



International Passport Advantage Express Agreement

This IBM International Passport Advantage Express Agreement (“Agreement”), including any applicable Attachments, Terms of Use, and Transaction Documents governs this transaction in which Customer acquires certain Eligible Products from IBM or a reseller. It is the complete agreement regarding this transaction by which Customer acquires Eligible Product(s), and replaces any prior oral or written agreements, communications, representations, statements, understandings, warranties, promises, covenants, commitments, or undertakings between Customer and IBM concerning Passport Advantage Express.

If there is a conflict among the terms of this Agreement, Attachments, Terms of Use, and Transaction Documents, those of an Attachment prevail over those of this Agreement, those of Terms of Use prevail over those of an Attachment and this Agreement, and the terms of a Transaction Document prevail over those of this Agreement, the Terms of Use, and an Attachment.

Once this Agreement is accepted, 1) unless prohibited by applicable law or specified otherwise, any reproduction of it or a Transaction Document made by reliable means (for example, electronic image, photocopy or facsimile) is considered an original and 2) all Eligible Products ordered under this Agreement are subject to it.

1. General

1.1 Agreement Structure

This Agreement is organized in six Parts:

Part 1 – General includes terms regarding Agreement Structure, Attachments and Transaction Documents, Definitions, Acceptance of Terms, Delivery, Payment, Taxes, Eligible Products, IBM Business Partners and Resellers, Intellectual Property Protection, Limitation of Liability, General Principles of Our Relationship, Agreement Termination, Compliance Verification, and Geographic Scope and Governing Law.

Part 2 – Warranties includes terms regarding Warranty for IBM Programs, Warranty for IBM Software Subscription and Support and Selected Support, Warranty for IBM Machine Components of IBM Appliances, Warranty for IBM SaaS, and Extent of Warranty.

Part 3 – Programs and Subscription and Support includes terms regarding IBM Programs, Programs in a Virtualization Environment, Fixed Term Licensing, CEO Product Categories, and Software Subscription and Support and Selected Support.

Part 4 – Appliances includes terms regarding Virtual Appliance, Appliances Comprising Both Program and Machine Components, Program Components and Machine Components.

Part 5 – IBM SaaS includes terms regarding Ownership, Customer’s Right to Use, Subscription to IBM SaaS, IBM SaaS Technical Support, Content, and Termination of IBM SaaS.

Part 6 – Country-unique Terms.

1.2 Attachments and Transaction Documents

Additional terms for Eligible Products are in documents called "Attachments" and "Transaction Documents" provided by IBM. Depending upon their country of use, Attachments may have different names. In general, Attachments and Transaction Documents (such as a supplement, schedule, invoice, exhibit, or addendum) contain specific details and terms related to this transaction. Customer may receive one or more Transaction Documents for a single transaction. Attachments and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions.

1.3 Definitions

Anniversary – the first day of the month that follows the anniversary of the Effective Date, unless the Effective Date is the first day of a month, in which event the anniversary of the Effective Date is the Anniversary.

Appliance – an Eligible Product, designed for a particular function and not for general purpose computing tasks, that may be a Program (in the case of a “Virtual Appliance”) or composed of a Program Component, a Machine Component, and any Machine Code Component that IBM may provide to Customer.

Audit Reports – a set of reports available in the IBM License Metric Tool (“ILMT”), or by another method acceptable to IBM as specified at

<http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> . These reports provide the Processor Value Unit (“PVU”) license requirements based on the Virtualization Capacity available to the Eligible Sub-Capacity Product.

CEO User – an individual to whom a machine has been assigned that is capable of copying, using, or extending the use of Programs in a CEO Product Category.

Content – information, software, and data, including, without limitation, any Personal Data, hypertext markup language files, scripts, programs, recordings, sound, music, graphics, images, applets, or servlets that are created, provided, uploaded, or transferred by Customer and any user authorized by Customer.

Customer – the customer Enterprise company that is ordering Eligible Products.

Customer-set-up Machine Component – an IBM Machine Component that Customer is responsible for installing according to instructions provided with it.

Date of Installation –

- a. for a Customer-set-up Machine Component, the date on Customer’s purchase invoice or sales receipt for the Appliance is the Date of Installation, unless IBM or Customer’s IBM reseller informs Customer otherwise.
- b. for an IBM Machine Component that IBM is responsible for installing, the business day after the day IBM installs it or, if Customer defers installation, makes it available to Customer for subsequent installation by IBM;

Effective Date – the date IBM accepts Customer’s order for Eligible Products, either directly from Customer or from Customer’s reseller.

Eligible Operating System Technology – an operating system for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .

Eligible Processor Technology – a processor technology for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .

Eligible Products – commercially available IBM Programs, Non-IBM Programs, Selected Support, authorizations to increase Customer’s use of a Program, IBM Trade-ups, Competitive Trade-ups, Annual IBM Software Subscription and Support Renewals, IBM Software Subscription and Support Reinstatement, Annual Third Party Software Subscription and Support Renewals, Third Party Software Subscription and Support Reinstatement, Selected Support renewals, IBM SaaS, and Appliances.

Eligible Sub-Capacity Product – a Product for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .

Eligible Virtualization Environment – a server or a group of servers cooperating as a single computing entity that contain an Eligible Processor Technology, an Eligible Operating System Technology, and an Eligible Virtualization Technology.

Eligible Virtualization Technology – a virtualization technology for which Sub-Capacity Licensing is available and specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> . An Eligible Virtualization Technology is capable of restricting processor capacity to a subset of the total physical capacity, sometimes referred to as partition, LPAR, or virtual machine.

Engineering Change – an update to modify certain aspects of the design of an installed Machine Component, including without limitation the design of a certain Machine Component part(s) or Machine Code Component.

Enterprise – any legal entity that, by more than 50%, owns, is owned by, or is under common ownership with Customer’s “Site” of record.

Fixed Term – a definite period of time specified by IBM in a Transaction Document, for example, in a Program’s PoE.

Full Capacity – The total number of physical processor cores activated and available for use on a server.

IBM – the IBM Enterprise company that is providing Eligible Products.

