

## Terms and Conditions for Global Managed Services of Scheer GmbH, 06/2015 version

### 01 Subject matter of contract

These Terms and Conditions for Global Managed Services shall apply in addition to any contracts between the business unit Global Managed Services of Scheer GmbH (SCHEER) and the Client. Any general terms and conditions of business, which the Client may use, shall be deemed inapplicable to the relationship between SCHEER and the Client, even if SCHEER did not expressly object to them. By accepting SCHEER's services, the Client is deemed to acknowledge these Terms and Conditions for Global Managed Services, and to waive application of any other general terms and conditions which conflict with them. General terms and conditions used by the Client shall be deemed binding upon the contracting parties only if SCHEER has accepted them in writing. In such cases, these Terms and Conditions for Global Managed Services shall also apply as a supplement.

### 02 Performance of services by SCHEER

#### 02.1

SCHEER shall perform the contractual services in accordance with the principles of proper professional practice and taking account of the relevant, acknowledged state of the art and technology applicable at the time this contract is made.

#### 02.2

For purposes of rendering its services, SCHEER shall select appropriately qualified staff (employees of Scheer Group companies) or third parties, and shall ensure that appropriate numbers of staff members/third parties are available to ensure the timely performance of the services. If SCHEER should deem it necessary to change the staffing on the project, then SCHEER shall take care to select staff with comparable qualifications.

#### 02.3

SCHEER can assume a guaranty (i.e. strict liability irrespective of culpability) for particular features and qualities of the services under the contract only if SCHEER has expressly guaranteed those features or qualities in a separate declaration of guaranty provided in writing to the Client. The declaration of guaranty shall be subject to the rules on liability set out in section 14 hereof.

### 03 Subcontractors

SCHEER is entitled to have a third party perform some of the services covered by this contract. In the event a third party is engaged to do so, SCHEER as the contractual counterparty hereby warrants proper performance of its contractual obligations to the Client, and the Client shall accept the services rendered by the third party as services of SCHEER.

### 04 Client's duties of cooperation

This section 04 contains the Client's general duties of cooperation. Further duties of cooperation may be listed in other contractual documents, including but not limited to, the service description, service level agreement and/or RACI matrix. All duties of cooperation owed by the Client will be deemed conditions precedent to proper performance of the services by SCHEER. If the Client fails to perform such duties and is responsible for such failures, then any detriment arising therefrom, such as additional expenses incurred by SCHEER or by the Client as well as any delays to the services, shall be borne by the Client.

#### 04.1

The Client shall appoint a competent contact person for SCHEER for the entire term of the consulting project. In the event that the contact person's employment or service relationship with the Client should end during the term of the consulting project, the Client shall be entitled and obliged to appoint another contact person. The same shall apply in the event that the contact person is incapacitated for a longer time due to illness or is for other material reasons unavailable to work for a longer period of time.

#### 04.2

The Client shall, in a timely, complete manner and free of charge, furnish to SCHEER all such resources, data, information and documents deemed necessary by SCHEER in order to perform the services covered by this contract. SCHEER is entitled to presume that all such resources, data, information and documents are complete, correct and up-to-date, except where such are obviously incomplete, incorrect or no longer up-to-date.

#### 04.3

The Client shall be responsible for coordinating its own staff and third parties, whom it has engaged, whose goods and services directly or indirectly relate to the contractual services. It shall also ensure that in providing their goods and services, such staff and third parties shall cooperate with SCHEER in such a way that the work of SCHEER is not impeded.

#### 04.4

The Client hereby assumes a duty to inspect and file formal complaints (if applicable) pursuant to § 377 of the German Commercial Code [*Handelsgesetzbuch* or "HGB"] in respect of all goods and services provided by SCHEER.

### 05 Remuneration, payments

#### 05.1

Unless otherwise agreed, the following applies:

- Remuneration shall be calculated on a 'time and material' basis, at the current, generally applicable daily (*per diem*) rates of SCHEER.
- Amounts invoiced are in all cases quoted as net prices, to which the statutory rate of VAT shall be added.

