

Software Maintenance Contract

§ 1

General information, Subject of contract

1. The software purchased by the Customer according to the commercial Hardware/Software Purchase Contract shall be maintained by ISD.
2. The maintenance services shall only refer to the most recent version (release) provided to the Customer and to versions (releases) not older than the previous version (release) approved by ISD, unless the acquisition of a new release is to be deemed unacceptable for the Customer. In such cases, the ISD shall merely provide customer support for the handling of emergencies by giving advice and providing help. Software that was modified by the Customer or by Third Parties shall only be subject to maintenance if ISD has agreed to and accepted the said modifications in writing, with reference to modifications to be made to this maintenance contract.
3. The maintenance services shall include the following tasks:
 - a) Fault clearance, error processing and correction (§ 2, 1.) after expiration of the warranty period according to the Hardware and/or Software Purchase Contract,
 - b) Updates and enhancements of purchased software modules (§ 2, 2.),
 - c) Technical Support/Hotline (§ 2, 3.).
4. ISD shall perform its maintenance tasks exclusively according to the terms and conditions of this contract; ISD will not accept any terms and conditions contrary to this contract or deviating from ISD's contract terms, unless ISD has explicitly agreed to the application of such conditions in writing. The contract terms of ISD shall even apply if ISD unconditionally performs its tasks aware of terms and conditions stipulated by the Customer that are contrary to this contract or deviate from the contract terms of ISD.
5. All agreements made between ISD and the Customer to enact this contract are specified writing in this contract.
6. The contract terms of ISD shall exclusively apply to trades with entrepreneurs according to § 310 (1) BGB (German Civil Code).
7. The contract terms of ISD shall also apply to all future maintenance contracts with the Customer.

§ 2

Maintenance services covered by the maintenance flat charge

ISD shall perform the following maintenance services for the software purchased by the customer, which shall be covered by the general maintenance flat charge:

1. Fault clearance, error processing and correction:

Dealing with reproducible defects of the software or errors in the supplied documentation (user guide) within an appropriate period after receipt of the relevant notices of defect by the customer, with the objective of either informing the customer how to eliminate the defect and when this will happen, (in particular by an Update according to § 2, 2.), or telling the Customer how to circumvent the defect or achieve a temporary makeshift solution.

A software shall be regarded as deficient in terms of this contract, if in case of a use according to contract, functions of the software fail to operate as described in the documentation (user guide), to an extent deemed unacceptable for the Customer, most notably if incorrect results or uncontrollable disruptions of the program flow occur or if the use of the software is impaired or prevented to a more than minor extent.

2. Updates and/or enhancements of purchased software modules:

Provision of changes and enhancements of the purchased software modules and the relevant documentation (user guide) with at least equally efficient functionality via a common data carrier or via EDI (Electronic Data Interchange).

3. Technical Support/Hotline:

Telephone information and customer support are provided during our normal business hours (Monday to Thursday: from 8.00 am to 5.00 pm, Friday: from 8.00 am to 3.00 pm, except for statutory holidays in North-Rhine Westphalia/Germany) at 0049-231-9793-166. The customer shall specify the occurred software problem as precisely as possible in order that he can eliminate or at least circumvent minor defects with the help of the information provided by ISD. In order to promote a targeted and effective error elimination, the customer shall provide one or several main contact persons (administrators) which are able to render a detailed problem description, forward the hotline information internally and, if required, use it accordingly. The customer shall be obliged to comply with the instructions given by ISD when providing descriptions, specifications, statements or notifications in connection with any technical queries about the purchased software, its operation and possible defects.

Notices of defects or requests for consulting formulated in writing will be answered in the afternoon of the working day following the receipt of the respective message, if possible over the phone to speed up the process. In case of notices in writing the customer shall specify name and phone extension of the responsible employee.

4. If maintenance services will result in changes of the data structure, ISD will provide the customer with appropriate conversion programs for the existing data, including the related user guide.