IBM Business Partner – an organization with which IBM has signed agreements to promote, market, and, in some instances, support certain Eligible Products.

IBM Machine Component – a Machine Component bearing an IBM logo.

IBM Program – a Program acquired under this Agreement and subject to the IPLA, including its LI.

IBM Software as a Service (“IBM SaaS”) – offerings IBM makes available to Customer remotely through the Internet providing access to (i) functionality of Programs, (ii) infrastructure, and (iii) technical support. IBM SaaS is not a Program but may require Customer to download enabling software in order to use it. IBM SaaS is an Eligible Product.

IBM SaaS User – one who accesses IBM SaaS using a user account identification and password associated with Customer’s IBM SaaS account and provided by Customer.

IBM Software Subscription and Support – software subscription and support provided for IBM Programs licensed under the IPLA. See **3.5 IBM Software Subscription and Support** for further description.

IPLA – IBM’s International Program License Agreement. The IPLA is included with each IBM Program in the Program’s directory, in a library identified as “License,” a booklet, or on a CD. It is also available on the Internet at <http://www.ibm.com/software/sla> and from IBM and its resellers.

License Information (“LI”) – a document that provides information and any additional terms specific to a Program. The Program’s LI is available at <http://www.ibm.com/software/sla/>. The LI can also be found in the Program’s directory, by the use of a system command, or as a booklet included with the Program.

Machine Code Component – microcode, basic input/output system code (called “BIOS”), utility programs, device drivers, diagnostics, and any other code (all subject to any exclusions in the license provided with it) delivered with an IBM Machine Component for the purpose of enabling the Machine Component’s function, as stated in its Specifications.

Machine Component – a hardware device, features, conversions, Upgrades, elements, or accessories, or any combination of them. The term "Machine Component" includes an IBM Machine Component and any non-IBM Machine Component (including other equipment) that IBM may provide to Customer.

Non-IBM Program – a Program that is governed by the terms of the third party end user license agreement that accompanies it. IBM is not a party to the third party end user license agreement and assumes no obligations under it.

Personal Data – any information that can be used to identify a specific individual, such as name, email address, home address, or phone number that is provided to IBM to store, process, or transfer on Customer’s behalf.

Processor Chip – Electronic circuitry containing one or more Processor Cores that plugs into a Processor Socket.

Processor Core – A physical functional unit within a computing device that interprets and executes program instructions and consists of at least one instruction control unit and one or more arithmetic and logic units. A multi-core technology allows two or more Processor Cores to be active on a single Processor Chip. A System z Integrated Facility for Linux (IFL) engine is considered a single Processor Core.

Processor Socket – Electronic circuitry that accepts a Processor Chip.

Processor Value Unit (“PVU”) – A metric used by IBM to assign a value to a Processor Core. The Processor Value Unit licensing model is described at http://www.ibm.com/software/lotus/passportadvantage/pvu_licensing_for_customers.html.

Program – the following, including the original and all whole or partial copies: 1) machine-readable instructions and data, 2) components, 3) audio-visual content (such as images, text, recordings, or pictures), 4) related licensed materials, and 5) license use documents or keys, and documentation.

Program Component – an IBM Program or Non-IBM Program that is preinstalled on a Machine Component.

Proof of Entitlement (“PoE”) – the document in which IBM specifies an Eligible Product’s level of authorized use. This PoE, supported by Customer’s matching paid invoice or receipt, is evidence of Customer’s level of authorized use.

Selected Program – a Non-IBM Program or an IBM Program licensed under the terms of the IBM License Agreement for Non-Warranted Programs.

Selected Support – Support for specified Selected Programs.

Service Provider – an entity that provides information technology services for end user customers, either directly or through a reseller.

Site – any defined entity, such as a physical location or organizational unit, e.g., a department, division, subsidiary or cost center that Customer provides to IBM or the reseller and for which IBM assigns a Passport Advantage Site Number.

Specifications – information specific to a Machine Component. IBM Machine Component Specifications are in a document entitled "Official Published Specifications."

Sub-Capacity Licensing – Licensing of Eligible Sub-Capacity Products based on Virtualization Capacity.

Subscription Period – the time during which IBM SaaS is made available to Customer as specified in the applicable Transaction Document.

Term – the period that begins either on the date IBM accepts Customer's initial order (in the case of the initial Term) or on the Anniversary (in the case of subsequent Terms), and ends on the day immediately prior to the next Anniversary.

Terms of Use ("ToU") – additional terms under which IBM makes IBM SaaS offerings available to Customer and viewed at <http://www.ibm.com/software/sla/slabd.nsf/sla/tou/> .

Third Party Software Subscription and Support – software subscription and support provided under the third party's terms for Non-IBM Programs. See **3.5 Software Subscription and Support** for further description.

Upgrade – a change to a Machine Component to modify, add, remove, enable, or disable a certain Machine Component resource or function. Each such change can be accomplished through a Machine Component conversion, or through the conversion, addition, removal, or exchange of a Machine Component's feature(s), but only to the extent announced and supported by IBM for the Machine Component.

Virtualization Capacity – the highest peak processor capacity available to an Eligible Sub-Capacity Product when deployed on an Eligible Virtualization Environment in accordance with the rules specified at <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> .

1.4 Acceptance of Terms

The Customer accepts this Agreement without modification by acquiring the Eligible Product(s) from IBM or a reseller. Additional or different terms in any order or written communication from Customer are void. An Eligible Product becomes subject to this Agreement when IBM accepts Customer's order by i) sending Customer a Transaction Document, ii) making the Program or IBM SaaS available to Customer or, when applicable, shipping the Appliance, or iii) providing the support, service, or solution.

Any Attachment or Transaction Document will be signed by both parties if requested by either party.

1.5 Delivery

Transportation charges, if applicable, will be specified in a Transaction Document. For Programs IBM provides to Customer in tangible form, IBM fulfills its shipping and delivery obligations upon delivery of such Programs to the IBM-designated carrier, unless otherwise agreed to in writing by Customer and IBM.