- SCHEER may invoice the Client on a monthly basis.
- Where services are charged on a 'time and material' basis, SCHEER shall document the type and hours of work performed (e.g. by referencing the applicable ticket number) and forward the documentation thereof together with the invoice to the Client.
- All invoices must be paid within 14 calendar days of receipt strictly net and free of bank fees and other charges to such account as SCHEER shall designate.

#### 05.2

The Client may exercise a right of set-off or retention only if its claim arises from the same contract and is undisputed, is ready for decision or has been adjudicated by *res judicata* court judgment. The Client may withhold payments for defects only to the extent reasonable in light of the specific defect, and only where the existence of such defect is undisputed.

#### 05.3

Without prejudice to SCHEER's other and further rights, in the event that the Client is in default of payment, SCHEER shall be entitled, after a written reminder, to discontinue or withhold performance of further services until the Client makes payment. In addition, SCHEER may at its discretion make the performance of services then outstanding dependant on the Client's full advance payment of the next instalment in each case or on the provision of security, in the form of a directly enforceable bank guarantee upon first demand from a major European bank equal to the amount of remuneration still outstanding.

#### 05.4

The Client may not assign its rights under this contract to third parties except with prior written consent of SCHEER.

### **06 Disruptions to proper performance of services / *force majeure***

If any event occurs for which SCHEER is not responsible, including events of *force majeure* and situations which are the equivalent thereof (e.g., strikes, strikes at third-party entities, lock outs, administrative orders, general disruptions of telecommunications networks or internet services, hacker attacks), which prevents SCHEER from adhering to the schedule or to service level agreements ("Disruption"), then deadlines shall be deemed extended by a time equal to the duration of the Disruption, including a reasonable start-up phase (where necessary). Service level agreements shall be suspended. The contracting parties shall notify one another without undue delay regarding the causes of any Disruption arising within their sphere and as to the duration of any extension of time.

If any Disruption gives rise to additional expense or losses, SCHEER may also request compensation for its additional expense and demand compensatory damages, except

where the Client likewise bears no responsibility for the Disruption.

### **07 Duty of loyalty and good faith (*Treuepflicht*)**

The contracting parties each hereby give one another a mutual undertaking of good faith. They shall each refrain from poaching staff of the other party hereto or from taking any indirect or direct action of any kind whatsoever which might be deemed encouragement to staff of the other party to leave that party's service. This mutual duty of good faith shall continue for a two-year period following the termination of the contract.

### **08 Confidentiality**

The contracting parties shall treat as confidential any and all information or information materials, to which they become directly or indirectly privy through oral, written or some other form of disclosure during the course of the contractual relationship or which are designated as confidential or which by their very nature would ordinarily be deemed to be confidential, and they agree as a rule to use such information and information materials only in accordance with the services covered by this contract. The contracting parties are permitted to disclose the information to their own staff members or staff members of affiliated enterprises, who require access to such information for business reasons.

This confidentiality covenant will not apply to information and information materials,

- (a) which are already obvious at the time they become known (i.e., readily accessible by any third persons);
- (b) which are lawfully made available to a contracting party by a third person after they become known, and such third person is not bound by any confidentiality obligation to the other contracting party;
- (c) which must be disclosed to a government agency or some other authorised third party at their demand;
- (d) which need to be disclosed to legal or tax advisors of the respective contracting party for purposes of providing advice.

In the cases described in sub-paragraphs (c) and (d), the contracting parties shall inform each other without undue delay before disclosing the protected information.

The contracting parties shall impose an equivalent confidentiality agreement in writing upon all staff members or third parties, whom they engage in order to perform the services covered by this contract.

The contracting parties are aware that the communication between the parties will also to a large extent be carried out in unencrypted electronic form (e.g., e-mail), and they therefore waive their rights to enforce any claims which are based on the fact that unauthorised third parties gained illegal access to the electronic communication

media and thereby gained knowledge about the aforementioned unencrypted electronic data.