§ 3

Maintenance services not covered by the maintenance flat charge

Against payment of a special fee to be agreed on, the customer may use the following service which goes beyond the scope of maintenance services laid down in § 2 and is not covered by the usual maintenance flat charge:

1. On-site maintenance

Maintenance services which are, on special request of the customer, performed by ISD on the customer's premises.

2. Installation

Customer support concerning the installation of the software purchased from ISD and updates.

3. Advanced consulting

Dealing with questions of the customer not covered by § 2, e.g. questions regarding alleged malfunctions, and/or defects which are not inherent in the purchased software but were caused by the customer due to operating errors, other external influences, notably defects caused by external forces, malicious intent or gross negligence of the customer, as well as defects/damage caused by missing or inappropriate power supply, undervoltage or overvoltage, environmental conditions or influences in the place of installation, faulty hardware or software products by Third Parties, or any other influences outside ISD's sphere of responsibility.

4. Consulting outside business hours according to § 2, 3.

The maintenance services not covered by the usual maintenance flat charge will be paid by the customer separately, according to the price list for services valid on the date of service provision, usually depending on the time expenditure.

§ 4

Separate services not covered by the maintenance contract

Not included in the scope of services provided by this maintenance contract are shall be in particular:

1. Individual adaptations to new requirements of the customer.
2. The provision of new modules sold by ISD after provision of the purchased software.
3. Additional functionalities in extended versions of the purchased software with different identification.

4. The elimination of defects caused by operation errors, faulty hardware products or software products by Third Parties and/or an insufficient level of knowledge of the customer's employees. An employee's level of knowledge shall be deemed insufficient if it does not correspond to the level of knowledge conveyed by the relevant product training. Not included is as well the elimination of defects or damage caused by missing or inappropriate power supply, undervoltage or overvoltage, environmental conditions or influences in the place of installation, faulty hardware or software products by Third Parties, or any other influences outside ISD's sphere of responsibility.
5. The maintenance and servicing for hardware or software which has not been purchased from and/or approved by ISD.
6. Maintenance services after manipulations of the program code of the purchased software by the customer.
7. The maintenance and servicing for software with malfunctions/defects caused by viruses, worms, Trojans or other agents introduced into the data processing system by the customer himself, his organs, legal representatives, subcontractors, or his employees or in any other way outside ISD's sphere of responsibility (e.g. via EDI, Internet, Intranet, Intercom, LAN/WAN etc.)
8. Training for / introduction to the operation and application of the purchased software or other software of the customer.
9. The exchanging of operating systems, other applications and configurations which are not part of the purchased software.
10. The maintenance of customer-specific solutions such as macros, variants, special interfaces or automations not included in the standard modules of ISD, even if the said solutions have been created with ISD's standard software tools.

The aforementioned services shall be ordered and paid separately.

§ 5

Maintenance fee

1. The maintenance fee for the services to be provided by ISD is normally 22% p.a. of the respective list price valid on the date of purchase. The maintenance fee specified in order confirmations and information on software maintenance, respectively, shall be binding. VAT will be charged separately. The maintenance fee shall be charged in advance on a yearly basis and shall be due for payment 14 days after issue of invoice. All modules purchased by the customer shall be included in the calculation of the maintenance fee. If the customer purchases further software modules at a later date, the maintenance fee will increase accordingly after delivery of the additional modules.
2. The ISD shall have the right to adjust maintenance fees for all purchased modules by unilateral price increase as per 1st January of each year, but at the earliest after expiry of the minimum contract duration agreed upon at the date of contract conclusion, at its reasonable discretion and taking in particular the general price increases into account, while not exceeding the usual fees for new customers. An immediate termination of the contract by the customer due to price increases shall be excluded.
3. The customer shall not be entitled to effect any set-offs against counterclaims, unless such counterclaims have not been disputed by ISD, or have been confirmed by a court.
4. The customer can only and exclusively reduce payments, effect any set-offs against payments, or exercise any rights to withhold or refuse payments, if the customer's counterclaim is legally valid and undisputed, regardless of its legal nature.