1.6 Payment

- a. When Customer acquires Eligible Products from a reseller, Customer pays reseller directly.
- b. When Customer acquires Eligible Products from IBM, Customer agrees to pay as IBM specifies in its invoice or equivalent document, including any late payment fee; and
- c. The amount payable for a Program license may either be a one-time charge or a charge for a Fixed Term, depending on the type of license.

1.7 Taxes

If, as a result of Customer moving, accessing, or using an Eligible Product across a border, any authority imposes a customs duty, tax, levy or fee (including withholding taxes for the import or export of any such Eligible Product), then Customer agrees that it is responsible for, and will pay, any such customs duty, tax, levy or fee. This excludes those taxes based on IBM's net income.

1.8 Eligible Products

IBM may add or withdraw Eligible Products at any time.

If IBM withdraws a Program or a version of a Program from marketing, Customer may not increase its level of use, beyond the authorizations already acquired, on or after the effective date of withdrawal without IBM's prior written consent, which IBM will not unreasonably withhold.

1.9 IBM Business Partners and Resellers

In addition to acquiring Eligible Products from IBM, Customer may acquire them from IBM Business Partners and resellers. Not all resellers, however, are authorized to resell all Eligible Products.

When Customer orders Eligible Products from Customer's IBM Business Partner(s) or reseller(s), IBM is not responsible for 1) their actions, 2) any additional obligations they have to Customer, or 3) any products or services that they supply to Customer under their agreements. When Customer acquires Eligible Products from an IBM Business Partner or reseller, the IBM Business Partner or reseller sets the charges and payment terms.

1.10 Intellectual Property Protection

For purposes of this Section 1.10, the term "Product" means an IBM Program, Machine Code Component, or IBM Machine Component.

1.10.1 Third Party Claims

If a third party asserts a claim against Customer that a Product infringes that party's patent or copyright, IBM will defend Customer against that claim at IBM's expense and pay all costs, damages, and attorney's fees that a court finally awards against Customer or that are included in a settlement approved in advance by IBM, provided that Customer:

- a. promptly notifies IBM in writing of the claim;
- b. allows IBM to control, and cooperate with IBM in, the defense and any related settlement negotiations; and
- c. is and remains in compliance with the Product's license and other terms and Customer's obligations under Remedies below.

1.10.2 Remedies

If such a claim is made or appears likely to be made, Customer agrees to permit IBM, in IBM's discretion, to: i) enable Customer to continue to use the Product; ii) modify it; or iii) replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, Customer agrees to immediately discontinue use of the Product and return it and all copies to IBM on IBM's written request. IBM will then give Customer a credit equal to the amount Customer paid for the returned Product (if the Product is IBM SaaS or subject to Fixed Term charges, up to twelve months' charges).

1.10.3 Claims for Which IBM is Not Responsible

IBM has no obligation regarding any claim arising from or related to any of the following:

- a. anything provided by Customer or a third party on Customer's behalf that is incorporated into a Product or IBM's compliance with any designs, specifications, or instructions provided by Customer or a third party on Customer's behalf;
- b. modification of a Product by Customer or a third party on Customer's behalf;
- c. a Product's use other than in accordance with its applicable licenses and restrictions or use of a non-current version or release of a Product, when a claim could have been avoided or the risk of a claim reduced by using the current version or release;
- d. the combination, operation, or use of the Product with any program, hardware device, data, apparatus, method, or process;
- e. the distribution, operation, or use of the Product outside Customer's Enterprise or for the benefit of any third party; or
- f. Separately Licensed Code, if any, as identified in the LI for the Product.

The LI for the Product or other documents may permit Customer to copy, modify, or redistribute all or portions of the Product without paying additional licensing fees to IBM. The indemnification obligation under this Agreement only applies to copies of the Product provided to Customer by IBM and additional copies expressly authorized in a PoE. IBM has no obligation for claims relating to copies of the Product

neither provided by IBM nor specifically authorized by a POE, even if permitted by the LI for the Product or other documents.

This Intellectual Property Protection section states IBM's entire obligation and Customer's exclusive remedy regarding any third party intellectual property claims. This Intellectual Property section does not obligate in any manner any third-party supplier of code (including Separately Licensed Code) included with or part of the Product.

1.11 Limitation of Liability

The limitations and exclusions in this **Section 1.11 (Limitation of Liability)** apply to the full extent they are not prohibited by applicable law without the possibility of contractual waiver.

1.11.1 Items for Which IBM May Be Liable

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Eligible Product or otherwise arising under this Agreement will not exceed the amount of any actual direct damages up to the greater of U.S. \$100,000 (or equivalent in local currency) or the charges (if the Eligible Product is IBM SaaS or is subject to Fixed Term charges, up to 12 months' charges) Customer paid for the Eligible Product that is the subject of the claim.

This limit also applies to any of IBM's Eligible Product developers and suppliers. It is the maximum for which IBM and its Eligible Product developers and suppliers are collectively responsible. Damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable are not subject to a cap on the amount of damages.

1.11.2 Items for Which IBM Is Not Liable

UNDER NO CIRCUMSTANCES IS IBM, ITS ELIGIBLE PRODUCT DEVELOPERS, OR SUPPLIERS LIABLE FOR ANY OF THE FOLLOWING, EVEN IF INFORMED OF THEIR POSSIBILITY:

- a. LOSS OF, OR DAMAGE TO, DATA;**
- b. SPECIAL, INCIDENTAL, EXEMPLARY, OR INDIRECT DAMAGES, OR FOR ANY ECONOMIC CONSEQUENTIAL DAMAGES; OR**
- c. LOST PROFITS, BUSINESS, REVENUE, GOODWILL, OR ANTICIPATED SAVINGS.**

1.12 General Principles of Our Relationship

1.12.1 Notices and Communications

To the extent permissible under applicable law, the parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

1.12.2 Assignment and Resale

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to assign without consent is void. The assignment of this Agreement, in whole or in part, within the Enterprise of which either party is a part or to a successor organization by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payments without obtaining Customer's consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that similarly affects all of its customers.

Customer agrees that Eligible Products are for use within Customer's Enterprise only and may not be resold, rented, leased, or transferred to third parties. Any attempt to do so in violation of these provisions is void.

