1) no. 2 (buildings and objects for buildings) and 634a (1) no. 2 (construction defects) BGB as well as in the case of intent in the case of fraudulent concealment of the defect and non-compliance with a quality guarantee, the longer legal obligations apply. The customer's claims for reimbursement of expenses in accordance with § 445a BGB (recourse of the seller) become statute-barred 12 months after the statutory commencement of the limitation period, provided that the last contract in the supply chain is not a consumer goods contract. The period begins with the time of the transfer of risk. The statutory provisions on suspension of expiry, suspension and restart of the deadlines remain unaffected.
  - b. Only deviations from the specification proven and reproducible by the customer shall be deemed to be material defects of the software. However, a material defect does not exist if it does not occur in the version of the software last provided to the customer and its use is reasonable for the customer.
  - c. Notices of defects by the customer must be made immediately in writing. The defect and the corresponding data processing environment must be described as precisely as possible.

- d. Claims for defects do not exist
- in the event of only insignificant deviations from the agreed quality,
  - in the event of only insignificant impairment of usability,
  - in the event of damage resulting from incorrect or negligent handling,
  - in the case of damage caused by special external influences that are not assumed under the contract,
  - for changes or extensions made by the customer or by third parties and the resulting consequences,
  - to ensure that the software provided is compatible with the data processing environment used by the customer.
- e. If the software has a material defect, the supplier must first be granted the opportunity for subsequent performance within a reasonable period of time. The supplier has the right to choose between the types of supplementary performance.
- f. Unless the supplier chooses another type of supplementary performance, subsequent performance shall be affected by remedying the material defect of the software as follows:
- aa. As a replacement, the Supplier shall provide a new version (update) or a new version (upgrade) of the Software, insofar as it is available from the Supplier or can be procured with reasonable effort. If the Supplier has granted the Purchaser a multiple license, the Purchaser may create a number of copies corresponding to the multiple license from the update or upgrade provided as a replacement.
- bb. Until an update or upgrade has been made available, the Supplier shall provide the Purchaser with an interim solution to circumvent the material defect, insofar as this is possible with reasonable effort and the Purchaser can no longer process tasks that cannot be postponed due to the material defect.
- cc. If a delivered data carrier or documentation is defective, the customer can only demand that the supplier replace it with defect-free ones.
- dd. The remedy of the material defect shall take place at the discretion of the supplier at the customer or the supplier. If the Supplier chooses to dispose of the Purchaser, the Purchaser shall provide hardware and software as well as other operating conditions (including the necessary computing time) with suitable operating personnel. The Purchaser shall provide the Supplier with the documents and information required by the Supplier to remedy the material defect.
- ee. At the request of the Supplier, the Purchaser shall enable remote maintenance access.

- ff. Claims of the order due to the expenses necessary for the purpose of supplementary performance are excluded to the extent that the expenses increase because the object of the delivery has subsequently been moved to a place other than the customer's branch office, unless the transfer corresponds to its intended use. This applies accordingly to claims for reimbursement of expenses of the customer in accordance with § 445a BGB (recourse of the seller), provided that the last contract in the supply chain is not a consumer goods contract.
  - gg. Recourse claims of the customer against the supplier according to § 445a BGB (recourse of the seller) exist only to the extent that the customer has not made an agreement with his customer that goes beyond the statutory claims for defects.
  - g. If the supplementary performance fails, the customer may – without prejudice to any claims for damages pursuant to Article XII GL – withdraw from the contract or reduce the remuneration.
  - h. In the event of claims for defects, payments by the customer may be withheld to an extent that is in reasonable proportion to the material defects that have occurred. A right of retention does not exist if a claim for defects is time-barred. If the notice of defects is unjustified, the supplier is entitled to demand reimbursement of the expenses incurred by him from the customer.
  - i. In all other respects, Article XII GL shall apply to claims for damages. Further or other claims of the customer against the supplier and his vicarious agents due to a material defect other than those regulated in this section 6 are excluded.
2. For non-permanently provided software, the following applies instead of Article VIII GL:
- a. Only deviations from the specification proven and reproducible by the customer shall be deemed to be material defects of the software. However, a material defect does not exist if it does not occur in the version of the software last provided to the customer and its use is reasonable for the customer.
  - b. Notices of defects by the customer must be made immediately in writing. The defect and the corresponding data processing environment must be described as precisely as possible.