§ 6

Contract duration and Termination

1. The maintenance service relationship shall begin upon delivery of the purchased software. The exact date shall be specified in the respective enclosures.

2. The Software Maintenance Contract shall normally have a duration of 24 months from the date of the first issuing of invoice for the maintenance fee. The contract duration specified in the order confirmation and information on software maintenance, respectively, shall be binding. The Software Maintenance Contract will be extended by further 12 months automatically, unless one of the contracting parties terminates the contract with a notice period of three months to the respective end of duration. The termination shall be effected by registered letter and reach the recipient not later than on the third working day of the first month of the term of notice. Possible liability claims of the customer shall be subject to a limitation period of one year from the date of service provision, however not longer than one year from the date of termination of the maintenance contract.
3. If ISD breaches a duty imposed by this contract, a contract termination by the customer shall only be possible after failure of ISD to take remedial action within a defined appropriate term.
4. If the customer is more than 6 months in arrears with the payment of the maintenance fee, the ISD is entitled to terminate the software maintenance contract without notice.
5. The Software Maintenance Contract shall be automatically extended by 24 months upon additional purchase of one or several software modules, which are, according to § 5, (1.), Sentences 5 and 6, included into the Software Maintenance Contract. This extension will also take effect if the scope of the software modules to be maintained changes for other reasons.
6. The maintenance relationship expires at the end of the last day for which the notice of termination was effectively given, which was confirmed in writing by the ISD. Expiry of the maintenance relationship ends the customer's entitlement to maintenance services arising from the contract.
7. Any termination by the ISD may also be effected as a partial termination, i.e. of individual software modules. If an additionally purchased module is affected and the corresponding partial termination is effected by the ISD for reasons beyond the customer's control, the ISD shall endeavor to arrange, on the customer's request, for a continuation of the software maintenance regarding the terminated additionally purchased module by the original manufacturer of the software.

§ 7

ISD's right to refuse performance

1. If the customer is in default with his payments of the maintenance fee, ISD shall have the right to suspend its maintenance services until full settlement of the outstanding payments, without any further default prerequisites being required. Furthermore, the ISD shall have the right to claim a late payment fine in the amount of 1% of the annual maintenance fee per month.
2. Warranty claims can only be raised by the customer if he has, taking the respective defect into account, paid at least an appropriate amount of the maintenance fee.

§ 8

Obligation of the customer to cooperate

The calculation time required by ISD for the performance of maintenance services shall be provided by the customer free of charge. The customer shall be obliged to make an additional, timely and complete data backup before each maintenance service carried out by ISD. If required, other tasks performed with the data processing equipment shall be suspended during performance of the maintenance service tasks.

§ 9

Liability

1. In cases of slight negligence of the customer, the liability of ISD, its organs, legal representatives or subcontractors shall be limited to the direct, average damage foreseeable for the type of service and deemed typical for the type of contract. ISD shall not be liable for slightly negligent breaches of nonessential contractual obligations.

The aforementioned limitations of liability shall not apply to cases of culpable injuries to health, body or life of the customer, his organs, and employees caused by ISD.

2. ISD shall be liable for loss of data only if the customer has ensured by the creation of backup copies, data backups, images or other appropriate means that the data can be reconstructed with a reasonable expenditure. The liability shall be limited to the expenditure required for reconstruction provided that a regular, appropriate and timely data backup has been made. The minimum standard shall be a data backup on a daily basis. In addition, the customer shall be obliged to make an additional, timely and complete data backup before each maintenance service provision. The said data backup shall be made at the customer's risk. ISD shall neither be liable for any indirect damage or consequential damages, e.g. loss of profit, loss of good will and/or non-occurrence of savings, nor liable to replace any frustrated expenses of the customer.

The liability of ISD for loss of data as a result of malicious intent or gross negligence of ISD, as well as a possible liability according to the product liability act shall remain unaffected by the above liability limitations.

§ 10

Warranty

1. The warranty shall be limited to a period of one year from the date of performance of the respective maintenance services.