1.12.3 Compliance with Laws

IBM will comply with laws applicable to IBM generally as a provider of information technology products and services. IBM is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Eligible Products that Customer acquires under this Agreement, or that IBM's provision of or Customer's receipt of particular Eligible Products under this Agreement meets

the requirements of such laws. Notwithstanding anything in this Agreement to the contrary, neither party is obligated to take any action that would violate law applicable to that party.

Each party agrees to comply with all applicable export and import laws and regulations including without limitation United States embargo and sanctions regulations and prohibitions on export for certain end uses or to certain users.

1.12.4 Dispute Resolution

Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any such claim and all respective rights related to the claim lapse.

1.12.5 Other Principles of Our Relationship

- a. Neither party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b. The exchange of any confidential information will be made under a separate, signed confidentiality agreement. However, to the extent confidential information is exchanged in connection with any Eligible Product under this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.
- c. This Agreement and any transaction under it do not create an agency, joint venture, or partnership between Customer and IBM. Each party is free to enter into similar agreements with others to develop, acquire, or provide competitive products and services.
- d. Customer authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors, IBM Business Partners, and resellers) to store and use Customer's business contact information wherever they do business, in connection with IBM Eligible Products or in furtherance of IBM's business relationship with Customer.
- e. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except as permitted in Section 1.11 (Limitation of Liability) above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- f. Customer is responsible for selecting the Eligible Products that meet its needs and for the results obtained from the use of the Eligible Products, including Customer's decision to implement any recommendation concerning Customer's business practices and operations.
- g. Eligible Products may not be used to provide commercial hosting or other commercial information technology services to third parties.
- h. Where approval, acceptance, consent, or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- i. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- j. Customer agrees that their use of IBM SaaS will comply with the IBM acceptable use policy at <http://www.ibm.com/services/us/imc/html/aup.html> and applicable data protection laws.
- k. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer's facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by Customer's delay in providing such access or performing other Customer responsibilities under this Agreement.
- l. In entering into this Agreement, including each Attachment, ToU, and Transaction Document, neither party is relying on any representation that is not specified in this Agreement, including without limitation any representations concerning: i) performance or function of any Eligible Product, other than as expressly warranted in this Agreement; ii) the experiences or recommendations of other parties; or iii) any results or savings that Customer may achieve.

1.13 Agreement Termination

IBM may terminate this Agreement at any time, with or without cause, immediately and without notice, after the initial software subscription and support term or IBM SaaS Subscription Period has expired. If Customer renewed either IBM Software Subscription and Support for any IBM Programs or IBM SaaS prior to the notice of termination, IBM, at its sole discretion, may either continue to provide IBM Software Subscription and Support to Customer for those Programs or those IBM SaaS offerings for the remainder of the current term or give Customer a prorated refund. If Customer renewed Third Party Software Subscription and Support for any Non-IBM Programs prior to the notice of termination, the third party may continue to provide Third Party Software Subscription and Support to Customer for that Non-IBM Program license for the remainder of the current term. If the third party does not do so, Customer may obtain a prorated refund.

Customer will be considered to have terminated this Agreement if it does not have software subscription and support in effect. Either of us may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

Any terms of this Agreement that by their nature extend beyond its termination remain in effect until fulfilled, and apply to respective successors and assignees.

1.14 Compliance Verification

For purposes of this **Section 1.14 (Compliance Verification)**, "Passport Advantage Terms" means 1) this Agreement and applicable Attachments, Transaction Documents, and Terms of Use provided by IBM, and 2) IBM software policies that may be found at the IBM Software Policy website (<http://www.ibm.com/softwarepolicies/>), including but not limited to those policies concerning backup, sub-capacity pricing, and migration.

The rights and obligations set forth in this **Section 1.14** remain in effect during the period the Eligible Product is the possession or control of Customer, and for two years thereafter.

1.14.1 Verification Process

Customer agrees to create, retain, and provide to IBM and its auditors accurate written records, system tool outputs, and other system information sufficient to provide auditable verification that Customer's use of all Eligible Products is in compliance with the Passport Advantage Terms, including, without limitation, all of IBM's applicable licensing and pricing qualification terms. Customer is responsible for 1) ensuring that it does not exceed its authorized use, and 2) remaining in compliance with Passport Advantage Terms.

Upon reasonable notice, IBM may verify Customer's compliance with Passport Advantage Terms at all Sites and for all environments in which Customer uses (for any purpose) Eligible Products subject to Passport Advantage Terms. Such verification will be conducted in a manner that minimizes disruption to Customer's business, and may be conducted on Customer's premises, during normal business hours. IBM may use an independent auditor to assist with such verification, provided IBM has a written confidentiality agreement in place with such auditor.

1.14.2 Resolution

IBM will notify Customer in writing if any such verification indicates that Customer has used any Eligible Product in excess of its authorized use or is otherwise not in compliance with the Passport Advantage Terms. Customer agrees to promptly pay directly to IBM the charges that IBM specifies in an invoice for 1) any such excess use, 2) software subscription and support for such excess use for the lesser of the duration of such excess use or two years, and 3) any additional charges and other liabilities determined as a result of such verification.

1.15 Geographic Scope and Governing Law

1.15.1 Geographic Scope

The terms of this Agreement apply in countries in which 1) IBM markets its Eligible Products directly or 2) its Eligible Products have been announced as otherwise available.

1.15.2 Governing Law

The rights, duties, and obligations of each party are valid only in the country in which the transaction is performed or, if IBM agrees, the country where the Eligible Product is placed in productive use, except that all licenses are valid as specifically granted.

Both parties agree to the application of the laws of the country in which the transaction is performed to govern, interpret, and enforce all of Customer's and IBM's respective rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

The United Nations Convention on Contracts for the International Sale of Goods does not apply.

2. Warranties

Unless IBM specifies otherwise, the following warranties apply only in the country of acquisition.

2.1 Warranty for IBM Programs

The warranty for an IBM Program is stated in its license agreement.

