

# General Terms and Conditions of ITEMIS AG for Maintenance Services

itemis AG

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**IMPORTANT! This English version is merely for the purpose of information. The legally binding text is the German text.**

## **1. Applicability of the contractual conditions**

The maintenance of the software products of ITEMIS AG, Am Brambusch 15-24, D-44536 Lünen, Germany, and to the extent expressly stipulated the maintenance of third-party software shall be exclusively governed, in entrepreneurial transactions, by these General Terms and Conditions ("GTC") in the version retrievable under [legal.itemis.com/en.html](https://legal.itemis.com/en.html) upon issuance of the order, unless otherwise stipulated. Other contractual conditions shall not become provisions of the contract, even if ITEMIS AG does not expressly object to them. Such shall also apply if, upon entering into similar contracts, no reference thereto is made.

## **1. Purpose of the contract and services**

- a. Systems to be maintained In consideration of the stipulated payment, ITEMIS AG shall render the maintenance services stipulated in each order alongside the services contemplated under the hand-over agreement (Überlassungsvertrag) for each respective current version of the standard software ("Maintained Software") in consideration of the fee stipulated therefor. If third-party software is expressly stipulated in a particular order, the restrictions described in these GTC shall apply thereto. ITEMIS AG shall render to the extent stipulated the following maintenance services:
- b. Disruption management
  - i. During its normal business hours (Monday to Friday from 9.00 to 17.00, except on public holidays in North Rhine-Westphalia, GERMANY), ITEMIS AG shall receive proper disruption reports from the Client (Clause 3.1) and shall furnish each with an identification code. At the request of the Client, ITEMIS AG shall confirm the receipt of the Client's disruption report by means of notification with the identification code issued. ITEMIS AG shall within one business day assign the disruption report to the disruption categories in accordance with Clause 2.2.2 and, by means of this assignment, carry out the steps described in Clause 2.2.4 for analyzing and rectifying the disruptions.
  - ii. Insofar as nothing to the contrary is stipulated, ITEMIS AG shall assign the received disruption notifications, after initial assessment, to one of the following categories:

Category Description a) Severe disruption The disruption is based upon an error of the Maintained Software, which error renders use of the Maintained Software impossible or allows such use only with severe restrictions. The Client cannot reasonably deal with this problem and therefore cannot complete tasks which cannot be postponed. b) Other disruption The disruption is based upon an error in the Maintained Software, which error significantly restricts the use of the Maintained Software though without a severe disruption being present. c) Other report Reports of disruption not falling into categories a) and b) are assigned to the other reports. Other reports are to be treated by ITEMIS AG only in accordance with agreements entered into under Clause 2.5.

- i. For notifications of severe disruptions and for other disruptions, ITEMIS AG shall, upon the basis of the circumstances reported by the Client, undertake measures to initially localize the cause of the disruption. ITEMIS AG shall have the right to conduct these measures by means of remote diagnosis, using remote access to the Client's systems. If, after the first analysis, the reported disruption does not appear to be an error in the Maintained Software, ITEMIS AG shall inform the Client of such. In other cases, ITEMIS AG shall arrange for appropriate measures for a further, deeper analysis to correct the reported disruption or in the case of third-party software to send the disruption notification together with the analysis of its results to the distributor or developer of the Maintained Software with a request for assistance. ITEMIS AG shall make available to the Client the measures it has available for dealing with or rectifying a disruption, such as instructions or bug fixes regarding the Maintained Software. The Client shall implement such measures for dealing with or for rectifying the disruptions without undue delay and shall, upon their implementation, once again report to ITEMIS AG without undue delay regarding any remaining disruptions.
  - ii. The disruption management of ITEMIS AG shall not encompass any services in connection with (i) the use of the Maintained Software in execution environments not yet released or (ii) changes to the Maintained Software by the Client or by third parties.
    - a. Hand-over of new versions of the program
  - iii. ITEMIS AG shall hand-over new versions of the Maintained Software to the Client in order to keep such software up-to-date and to prevent disruptions. This pertains to (i) updates of the Maintained Software with technical modifications, improvements, minor functional upgrades and patches with bug fixes regarding the Maintained Software or (ii) other workarounds to deal with possible disruptions. These new versions of the Maintained Software shall be collectively referred to as the "New Program Versions."
  - iv. The maintenance services shall not include (i) the hand-over of upgrades with material functional enhancements (ii) the hand-over of new products, or (iii) the obligation to continue with the development of the
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Maintained Software, unless something else is expressly stipulated under Clause 2.5.