## 09 Rights of use

### 09.1

SCHEER grants the Client the non-exclusive, perpetual, irrevocable and non-assignable right to use the physical results or service deliverables [*Arbeitsergebnisse*], which are generated during the course of the contract, for its own internal purposes. Any other uses require the express written consent of the contracting party.

### 09.2

If and to the extent that new (co-)copyrights or other new intellectual property rights to the work product are created, then all rights to exploit, publish, edit and reproduce shall inure to SCHEER in accordance with this section 09. The same applies without exception to the extent SCHEER contributes its own methods, results, resources/tools, programs/software or similarly protectable know-how, with respect to all industrial property rights related thereto which already exist for SCHEER.

## 10 Inspection and formal acceptance (*Abnahme*)

Deliverables, i.e. work results of a contract for work and labour [*Werkleistungen*], which may for example be delivered as part of a project, will be formally accepted in accordance with the following terms and conditions:

### 10.1

If no formal acceptance deadlines are stipulated in the contract, then the Client will be entitled to a reasonable period of time for inspecting the contractual deliverables (which should generally not exceed two weeks) after SCHEER has delivered the deliverables subject to acceptance. Within this inspection/formal acceptance period, the Client shall use jointly defined testing criteria (e.g. test data, test cases) to review whether the deliverables conform to the terms of the contract. Any defects shall be communicated to SCHEER in the form of a defect list including a specific and structured description.

### 10.2

Notified defects will be classified by the contracting parties into one of the following categories:

- (a) Category 1: The contractual deliverable contains a defect which makes it impossible to use or possible but only with severe restrictions.
- (b) Category 2: The contractual deliverable contains a defect which limits its usefulness, but not to the extent of a category 1 defect.
- (c) Category 3: The contractual deliverable contains a defect which only slightly limits its usefulness.

### 10.3

In the case of a category 1 defect, the Client may refuse to issue its statement of formal acceptance. This will also apply if there are several category 2 or category 3 defects

which collectively have the effect of a category 1 defect. SCHEER shall within a reasonable period of time cure any duly reported defects with the category 1 effects in a manner that eliminates the category 1 effects. If the inspection related to the formal acceptance cannot be duly continued because of such a defect, its effects or its cure, then the inspection/formal acceptance period for the contractual work impacted thereby will be reasonably extended.

### 10.4

If no category 1 defect effects are present, then the deliverable may qualify for acceptance. In that case, the Client shall declare its formal acceptance without undue delay following the completion of any testing but no later than following the expiration of the inspection/formal acceptance period. The contractual deliverable will be deemed formally accepted – even without an express declaration from the Client and without a formal acceptance request from SCHEER,

- (a) if the Client makes use of the contractual deliverable, unless this is done for testing purposes or as part of a possible duty to mitigate damages; or
- (b) if the Client does not, within the inspection period, lodge any complaints about defects, which would hinder the formal acceptance; or
- (c) if the tests are able to be carried out using the testing criteria and do not yield any defects, which would hinder the formal acceptance; or
- (d) if the Client otherwise implies through its conduct that it recognises the deliverable as substantially in conformity with the contract.

## 11 Defects in title

### 11.1

SCHEER will be liable for the infringement of third party rights caused by its service, but only if and to the extent that the service results and/or deliverables are used in a contractually conforming manner and specifically in an environment of use which had been contractually stipulated.

### 11.2

Where there is performance impossibility [*Unmöglichkeit*] or in cases of a warranty against defects in title, the following provision will take precedence over the rule prescribed in section 12:

If a third party asserts against the Client that service results and/or deliverables performed by SCHEER infringe its rights, the Client shall without undue delay inform SCHEER thereof in writing. If service results and/or deliverables performed by SCHEER infringe third party rights, then SCHEER shall, in its own discretion and upon reasonable consideration of the Client's interests, procure the right to use the service results and/or deliverables for the Client or restructure the service to avoid the infringement of rights.

If SCHEER is unable to achieve any other remedy at a reasonable expense, then it shall take back the service results and/or deliverables and refund the remuneration, which the Client paid for it, less a reasonable indemnity for the use. This section hereby exhaustively describes the Client's rights based on defects in title.