- c. There are no claims:
- in the event of only insignificant deviations from the agreed quality
  - in the case of only insignificant impairment of usability
  - in the event of damage resulting from incorrect or negligent handling
  - in the case of damage caused by special external influences that are not assumed under the contract
  - for changes or extensions made by the customer or by third parties and the resulting consequences
  - to ensure that the software provided is compatible with the data processing environment used by the customer.
- d. If the software has a material defect, the supplier must first be granted the opportunity for subsequent performance within a reasonable period of time. The supplier has the right to choose between the types of supplementary performance.
- e. Unless the supplier chooses another type of supplementary performance, subsequent performance shall be affected by remedying the material defect of the software as follows:
- aa. As a replacement, the Supplier shall provide a new version (update) or a new version (upgrade) of the Software, insofar as it is available from the Supplier or can be procured with reasonable effort. If the Supplier has granted the Purchaser a multiple license, the Purchaser may create a number of copies corresponding to the multiple license from the update or upgrade provided as a replacement.
- bb. Until an update or upgrade has been made available, the Supplier shall provide the Purchaser with an interim solution to circumvent the material defect, insofar as this is possible with reasonable effort and the Purchaser can no longer process tasks that cannot be postponed due to the material defect.
- cc. If a delivered data carrier or documentation is defective, the customer can only demand that the supplier replace it with defect-free ones.
- dd. The remedy of the material defect shall take place at the discretion of the supplier at the customer or the supplier. If the Supplier chooses to dispose of the Purchaser, the Purchaser shall provide hardware and software as well as other operating conditions (including the necessary computing time) with suitable operating personnel. The Purchaser shall provide the Supplier with the documents and information required by the Supplier to remedy the material defect.
- ee. At the request of the Supplier, the Purchaser shall enable remote maintenance access.
- f. If the supplementary performance fails, the customer may – without prejudice to any claims for damages pursuant to Article XII GL – terminate the contract without notice or reduce the remuneration.
- g. In all other respects, Article XII GL shall apply to claims for damages. Further or other claims of the customer against the supplier and his vicarious agents due to a material defect other than those regulated in this section 6 are excluded.

### 7. Industrial property rights and copyrights; Defects of title

Instead of Article IX GL:

1. Unless otherwise agreed, the supplier is obliged to make the delivery only in the country of the place of delivery or in the territory of the European Union or a contracting state of the Agreement on the European Economic Area without infringement of industrial property rights and copyrights of third parties (hereinafter: property rights). If a third party asserts justified claims against the Customer due to the infringement of property rights by deliveries provided by the Supplier and used in accordance with the contract, the Supplier shall be liable to the Purchaser within the limitation period agreed for material defects in the case of software provided for an unlimited period of time, and within the statutory limitation period in the case of software provided for a limited period of time, as follows:
  - a. The supplier shall, at his discretion and at his own expense, either obtain a right of use for the deliveries in question, modify them in such a way that the property right is not infringed, or replace them. If this is not possible for the supplier under reasonable conditions, the customer is entitled to the statutory rights of withdrawal or reduction.
  - b. The Supplier's obligation to pay damages shall otherwise be governed by Article XII GL.
  - c. The above-mentioned obligations of the Supplier shall only exist if the Purchaser notifies the Supplier immediately in writing of the claims asserted by the third party, does not acknowledge a breach and the Supplier reserves the right to take all defensive measures and to negotiate settlements. If the customer discontinues the use of the delivery for damage reduction or other important reasons, he is obliged to inform the third party that the cessation of use does not entail any acknowledgement of an infringement of property rights.
2. Claims of the customer are excluded if he is responsible for the infringement of property rights.
3. Claims of the customer are also excluded if the infringement of property rights is caused by special specifications of the customer, by an application not foreseeable by the supplier or by the fact that the delivery is changed by the customer or used together with products not delivered by the supplier.
4. In the event of infringements of property rights, the provisions of Section 6 No. 1 (h) and Section 6 No. 1 (e) sentence 1 shall otherwise apply mutatis mutandis to the claims of the Customer regulated in Section 7 No. 1 (a).
5. In the event of other defects of title, the provisions of Section 6 shall apply.
6. Further or other claims of the customer against the supplier and his vicarious agents due to a defect of title other than those regulated in this section 7 are excluded.

© 2018 ZVEI - Zentralverband Elektrotechnik- und Elektronikindustrie e. V., Lyoner Straße 9, 60528 Frankfurt am Main All rights reserved.