- v. Absent a contrary agreement, ITEMIS AG shall make available to the Client the new versions of the program exclusively by internet download. No hand-over by data carriers shall be owed.
- vi. Following notification and activation of access data for the download section (first-time download), the Client shall, without undue delay, examine the new version of the program and lodge any complaints of discernible defects. § 377 of the German Handelsgesetzbuch (the Commercial Code) shall apply for this purpose. Disruptions and defects in the new version of the program shall be addressed by ITEMIS AG pursuant to Clause 2.2. In this respect, Clauses 3.1 and 7 shall also apply.
- vii. To the extent that ITEMIS AG has made a new version of the program available to the Client, ITEMIS AG shall continue to maintain the previous version only for a reasonable transition period, which, as a rule, shall not extend past six (6) months.
- viii. Unless stipulated otherwise, for new versions of third-party software, priority shall be given to the warranty provisions of the hand-over agreement (Überlassungsvertrag) between the Client and the provider of this third-party software.
  - a. Support hotline
- ix. ITEMIS AG shall set up a support hotline for the Client. This hotline shall exclusively address inquiries of the Client in connection with the technical prerequisites and conditions for use of the Maintained Software as well as individual functionality issues. The support hotline shall receive such inquiries by e-mail, telefax, and telephone during the normal business hours (see above) of ITEMIS AG. The support hotline shall not render any services in connection with (i) the use of the Maintained Software in execution environments not approved for release or (ii) modifications made by the Client or by third parties to the Maintained Software. Approved execution environments are such that are supported by the manufacturer of the respective environment at the time of use of the Maintained Software.
- x. The prerequisite for accepting and processing inquiries shall be that the Client appoints personnel to work with ITEMIS AG who are sufficiently qualified as specialized experts and who are charged in-house at the Client with processing inquiries from the users of the Maintained Software. The Client shall be obligated to direct inquiries to the support hotline solely through these personnel appointed by ITEMIS AG and thereby to use the templates set up by ITEMIS AG.
- xi. The support hotline shall process proper inquiries within the meaning of Clause 2.4.2, and shall answer these to the extent possible. To answer questions, the support hotline shall be able to refer to documentation and to other training material for the Maintained Software in possession of the Client. To the extent that an answer by the support hotline is not possible or is not promptly possible, ITEMIS AG shall be able to forward the inquiry for processing by someone else, especially inquiries regarding any Maintained Software not developed by ITEMIS AG. Any further services by the support hotline, e.g., other response times and on-call duty or on-site services at the Client's premises shall be expressly stipulated in advance, in accordance with Clause 2.5.
  - a. Additional services
- xii. ITEMIS AG shall owe no further maintenance services extending beyond the services described in Clauses 2.2 to 2.4. Such services shall therefore necessitate an express agreement and are to be compensated separately. It shall be possible that such can concern, for example, (i) additionally stipulated on-site services, (ii) consulting for and support with a modified hardware and/or software environment, (iii) clarification of interfaces with other systems, (iv) support for installation and configuration, (v) configuring new products and services, and (vi) modified operational processes of the Client and continued developments regarding the Maintained Software.
- xiii. Other additional services shall include, but not be limited to, all measures taken by ITEMIS AG aimed at correcting disruptions which do not appear to be errors in the Maintained Software. Such shall encompass, inter alia, disruptions due to (i) improper use of the software by the Client, (ii) force majeure, (iii) interventions by third parties, or (iv) other influences for which ITEMIS AG does not bear responsibility.