#### 11.3

The Client shall support SCHEER, at the latter's request, in defending against any claims pursuant to subsection 11.2. The expenditures and costs incurred by the Client in this regard will be reimbursed by SCHEER. Each party shall bear the costs of its own personnel in terms of time spent.

#### 11.4

The Client's claims based on defects in title shall be barred by prescription pursuant to subsection 12.5.

#### 11.5

Section 14 shall apply to supplement the rule regarding the aforementioned Client claims.

### 12 Warranty/rights concerning defects

#### 12.1

If SCHEER performs the services under this contract in a flawed manner or in a manner that breaches the contract, then SCHEER will be obligated to perform such services for the Client in a non-flawed manner or in a manner that conforms to the contract and to do so within a reasonable period of time and at no additional cost. The availability of a workaround solution will likewise serve as a suitable means for curing the flaw.

A prerequisite here is a written complaint, which contains a reasonable grace period set by the Client and which must be made without undue delay but in any case no later than two weeks after the Client learns of the problem. In this respect, the Client must, to the extent of its abilities, prove that the flaw notified in the complaint is based on a defect [*Leistungsstörung*] that occurred within the ambit of responsibility of SCHEER.

#### 12.2

If a contractually conforming and non-flawed performance of the services covered under this contract cannot be finally and successfully consummated even within an additional reasonable grace period due to reasons that are attributable to SCHEER's responsibility, then in cases involving deliverables performed under a contract for work and labour [*Werkvertrag*], the statutory warranty rights will apply, except for the right to self-help. In cases involving services performed under a service contract [*Dienstvertrag*], the Client will have the right to reduce the compensation accordingly in order to reflect the defective element of the service results which it cannot use and in which it has no interest.

The Client will have no other, more extensive claims based on defects/performance irregularities. This exclusion does

not apply where there has been an intentional act or omission [*Vorsatz*] or gross negligence [*grobe Fahrlässigkeit*], fraudulent concealment of a defect, and where there has been a death, physical injury or impairment to health.

#### 12.3

If, based on a non-conforming service rendered by SCHEER, the Client can rescind the contract and/or demand compensatory damages in lieu of performance or can allege the same, then the Client shall, upon request of SCHEER, state within a reasonable grace period whether it will enforce such rights or continue to request the performance of the service (according to § 350 BGB).

#### 12.4

To the extent required, the Client shall, free of charge, support SCHEER on any follow-up rectification work [*Nachbearbeitung*]. Specifically, the Client must report the notified performance irregularity in writing and must provide sufficiently detailed information which is helpful in identifying the irregularity.

#### 12.5

The Client's rights arising from defects will lapse as soon as the Client modifies the service result or interferes in the service result, unless the Client can prove that this modification or this interference was not the cause of the defect.

Otherwise, the rights based on defects will expire 12 months after the performance of the service impacted by the defect (service results) or after the service has been formally accepted, either in whole or in part (deliverables). The statutory deadlines for enforcing the recourse claim under § 478 BGB will remain unaffected thereby. The same applies if the law prescribes a longer deadline period in the event of intentional or grossly negligent breach of an obligation by SCHEER, in the event of a fraudulent concealment of a defect, or in cases involving death, physical injury or impairment of health.

#### 12.6

With respect to the Client's claims under this section 12, section 14 will also apply as a supplement.

#### 12.7

SCHEER may demand compensation of its expense on the basis of its current *per diem* rates (as amended from time to time), to the extent that

- (a) SCHEER engages in work based on a report even though no defect is in fact present, unless the Client would have been unable to recognize that no defect exists without incurring an unreasonable expense; or
- (b) a reported disruption cannot be reproduced or otherwise verified as a defect by the Client.

### 13 Performance delay (*Verzug*)

Unless otherwise agreed, the following applies:

In the event of a culpable delay in the service (performance delay), the Client may, beginning in the third week of the performance delay and upon evidence of a relevant loss, claim compensation for any damages and expenses. For each complete week of the performance delay thereafter, this claim will be limited to 0.5% of the net price for that portion of the service, which cannot be used because of the delay. The liability for the performance delay is limited in total to no more than 5% of this price. These limitations do not apply to the extent that the performance delay is based on gross negligence or intentional acts or omissions on the part of SCHEER. Any other Client claims, which are based on a delay in the service, are excluded.