2.2 Warranty for IBM Software Subscription and Support and Selected Support

IBM warrants that it provides IBM Software Subscription and Support and Selected Support using reasonable care and skill.

2.3 Warranty for IBM Machine Components of IBM Appliances

IBM warrants that each IBM Machine Component is free from defects in materials and workmanship and conforms to its Specifications.

The warranty period for an IBM Machine Component is a fixed period commencing on its Date of Installation (also called "Warranty Start Date") and specified in a Transaction Document. During the warranty period, IBM provides repair and exchange service for the IBM Machine Component, without charge, under the type of service IBM designates in a Transaction Document for the IBM Machine Component. If an IBM Machine Component does not function as warranted during the warranty period and IBM is unable to either i) make it do so or ii) replace it with one that is at least functionally equivalent, Customer may return it to the party from whom Customer acquired it for a refund.

For an IBM Machine Component that IBM is responsible to install, if Customer elects to install the IBM Machine Component itself or have a third party install the IBM Machine Component, IBM may inspect the IBM Machine Component at Customer's expense before providing warranty service on the IBM Machine Component. If the IBM Machine Component is not in an acceptable condition for warranty service, as solely determined by IBM, Customer may request that IBM restore it to an acceptable condition for warranty service or Customer may withdraw its request for warranty service. IBM, at its sole discretion, will determine if restoration is possible. Restoration is provided as a billable service.

If the IBM Machine Component does not function as warranted during the warranty period, refer to the service documentation that shipped with the IBM Machine Component for support assistance and problem determination procedures.

If Customer is unable to resolve the problem with the service documentation, contact IBM or the reseller to obtain warranty service. Contact information for IBM is provided in the "Warranty Information" that ships with IBM Machine Component. If Customer does not register the IBM Machine Component with IBM, Customer may be required to present proof of purchase as evidence of Customer's entitlement to warranty service.

2.4 Warranty for IBM SaaS

The warranty for IBM SaaS is stated in the Terms of Use.

2.5 Extent of Warranty

THESE WARRANTIES ARE CUSTOMER'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, AND FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

The warranties stated in Section 2.3 will not apply to the extent that there has been misuse (including, but not limited to, use of any Machine Component capacity or capability, other than that authorized by IBM in

writing), accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by Customer or a third party, or failure or damage caused by a product for which IBM is not responsible. The warranty for IBM Machine Components is voided by removal or alteration of Machine Components or parts identification labels.

Items Not Covered by Warranty

IBM does not warrant uninterrupted or error-free operation of an Eligible Product or that IBM will correct all defects.

IBM will identify IBM Eligible Products that it does not warrant.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, **WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND**. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Customer.

3. Programs and Subscription and Support

3.1 IBM Programs

IBM Programs acquired under this Agreement are governed by the terms of the IPLA.

3.1.1 Versions and Platforms:

Customer may use Programs and their associated user documentation in accordance with the terms of this Agreement in any commercially available national language version up to the level of use authorized in the PoE. Customer is authorized to use the Program(s) that Customer acquires under this Agreement on any platform or operating system for which IBM currently makes Program code available under this Agreement unless the Program is designated as platform or operating system specific at the time Customer acquired it.

3.1.2 IBM Trade-ups:

Licenses for certain Programs that replace qualifying IBM Programs may be acquired for a reduced charge. Customer agrees to terminate Customer's use of the replaced IBM Programs when Customer installs the replacement Programs.

3.1.3 Competitive Trade-ups:

Licenses for certain Programs that replace qualifying Non-IBM Programs may be acquired for a reduced charge. Customer agrees to terminate Customer's use of the replaced Non-IBM Programs when Customer installs the replacement Programs.

3.2 Programs in a Virtualization Environment

3.2.1 Authorizations

- a. A PoE must be acquired for the total number of PVUs associated with the Virtualization Capacity available to an Eligible Sub-Capacity Product.
- b. Prior to an increase in an Eligible Sub-Capacity Product's Virtualization Capacity, Customer must first acquire sufficient additional authorizations, including IBM Software Subscription and Support, if applicable, to cover that increase.
- c. IBM does not give credits or refunds for charges already due or paid if an Eligible Product's use falls below the authorized level of use.

3.2.2 IBM's Responsibilities

IBM will make available and authorize Customer to use:

- a. the ILMT at no charge, when ordered by Customer or Customer's IBM Reseller. IBM provides the ILMT to Customer for Customer's compliance with these Sub-Capacity Licensing terms; and
- b. the information center included with the ILMT to aid Customer's compliance with these Sub-Capacity Licensing terms.

Customer may make copies of the ILMT and information center for Customer's compliance with these Sub-Capacity Licensing terms.

3.2.3 Customer's Responsibilities under Sub-Capacity Licensing Terms

Customer agrees to:

- a. install and configure the most current version of ILMT in accordance with the ILMT information center, within 90 days of Customer's first Eligible Sub-Capacity Product deployment on an Eligible

Virtualization Environment, to enable Customer to collect Virtualization Capacity data by Eligible Sub-Capacity Product and generate Audit Reports in accordance with these Sub-Capacity Licensing terms. Exceptions to this requirement are:

- (1) when ILMT does not yet provide support for the Eligible Virtualization Environment
- (2) if Customer's Enterprise has fewer than 1,000 employees and contractors, Customer is not a Service Provider, and Customer has not contracted with a Service Provider to manage Customer's Eligible Virtualization Environment
- (3) if the total physical capacity of Customer's Enterprise servers with an Eligible Virtualization Environment, measured on a Full Capacity basis, but licensed using sub-capacity terms is less than 1,000 PVUs.
- (4) when Customer's servers with Eligible Sub-Capacity Products are licensed to the Full Capacity of the servers

For these exceptions, use of ILMT, while recommended, is not required for Sub-Capacity Licensing. In lieu of ILMT, Customer is required to manually manage and track Customer's Eligible Virtualization Environment, and manually prepare Audit Reports documenting the Virtualization Capacity by Eligible Sub-Capacity Product for Customer's Eligible Virtualization Environment during each calendar or fiscal quarter. These Audit Reports must contain the information listed in the example Audit Report available at