#### **1. Client's duties of cooperation**

- a. Notifications of disruption by the Client shall precisely describe the disruption (including, but not limited to, the conditions under which the disruption arose, and the symptoms and the effects of the disruption). The Client shall support ITEMIS AG during the analysis and rectification of disruptions by specifically describing the problems arising, by informing ITEMIS AG comprehensively, and shall grant ITEMIS AG the necessary time and opportunity to analyze and to rectify the disruptions. The Client shall instruct ITEMIS AG without undue delay regarding modifications in the operational environment, in order to enable ITEMIS AG to carry out the Maintenance Services.
  - b. The Client shall grant ITEMIS AG, at the latter's request, during its regular business hours any access to its offices and remote access to the hardware and software, which access is necessary to render services, within the scope appropriate for the rendering of the Maintenance Services. It shall provide the technical facilities necessary for this purpose. Insofar as the urgency of each Maintenance Service
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necessitates, this access and this remote access by ITEMIS AG shall also be granted to ITEMIS AG outside the regular business hours of the Client. This duty to cooperate shall not establish a duty on the part of ITEMIS AG to render services on-site at the Client; Clause 2.5 shall apply in this respect.

- c. The Client is to arrange at its own expense for the technical conditions necessary for the remote diagnoses in accordance with Clause 2.2.4, and is to guarantee ITEMIS AG remote access to its EDP facility.
- d. Further, the Client shall have the duty to practice data back-up and to protect against viruses using state-of-the-art technology.

## **2. Term and notice of termination**

- a. Unless agreed otherwise, the term of the maintenance order shall begin at the time of the order issuance in the event the order is issued after delivery of the Maintained Software. In the event the order is issued prior to delivery of the Maintained Software, the term of the maintenance order shall begin with the delivery of the Maintained Software. Notice of access data for the download section shall correspond with delivery of the Maintained Software. If a license key is required for use of the Maintained Software, the delivery of the license key shall be decisive for the start of the term of the maintenance order after the previous delivery of the Maintained Software or its provision on the download section.
- b. The maintenance order ends automatically if it is not extended in writing with a period of 3 (three) days to the end of the contract term.
- c. The right of both parties to extraordinary termination for cause shall not be affected.
- d. Any notice of termination shall require the written-form. Clause 12.3 shall apply.

## **3. Payment**

- a. The Client shall pay for the Maintenance Services of ITEMIS AG by means of an ongoing lump sum, in accordance with the agreement made in the maintenance order. The payment for maintenance shall be itemized by and applied to each Maintained Software acquired. Upon issuance of the order, payment shall be invoiced together with the licensing fee simultaneously with acquisition of the Maintained Software for the first contract year, and consequently shall be payable by no later than the third (3rd) business day of each contract year, in advance for said contract year.
- b. Additional services pursuant to Clause 2.5, not compensated by the lump-sum maintenance payment, shall be invoiced by expenditure at the ITEMIS AG prices generally applicable at the time of the issuance of the order, unless agreed otherwise. Payments shall generally be net prices plus statutory value-added tax. ITEMIS AG shall be able to invoice such on a monthly basis. If payment for services is based on time and material, ITEMIS AG shall document the nature and duration of the work and shall forward this documentation with the invoice.

## **4. Rights of the Client to the software**

The Client's usage rights in new versions of the program and in other bug fixes regarding the Maintained Software shall correspond to the usage rights in the prior version of the Maintained Software. The rights in the new versions of the program and in other bug fixes shall, after a reasonable transition period-which, as a rule, shall not exceed one (1) month after notification and release of the access data for the download section (first-time download)-substitute for the rights in the previous versions. The Client shall be allowed to archive a reproduction.