#### **14 Liability**

The following provisions apply only where there has been simple negligence [*einfache Fahrlässigkeit*] on the part of SCHEER and only if the law has not mandated unlimited liability.

SCHEER will be liable only to the extent that it has breached a material contractual duty (a so-called "cardinal duty"). Cardinal duties are contractual duties, the fulfillment of which is absolutely needed to ensure the orderly performance of the contract and the adherence to which the Client ordinarily relies upon or could be reasonably expected to rely upon. The liability for any property damages or pecuniary losses will be limited to those damages considered foreseeable and typical for the specific contract. The liability per year will be limited to the total net compensation incurred in the relevant year in which the damage arose. Subsection 12.5 will apply *mutatis mutandis* with respect to the prescription period. Liability for lost profits and unrealized savings as well as liability for any consequential damages is excluded.

This section shall apply *mutatis mutandis* to any expense reimbursement claims and other liability claims held by the Client against SCHEER.

#### **15 Termination**

##### **15.1**

The contract defines the modalities of regular termination [*ordentliche Kündigung*], and the eventual contractual base term and renewal terms. Unless otherwise agreed, and notwithstanding the right of both parties to effect an extraordinary termination without notice [*außerordentliche, fristlose Kündigung eines Vertrages*], the contract cannot be terminated unilaterally during the contractual base term.

##### **15.2**

In the event the Client is unable, for commercial reasons, to perform the duties it owes to SCHEER, SCHEER may terminate the contract for cause without prior notice, also where the Client has filed a petition for insolvency. § 321 BGB and § 112 of the German Insolvency Regulation [*In-*

*solvenzordnung*] will remain unaffected thereby. The Client shall inform SCHEER in writing about any threatened insolvency (its inability to pay debts as they fall due) as early as possible.

##### **15.3**

In cases of § 649 BGB, SCHEER may invoice a lump sum of 15 % of the amount that would have been payable as contractual compensation until next possible date of regular termination according to the contractually agreed modalities of termination. Nevertheless, the Client may prove that SCHEER has had less expenditure.

##### **15.4**

The Client is responsible for the timely organization of subsequent services following the termination of the contract. SCHEER agrees to co-operate as reasonably necessary for the transition to another service provider. Unless otherwise agreed, SCHEER will invoice the resulting efforts to the Client on a 'time and material' basis, at the current, generally applicable daily (*per diem*) rates of SCHEER.

#### **16 Final provisions**

##### **16.1**

Should any provisions of this Contract be or become unenforceable or void either in whole or in part, or should the Consulting Terms and Conditions contain any gaps or omissions, then the enforceability of the Terms and Conditions for Global Managed Services will not otherwise be affected thereby. The contracting parties agree instead to replace the unenforceable or void provision with an enforceable provision, which will be deemed to have been agreed upon from the outset and which reflects the meaning and purpose of the unenforceable or void provision. In the case of gaps or omissions, the contracting parties will be deemed to have agreed to a provision, which corresponds to that which - based on the meaning and purpose of these Terms and Conditions for Global Managed Services - would have been reasonably agreed from the outset, had the contracting parties considered the matter from the outset.

##### **16.2**

The contract and any legal relationships between the contracting parties based thereon shall be governed exclusively by the laws of the Federal Republic of Germany to the exclusion of all provisions under German private international law (conflicts of law). The application of the laws of a third party country, including that country's rules on conflicts of law, as well as the application of the UN Sales Convention and the case law construing it, are expressly excluded.

##### **16.3**

The judicial forum for any registered merchant, legal entity under public law [*juristischen Person des öffentlichen Rechts*], and any special fund under public law [*öffentlich-*

*rechtlichen Sondervermögen*] shall be the city of Saarbrücken. SCHEER may choose the Client's registered place of business to serve as a judicial forum.

16.4

Any modifications and addenda to a contract must be made in writing.