<http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> . These Audit Reports must be prepared as frequently as is required to maintain a history of increases to Virtualization Capacity, but not less often than once per quarter, and must be maintained for at least two years to demonstrate ongoing compliance with these Sub-Capacity Licensing terms;

- b. promptly install new versions, releases, modifications, or code corrections ("fixes") of the ILMT that IBM makes available. Customer must subscribe to Tivoli Support notifications via <http://www.ibm.com/support/mynotifications> in order to be notified when these become available;
- c. not alter, modify, omit, delete, or otherwise misrepresent by any means, directly or indirectly, the:
 - (1) ILMT audit records;
 - (2) ILMT, except for changes provided by IBM; or
 - (3) Audit Reports that Customer submits to IBM.
- d. generate, using ILMT or manually, Audit Reports at least each calendar or fiscal quarter and retain for a period of not less than two years the Audit Reports and make these reports available to IBM upon notice as specified in Section 1.14. Failure to generate Audit Reports or make Audit Reports available to IBM will result in charging for Eligible Sub-Capacity Products under Full Capacity terms;
- e. assign a person in Customer's organization with authority to manage and promptly resolve any questions on Audit Reports or inconsistencies between Audit Report contents, license entitlement, or ILMT configuration;
- f. promptly place an order with IBM or Customer's IBM reseller if Audit Reports reflect Eligible Sub-Capacity Product use in excess of Customer's authorized level. IBM Software Subscription and Support coverage will be determined to begin at the time Customer exceeded Customer's authorized level.

3.2.4 Additional Terms

Product deployments that are not able to meet these Sub-Capacity Licensing requirements must be licensed using Full Capacity terms.

3.3 Fixed Term Licensing

Fixed Term Licenses have a term that begins on the date that Customer's order is accepted by IBM or the calendar day following the expiration of a prior Fixed Term.

3.3.1 Automatic Renewal of Fixed Term Licenses

Customer may renew Customer's expiring Fixed Term License by written authorization to renew (e.g., order form, order letter, purchase order), prior to the expiration date, in accordance with the terms of this Agreement.

IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE, EXPIRING FIXED TERM LICENSES ARE AUTOMATICALLY RENEWED FOR THE SAME DURATION AS THE

EXPIRING TERM UNDER THE TERMS OF THIS AGREEMENT AND AT THE THEN CURRENT RENEWAL CHARGES FOR SUCH PROGRAM LICENSES UNLESS, PRIOR TO THE EXPIRATION DATE, IBM RECEIVES, EITHER DIRECTLY FROM CUSTOMER OR THROUGH CUSTOMER'S RESELLER, AS APPLICABLE, CUSTOMER'S WRITTEN NOTIFICATION THAT CUSTOMER DOES NOT WANT TO RENEW. CUSTOMER AGREES TO PAY SUCH RENEWAL CHARGES.

If Customer chooses not to renew the Fixed Term License, Customer agrees to discontinue use of the Program on the expiration date.

If, after the expiration date, Customer chooses to resume use of the Program, Customer must pay charges associated with an initial Fixed Term License rather than a Fixed Term License renewal.

3.3.2 Withdrawal of Fixed Term License for a particular Program

If IBM withdraws Fixed Term licensing for a particular IBM Program, Customer understands that

- a. Customer may not renew the Fixed Term License for that IBM Program; and
- b. if Customer renewed the Fixed Term License for that IBM Program prior to the notice of withdrawal, Customer may either (a) continue to use the Program under the Fixed Term License terms until the end of the then current Fixed Term or (b) obtain a prorated refund.

3.4 CEO Product Categories

"CEO Product Categories" (groupings of Eligible Products) are acquired on a per-user basis. Customer must acquire Customer's first CEO Product Category ("Primary Product Category") for all CEO Users within Customer's Enterprise and for not less than the number of CEO Users specified in the CEO Product Categories Table at <http://www.ibm.com/software/passportadvantage> .

Customer may acquire additional CEO Product Categories if Customer meets the minimum number of CEO Users requirement specified in the CEO Product Category in the CEO Product Categories Table at <http://www.ibm.com/software/passportadvantage> . However, Customer need not acquire additional CEO Product Categories for all CEO Users within Customer's Enterprise.

A CEO User may use any or all of the Programs included in a chosen CEO Product Category. But all IBM Programs that are used for client access must be acquired from the same CEO Product Category as the server Program they access.

CEO Product Categories: Additions and Deletions

IBM may add Eligible Products to or delete Eligible Products from any CEO Product Category at any time. If IBM deletes an Eligible Product from a CEO Product Category, Customer may continue to use the deleted Eligible Product but Customer may not exceed the number of CEO Users enrolled prior to the deletion.

Increasing the number of CEO Users

In the event Customer increases the number of CEO Users, Customer must acquire an authorization to use the CEO Product Category for each new CEO User.

Decreasing the number of CEO Users

Customer will notify IBM in writing prior to Customer's next Anniversary in the event Customer's total number of CEO Users decreases. Decreases may result from a reorganization, restructuring, or sale of one or more of Customer's Sites. A reduction in the number of CEO Users of a temporary or seasonal nature does not qualify as a decrease. If the level of authorized use of a CEO Product Category drops below the minimum number of CEO Users applicable to that CEO Category, Customer may not renew IBM Software Subscription and Support on a CEO Product Category basis.

3.5 Software Subscription and Support and Selected Support

3.5.1 Software Subscription and Support

- a. For purposes of this Agreement, "software subscription and support" means both IBM Software Subscription and Support and Third Party Software Subscription and Support. IBM provides IBM Software Subscription and Support with each IBM Program licensed under the IPLA. IBM Software Subscription and Support is a single offering not available as separate components. IBM does not provide IBM Software Subscription and Support for (i) Non-IBM Programs or for (ii) Programs that are licensed under the IBM License Agreement for Non-Warranted Programs (together "Selected Programs").