2. If the performed fault clearances/error processings and corrections (§ 2, 2.) or the updates / enhancements of the purchased software modules provided to the customer are deficient / insufficient, impairing the agreed requirements to a more than minor extent, ISD will eliminate the defects after receipt of notice by the customer (supplementary performance). In his notice the customer shall set a reasonable time limit to ISD. ISD shall have the right to determine the type of supplementary performance, to an extent deemed acceptable for the customer. In case of grave defects, ISD may provide the customer with corrective actions or makeshift solutions until final error elimination, insofar as this can be deemed acceptable for the customer. ISD shall have the right to make two attempts at elimination for each newly occurred defect.

3. If ISD fails to eliminate a defect within an appropriate period, and another attempt of ISD to eliminate the defect within a period of grace fixed by the customer equally fails, the customer shall be entitled to demand a price reduction.

4. Minor defects shall not entitle the customer to demand a price reduction. In case of a more than minor defect the reduction shall be effected according to the proportion of the fee for an error-free service provision as laid down in § 2, 1. + 2. to the agreed maintenance fee at the date of contract conclusion.

5. Even after two failed attempts at error elimination, the customer shall have no right to cancel the contract if the breach of duty committed by ISD was of an only insignificant nature, or if the customer himself was solely or mainly responsible for the creation of the circumstances that would entitle him to cancel the contract, or if the circumstances occurred at a time during which the customer was in default of acceptance.

6. If the ISD has already completed a part of the order, the customer shall only be entitled to a cancellation if he can prove that he is no longer interested in the part of the order.

7. Prior to making claims on ISD because of a breach of duty or correcting a defect himself, the customer shall notify ISD in writing, setting an appropriate period of grace.

8. Any warranty claims of the customer shall become void if the customer or any third party has made modifications to the purchased software for which ISD has not given its previous explicit and written permission, unless the customer can prove that there is no causal relationship between such changes and the occurred defect and that the changes do not cause any additional maintenance efforts. This does however not entitle the customer to make any changes to the purchased software.

9. ISD's performance and warranty obligations shall not apply if the customer does not use the purchased software in accordance with the conditions expressly stipulated and approved in writing by the ISD.

§ 11

Subcontractors

1. ISD shall have the right to wholly or partly transfer the execution of its maintenance performances to subcontractors. ISD shall be obliged to notify the customer if such transfer will be necessary. ISD shall be obliged to provide the customer with name and address of the respective subcontractor and inform him about the credit-worthiness and ability of the subcontractor to perform the required tasks. The customer can only refuse the involvement of the subcontractor if he deems such involvement unacceptable.

§ 12

Written form

- a) The present contract terms shall apply exclusively and for the entire duration of the business relation between the parties. If the customer uses general terms and conditions of business, the contract shall take effect even without an explicit agreement on the incorporation of such terms and conditions of business. If the terms and conditions of the customer have been effectively incorporated, and the contract terms are consistent with the terms and conditions of the customer, they shall be deemed agreed. Any conflicting individual provisions shall be replaced by provisions of non-mandatory law. The same applies in the event that the terms and conditions of the customer contain provisions which are not contained in these contract terms. If the contract terms contain provisions which are not contained in the terms and conditions of the customer, the contract terms shall apply.
- b) The customer is aware of and accepts the validity of the present contract terms by ISD for the entire duration of the business relation. The customer was given an appropriate opportunity to take note of and acknowledge the contents of the present contract terms.

§ 13

Place of fulfilment, Place of venue

Place of fulfilment of all mutual obligations resulting from this contract shall be Dortmund (Germany).

As the customer is a contractor, an independent trader, a freelancer or merchant according to the commercial code, a legal entity under public law or a public-law special fund, Dortmund (Germany) shall be considered as agreed upon as place of venue for the settlement of lawsuits in connection with the fulfilment of this contractual relationship.

§ 14

Applicable law

All legal relations between the contracting parties resulting from this contract shall be governed by the Law of the Federal Republic of Germany, to the exclusion of the Private International Law and the Convention of the International Sale of Goods (CISG) and any references thereto in national law.