### **1. Material and title defects**

- a. ITEMIS AG shall guarantee the quality of the Maintenance Services due under the contract. The new program versions made available by ITEMIS AG shall have the stipulated quality, shall be suitable for the contractually required or otherwise usual use, and shall be of the quality usual for software of this type; they are, however, not error-free. If and to the extent that, in the individual case, no individual agreement concerning the quality was entered into, the quality delineated in each specification shall be deemed stipulated. An impairment of the functioning of the software resulting from hardware defects, from environmental circumstances, operating error, or the like, shall not constitute a defect. A negligible inconsiderable deviation in quality shall not be taken into consideration.
  - b. In the event of material defects, ITEMIS AG shall initially be able to render subsequent performance. Subsequent performance shall take place at the discretion of ITEMIS AG (i) by means of eliminating the defect, (ii) by delivering a program which does not evince the defect, or (iii) by demonstrating possibilities for avoiding the effects of the defect. The Client is to take on a new version of the program, equally valued, or the previous version of the program free from defects; such shall not apply if it is unreasonable for the Client.
  - c. ITEMIS AG, at its discretion, shall be able to remedy defects on site or at its offices. ITEMIS AG shall also be able to remedy defects by means of remote access to the systems of the Client.
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- d. Pursuant to Clause 2.5.2, ITEMIS AG shall be able to demand reimbursement for its expenses occasioned by the Client's complaints of defect, to the extent that the Client is not in the position to demonstrate proof of any defect and has ascertained the defects with the least amount of negligence.
  - e. ITEMIS AG shall guarantee that the use of the software by the Client pursuant to the contract shall not be opposed to any third-party rights. In the event of defects in title, ITEMIS AG shall guarantee that, at its discretion, it shall provide the Client a legally unobjectionable opportunity of usage in the software or in software of equivalent value.
  - f. The Client shall promptly instruct ITEMIS AG in writing in the event that third parties are enforcing intellectual property rights (e.g., copyrights or patent rights) against it. The Client shall authorize ITEMIS AG to pursue the third-party dispute alone. If ITEMIS AG makes use of this authorization, the Client shall not be able to acknowledge the third-party claims itself without the consent of ITEMIS AG. ITEMIS AG shall, at its own expense, defend against the claims of third parties.
  - g. Warranty claims due to defects shall expire in one (1) year, with the exception of malice or of claims for compensatory damages in cases contemplated under Clause 8.1.1. The limitation period shall commence upon the software being downloaded from the internet after notification and activation of the access data for the download section.

## **2. Liability**

- a. ITEMIS AG shall tender compensatory damage payments or reimbursement of unavailing expenditures, regardless of legal grounds (e.g., for debt or similar obligations based in commercial law, for breach of duty, and for tortious acts), only to the following extent:
  - i. ITEMIS AG shall have unlimited liability for malice or gross negligence, for injury to life, body, or health, in accordance with the provisions of the German Produkthaftungsgesetz (the Products Liability Act) and to the extent of any guarantee assumed by ITEMIS AG.
  - ii. For slight negligence, ITEMIS AG shall be liable only to the extent that it has breached a material contractual duty, (i) the fulfillment of which is absolutely necessary for performance under the contract, or (ii) the breach of which jeopardizes the attainment of the contractual purpose and upon compliance with which the Client may regularly rely. The liability of ITEMIS AG in these cases shall be limited to the damages which are foreseeable and typical for the type of business in question.
  - iii. The liability of ITEMIS AG shall be limited in cases under Clause 8.1.2 to a maximum of EUR 200,000.00 per damage event, totaling EUR 400,000.00 for all of the client's damage events.
  - iv. ITEMIS AG shall have no further liability.
- b. The above limitation of liability shall also apply to the personal liability of employees, representatives, organs, and vicarious agents of ITEMIS AG.
- c. Objections based on contributory negligence shall remain available to ITEMIS AG.