- b. IBM Software Subscription and Support begins on the date of acquisition and ends on the last day of the corresponding month in the following year, unless the date of acquisition is the first day of the month, in which case coverage ends on the last day of the prior month in the following year.
- c. While IBM Software Subscription and Support is in effect for an IBM Program license:
 - (1) IBM will make available to Customer IBM Program defect corrections, restrictions, and bypasses, if any, that it develops.
 - (2) IBM will make available to Customer and authorize Customer to use the most current commercially available version, release, or update, should any be made available.
 - (3) IBM provides Customer assistance for Customer's i) routine, short duration installation and usage (how-to) questions; and ii) code-related questions (together "Support"). Such Support for a particular version or release of an IBM Program is available only until IBM or the third party, as applicable, withdraws Support for that IBM Program's version or release. When Support is withdrawn, Customer must upgrade to a supported version or release of the IBM Program in order to continue to receive Support. The IBM "Software Support Lifecycle" policy is available at <http://www.ibm.com/software/info/supportlifecycle/> .
 - (4) IBM provides Support via electronic access and, if available, telephone, only to Customer's information systems (IS) technical support personnel during the normal business hours (published prime shift hours) of Customer's IBM support center. (This assistance is not available to Customer's end users.) IBM provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Handbook for details at <http://www.ibm.com/software/support> .
 - (5) IBM may request that Customer allow it to remotely access Customer's system to assist Customer in isolating the software problem cause. Customer remains responsible for adequately protecting Customer's system and all data contained in it whenever IBM remotely accesses it with Customer's permission.
- d. IBM Software Subscription and Support does not include assistance for 1) the design and development of applications, 2) Customer's use of IBM Programs in other than their specified operating environment or 3) failures caused by products for which IBM is not responsible under this Agreement.

FOR THE AUTHORIZED USE OF EACH IBM PROGRAM INSTALLED AND IN SERVICE AT A CUSTOMER'S SITE, CUSTOMER HAS THE OPTION TO MAINTAIN IBM SOFTWARE SUBSCRIPTION AND SUPPORT FOR EITHER (a) ALL OF THE AUTHORIZED USE OR (b) NONE OF THE AUTHORIZED USE.

THERE IS NO OPTION FOR MAINTAINING IBM SOFTWARE SUBSCRIPTION AND SUPPORT COVERAGE FOR ONLY A PORTION OF AUTHORIZED USE INSTALLED AND IN SERVICE FOR AN IBM PROGRAM AT A CUSTOMER SITE.

CUSTOMER SHALL NOT USE ANY OF THE IBM SOFTWARE SUBSCRIPTION AND SUPPORT BENEFITS SPECIFIED IN SUBSECTION C OF THIS SECTION 3.5, INCLUDING THE APPLICATION OR USE OF ANY FIXES, UPDATES, OR UPGRADES, FOR IBM PROGRAMS FOR WHICH CUSTOMER HAS NOT FULLY PAID IBM SOFTWARE SUBSCRIPTION AND SUPPORT. IF CUSTOMER USES ANY OF THESE BENEFITS FOR WHICH IT HAS NOT FULLY PAID, THEN CUSTOMER AGREES TO ACQUIRE IBM SOFTWARE SUBSCRIPTION AND SUPPORT REINSTATEMENT SUFFICIENT TO COVER ALL SUCH UNAUTHORIZED USE OF SUCH BENEFITS AT THEN CURRENT APPLICABLE IBM PRICES.

3.5.2 Selected Support

Selected Programs eligible for Selected Support are listed at <http://www.ibm.com/lotus/PASelectedSupportPrograms> .

Selected Support begins on the date that IBM accepts Customer's order for such support and ends on the last day of the corresponding month in the following year, unless IBM accepts Customer's order on the first day of a calendar month, in which case coverage ends on the last day of the immediately preceding calendar month in the following year.

While Selected Support is in effect for a Selected Program:

- a. IBM will make available to Customer Selected Program defect corrections, if any, that it develops.

- b. IBM provides Customer assistance for Customer's 1) routine, short duration installation and usage (how-to) questions; and 2) code related questions. Selected Support for a particular version or release of a Program is available only until IBM withdraws Selected Support for that Program's version, release, or modification. When such Selected Support is withdrawn, Customer must upgrade to a supported version or release of the Program in order to continue to receive such support. The IBM "Software Support Lifecycle" policy does not apply to Selected Support.
- c. IBM may provide Customer with assistance in designing and developing applications based on Customer's subscription level.
- d. IBM may provide assistance via electronic access and, if available, telephone, depending on Customer's location and the subscription level Customer acquires. Such assistance is provided only to Customer's information systems (IS) technical support personnel during the normal business hours (published prime shift hours) of Customer's IBM support center. Consult the IBM Software Support Handbook for details applicable to Selected Support at <http://www.ibm.com/software/support>.
- e. IBM may request that Customer allow it to remotely access Customer's system to assist Customer in isolating the software problem cause. Customer remains responsible for adequately protecting Customer's system and all data contained in it whenever IBM remotely accesses it with Customer's permission.

IBM does not provide licenses under this Agreement for Selected Programs.

3.5.3 Customer Data and Databases

To assist Customer in isolating the cause of a problem with a Program under either IBM Software Subscription and Support or Selected Support, IBM may request that Customer 1) allow IBM to remotely access Customer's system or 2) send Customer information or system data to IBM. IBM uses information about errors and problems to improve its products and services, and assist with its provision of related support offerings. For these purposes, IBM may use IBM entities and subcontractors (including in one or more countries other than the one in which Customer is located), and Customer authorizes IBM to do so.

Customer remains responsible for 1) any data and the content of any database Customer makes available to IBM, 2) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data (including any personally-identifiable data), and 3) backup and recovery of any database and any stored data. Customer will not send or provide IBM access to any personally-identifiable information, whether in data or any other form, and will be responsible for reasonable costs and other amounts that IBM may incur relating to any such information mistakenly provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims.

3.5.4 Automatic Annual Renewal of Software Subscription and Support and Selected Support

Customer may renew Customer's expiring software subscription and support or Selected Support by written authorization to renew (e.g., order form, order letter, purchase order), prior to the expiration date, in accordance with the terms of this Agreement.

IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE, EXPIRING SOFTWARE SUBSCRIPTION AND SUPPORT AND SELECTED SUPPORT ARE AUTOMATICALLY RENEWED TO THE NEXT ANNIVERSARY UNDER THE TERMS OF THIS AGREEMENT AND AT THE THEN CURRENT RENEWAL CHARGES UNLESS, PRIOR TO THE EXPIRATION DATE, IBM RECEIVES, EITHER DIRECTLY FROM CUSTOMER OR THROUGH CUSTOMER'S RESELLER, AS APPLICABLE, CUSTOMER'S WRITTEN NOTIFICATION THAT CUSTOMER DOES NOT WANT TO RENEW. CUSTOMER AGREES TO PAY SUCH RENEWAL CHARGES.

To reinstate any expired software subscription and support coverage, Customer must acquire IBM Software Subscription and Support Reinstatement or Third Party Software Subscription and Support Reinstatement, as applicable.

3.5.5 Withdrawal of Software Subscription and Support or Selected Support for a Particular Program

If IBM or the third party, as applicable, withdraws software subscription and support or Selected Support for a particular Program, Customer understands that

- a. IBM will not make software subscription and support renewal or Selected Support renewal available for that Program; and
- b. if Customer renewed IBM Software Subscription and Support for that IBM Program license or Selected Support for a Selected Program license prior to the notice of withdrawal, IBM may either

continue to provide IBM Software Subscription and Support or Selected Support to Customer for that Program license until the end of the then current term or Customer may obtain a prorated refund. If Customer renewed Third Party Software Subscription and Support for that Non-IBM Program prior to the notice, the third party may continue to provide Third Party Software Subscription and Support to Customer for that Non-IBM Program license until the end of the then current term. If the third party does not do so, Customer may obtain a prorated refund.

4. Appliances

4.1 Virtual Appliance

Customer is licensed to use the Program(s) pursuant to the terms of this Agreement.

4.2 Appliances Comprising Both Program and Machine Components

IBM provides Appliances comprising both Program Components and Machine Components as a single product. Customer shall not use either such component independently of the Appliance of which it is a part for any purpose.

4.3 Program Components

Customer is licensed to use the Program Component(s) pursuant to the terms of this Agreement, but only on the Machine Component supplied by IBM or an authorized reseller or any replacement of a Machine Component provided to Customer by IBM or an authorized reseller. Customer may not transfer its license to use the Program Component(s) to another Enterprise.

4.4 Machine Components

4.4.1 Production Status

Each IBM Machine Component is manufactured from parts that may be new or used. In some cases, an IBM Machine Component may not be new and may have been previously installed. Regardless, IBM's applicable warranty terms described in Part 2.3 apply.

4.4.2 Title and Risk of Loss

When Customer acquires a Machine Component directly from IBM, IBM transfers title to a Machine Component to Customer or, if applicable, Customer's lessor, upon payment of all the amounts due. For a feature, conversion, or another type of upgrade acquired for a Machine Component, IBM reserves transfer of title until IBM receives payment of all the amounts due and, as applicable, all removed parts, which become IBM's property.

For each Machine Component, IBM bears the risk of loss or damage up to the time it is delivered to the IBM-designated carrier for shipment to Customer or Customer's designated location. Thereafter, Customer assumes the risk. Each Machine Component will be covered by insurance, arranged and paid for by IBM for Customer, covering the period until it is delivered to Customer or Customer's designated location. For any loss or damage, Customer must i) report the loss or damage in writing to IBM within 10 business days of delivery and ii) follow the applicable claim procedure.

4.4.3 Installation

a. Machine Component Installation

- (1) Customer agrees to provide an environment meeting the requirements for the Machine Component as specified in its published documentation.
- (2) Customer is responsible for installing a Customer-set-up Machine Component and a non-IBM Machine Component according to instructions provided by IBM or the Machine Component's manufacturer.
- (3) For a Machine Component that IBM is responsible for installing, IBM has standard installation procedures. IBM will successfully complete these procedures before it considers a Machine Component (other than a Machine Component for which Customer defers installation or a Customer-set-up Machine Component) installed. For an IBM Machine Component that IBM is responsible to install, if the IBM Machine Component is not made available for IBM to install within six months from shipment, installation will be subject to an installation charge.

b. Upgrades and Engineering Changes

- (1) IBM sells Upgrades for installation on Machine Components, and, in certain instances, only for installation on a designated, serial-numbered Machine Component. Within 30 days of the

shipment of an Upgrade, Customer agrees to install the Upgrade or, if IBM is responsible for the installation, to allow IBM to install the Upgrade. Certain Upgrade orders may be terminated at IBM's discretion if not made available for IBM to install within 30 days of shipment, in which case Customer must return the Upgrade at Customer's expense. In all cases, if the Upgrade is not made available for IBM to install within six months from the date IBM ships the Upgrade, installation will be subject to an installation charge.

- (2) Customer agrees to allow IBM to install mandatory Engineering Changes (such as those required for safety) on a Machine Component within 30 days of IBM's notice to Customer unless otherwise agreed to by the parties.

Many Upgrades and Engineering Changes require the removal of parts and the transfer of ownership and possession of the removed parts to IBM. Customer is responsible for the return of all removed parts to IBM upon installation of the Upgrade or Engineering Change. As applicable, Customer represents that Customer has permission from the owner and any lien holders to i) install Upgrades and Engineering Changes and ii) transfer ownership and possession of removed parts to IBM. Customer further represents that all removed parts are genuine, unaltered, and in good working order. A part that replaces a removed part will assume the warranty or maintenance service status of the replaced part.

4.4.4 Machine Code Component

A Machine Code Component is licensed under the terms and restrictions of the Machine Code license agreement (e.g., IBM License Agreement for Machine Code, IBM Agreement for Licensed Internal Code, or an equivalent) provided with the Machine Code Component. Customer acceptance of the terms of this Agreement includes acceptance of IBM's Machine Code license agreements, current versions of which are available at the following URL:

http://www.ibm.com/servers/support/machine_warranties/support_by_product.html or by contacting an IBM representative. