

## Software Clause for the Transfer of Standard Software as part of Deliveries

### **Supplement and Amendment to the "General Terms and Conditions for the Supply of Nihon Kohden Products and Services".**

#### **Article I: Scope of application of the Software clause**

**1.** This Software clause shall apply exclusively to the provision of standard Software, whether for a limited or unlimited period, which is provided for use as part of or in connection with a delivery of the associated hardware ("Software"), as well as to the entire Supplier, insofar as a breach of duty or defect in performance has its cause in the Software. Hardware shall be solely subject to the GTC. Insofar as this Software clause does not contain any provisions, the GTC shall apply.

**2.** Firmware is not "Software" within the meaning of this Software clause. The Supplier shall not be obliged to provide any services under this Software clause; these shall be subject to a separate agreement between the parties. The Software shall be provided exclusively in machine-readable form (object code).

#### **Article II: Documentation**

Supplementary to Article I No. 2 GTC the following applies: The provision of documentation requires a separate written agreement. If documentation is provided, the term "Software" hereinafter also includes the documentation.

#### **Article III: Rights of Use**

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

**1.** The Supplier grants the Purchaser the non-exclusive right to use the Software in accordance with this contract. Unless otherwise agreed, the right of use shall refer to the country of the place of delivery of the

hardware and in the territory of the UK, European Union or another contracting state of the Agreement in the European Economic Area. The right of use is limited to the agreed period of time.

**2.** If the right of use is granted for a limited period of time, the following provisions shall apply: The Purchaser may use the Software only with the hardware named in the contractual documents, in the absence of such naming with the hardware delivered together with the Software. The use of the Software with another hardware requires the express written consent of the Supplier. This shall not apply insofar and as long as the Purchaser temporarily uses the Software with a replacement device to the agreed extent due to a defect of the agreed device.

**3.** The right of use and exploitation is limited to the contractually agreed purposes of use. The right of use may be granted as a single or multiple license. The single license covers the use of the Software on one device. The multiple license must be expressly granted in writing and extends to the number of permitted devices where the Software may be used simultaneously, the number of reproductions/copies allowed and the license to use the Software in networks.

**4.** The right to reproduce/copy the Software is limited to the installation necessary for loading, displaying, running, transferring and saving the Software and to the right to make a backup copy. In the case of a multiple license, the right to reproduce/copy shall extend to the instructions provided by the Supplier. The Purchaser shall keep records of the whereabouts of all reproductions/copies and submit them to the Supplier upon request.

**5.** The right to edit the subject matter of the license is limited to maintaining or restoring the agreed functionality of the subject matter of the license.

**6.** The Purchaser shall not be entitled to modify, decompile, translate or isolate parts of the software if these rights are not expressly granted by the Supplier

**7.** Upon request and to the extent that there is a legitimate interest in doing so, the Purchaser shall permit the Supplier or a third party commissioned by it to examine whether the use of the Software is within the scope of the rights granted herein; the Purchaser shall support the Supplier in carrying out such examination to the best of its ability.

**8.** The Supplier grants the Purchaser the right to transfer the right of use granted to the Purchaser to third parties for permanently provided Software. The Purchaser, to whom the Software is not transferred for the purpose of commercial resale, may only transfer the right to use the Software to third parties together with the device which it has acquired from the Supplier together with the Software. In the event of a transfer of the right of use to third parties, the Purchaser shall ensure that the third party is not granted any further rights of use to the Software than those imposed on the Purchaser under this contract. In this context, the Purchaser may not retain any copies of the Software. The Purchaser is not entitled to grant sub-licenses. If the Purchaser transfers the Software to a third party, the Purchaser shall be responsible for compliance with any export requirements and shall indemnify the Supplier against any obligations.

**9.** If the Supplier only owns the derived rights of use to the Software (third party software), the terms of use agreed between the Supplier and the provider of the third-party software shall apply in addition to and in priority to the provisions of this Article 3. The Supplier shall notify the Purchaser of such conditions and make them available upon request.

**10.** For open-source software, the original terms of use of the open-source software shall take precedence over the provisions of this Article 3. The Supplier shall notify the

Purchaser of such conditions and make them available upon request.