## **3. Non-disclosure**

- a. "Confidential Information" shall mean all information and documents of each party labeled as confidential or, based upon surrounding circumstances, are to be regarded as confidential, including, but not limited to, information concerning operational processes, business relationships, and know-how.
  - b. The parties are to the Confidential Information in confidence. This obligation shall continue to exist for a term of three (3) years after the end of the order.
  - c. Excepted from this obligation shall be such Confidential Information,
    - i. which, upon entering into this contract, was already demonstrably known or thereafter became known to a third party, without a non-disclosure agreement having been breached thereby or provisions of law or official regulations having been violated thereby,
    - ii. which, upon entering the contract, is publicly known or thereupon is made publicly known, insofar as such is not due to a breach of this contract;
    - iii. which must be disclosed due to obligations under law or by order of a court or of an official agency. To the extent permissible and possible, the recipient obligated to disclosure shall notify the other party in advance and shall provide it the opportunity to make legal objections to the disclosure.
  - d. The parties shall grant access to Confidential Information only to such consultants who are subject to professional confidentiality or to whom obligations corresponding to the non-disclosure obligations of this contract have been previously imposed. Furthermore, the parties shall disclose Confidential Information only to those employees who have to know such for the performance of this contract, and shall also obligate these employees, to the extent permissible under labor law, to non-disclosure for the time period subsequent to their departure.
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#### **4. Data protection/data security**

The contracting parties shall observe the relevant data protection regulations. If and to the extent that the customer intends to provide personal data within the scope of the provision of ITEMIS AG's services - for example by remote access - for the processing of which ITEMIS AG has no legal basis according to Article 6 (1) DSGVO or Article 9 (2) DSGVO, the customer shall inform ITEMIS AG in advance without being asked. Prior to the provision of such personal data by the Customer, the contracting parties shall conclude a separate order processing agreement pursuant to Article 28 DSGVO with the Customer as the responsible party and ITEMIS AG as the order processor.

##### **1. Arbitration proceedings**

The contracting partners agree to submit all differences of opinion arising from or in connection with this contract, or from amendments to or restatements of this contract, which differences they cannot resolve between themselves, to the dispute resolution center of the Deutsche Gesellschaft für Recht und Informatik (the German Association of Law and Informatics, [www.dgri.de](http://www.dgri.de)), in order to settle the dispute provisionally or conclusively, in whole or in part, in accordance with the rules of arbitration as amended at the time of the initiation of the arbitration proceedings. The limitation period for all claims arising from the disputed matter shall be tolled from the time of the application for arbitration until the end of the arbitration proceedings; § 203 of the German Bürgerliches Gesetzbuch (the Civil Code) shall apply mutatis mutandis.

##### **1. Final provisions**

- a. The Client shall be able to transfer to third parties any claims against ITEMIS AG based upon this contract only following written consent of ITEMIS AG.
  - b. The Client shall be able to offset or to withhold payment due to defects only insofar as it is actually entitled to claims for payment due to material or title defects in service. For other defect claims, the Client shall be able to withhold payments only in a proportional partial amount, taking the defect into consideration. The Client shall have no withholding right if its defect claim is time-barred. Apart therefrom, the Client shall be able to offset or to withhold payment only for undisputed or legally ascertained claims.
  - c. Amendments to and restatements of these GTC shall require the written-form. Such shall also apply to the amendment to or deletion of this clause. The written-form shall be satisfied only by transmitting the signed original.
  - d. German law is to be applied to this contract, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980 (UN sales law).
  - e. The place of performance shall be the seat of ITEMIS AG. The sole venue shall also be the seat of ITEMIS AG, to the extent that the Client is a merchant or a legal person under public law.
  - f. Should individual provisions of these GTC be ineffective, such shall not impair the effectiveness of the remaining provisions. In lieu of the ineffective provisions, the contracting parties shall implement one which legally and financially is best attuned to the objective of the contract. ITEMIS AG | GTC Maintenance Services (As of: 15 October 2014, version 1.0c)
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