#### [Article IV: Transfer of Risk](#)

In addition to Article V of these GTC, the following shall apply:

If Software is provided 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. during download).

#### [Article V: Obligations of the Purchaser, Liability](#)

In addition to Article VI of these GTC, the following shall apply:

The Purchaser shall take all necessary and reasonable measures to prevent or limit potential damages caused by the Software. The Purchaser shall ensure a regular backup of programs and data. If the Purchaser breaches this obligation, the Supplier shall not be liable for any resulting consequences and for the replacement of lost or damaged data or programs.

#### [Article VI: Defects as to Quality \("Defects"\)](#)

**1.** For Software provided on a permanent basis, the following provisions shall apply instead of Article VIII GTC:

**(a)** The limitation period for warranty claims due to material defects shall be 12 months from the statutory commencement of the limitation period delivery. This does not apply to claims for damages due to gross negligence or willful misconduct.

**(b)** Only deviations from the Software specification that are proven and reproducible by the Purchaser shall be deemed to be Defects of quality of the Software. 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. This shall not apply if the last contract in the supply chain is a sale of consumer goods.

**(c)** Notification of potential Defects by the Purchaser must be made in writing without undue delay. Potential Defects and the relevant data processing environment shall be described as precisely as possible therein.

**(d)** Claims based on Defects are excluded in the case of any of the following:

- insignificant deviations from the agreed specification;
- only minor impairment of usability;
- Defects arising from faulty or negligent handling by the Purchaser;
- Defects arising from particular external influences not foreseeable under the contract;
- modifications or amendments of the Software made by the Purchaser or third parties, and any consequences resulting therefrom; or
- incompatibility of the Software with the data processing environment of the Purchaser.

**(e)** In the case of defective Software, the Supplier shall first be given the opportunity to remedy the defect within a reasonable period of time. The Supplier shall have the right to choose between the types of supplementary performance. The supplementary performance shall generally take place as follows:

- The Supplier will provide a replacement by way of an update or an upgrade of the Software if 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 upgrade.
- Until an update or upgrade is provided, the Supplier shall offer the Purchaser a workaround that bypasses the Defect, provided that this does not lead to disproportionate effort of the Supplier.
- If a data medium or documentation supplied proves to be defective, the Purchaser's right shall be limited to

demanding that the Supplier replaces it with a non-defective version.

- The Supplier shall have the right to choose whether it fixes the Defect at the location of the Purchaser or at another location.
- If the Supplier chooses to fix 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.
- The Purchaser shall provide the Supplier with access to remote maintenance upon request.

**(f)** If the Defect cannot be fixed, the Purchaser shall be entitled to rescind/terminate the contract or reduce the remuneration, irrespective of any claims for damages it may have according to Article XII of the GTC.

**(g)** Claims for damages shall furthermore be subject to Article XII of the GTC. Any other claims of the Purchaser against the Supplier or its agents or any such claims exceeding the claims provided for in this Article, if based on a Defect, shall be excluded.

2. For Software not provided on a permanent basis Article VI, No. 1 (a) does not apply.

## Article VII: Defects of Title / Intellectual Property Rights

Article IX of the GTC shall be specified by the following:

1. Unless otherwise agreed, the Supplier shall provide the Supplies free from third parties' intellectual property rights in the country of the place of delivery. If a third party asserts a justified claim against the Purchaser based on an infringement of an intellectual property right ("IPR") by the Supplies made by the

Supplier and used in conformity with the contract, the Supplier shall be liable to the Purchaser - in case of Software provided for a permanent basis within the contractual limitation period stipulated for Defects; in 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 in such a way that they no longer infringe the IPR or replace them. If this is not possible for the Supplier under reasonable conditions, the Purchaser shall be entitled to withdraw the contract or reduce the purchase price pursuant to the applicable statutory provisions.

**(b)** The Supplier's liability to pay damages is governed by Article XII of the GTC.

**(c)** These obligations 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.

**2.** Claims of the Purchaser shall be excluded if the Purchaser is responsible for the infringement of the respective IPR.

**3.** Claims of the Purchaser shall be 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.** Any other claims of the Purchaser against the Supplier or any such claims exceeding the claims provided for in this Article VII, based on a legal defect are excluded.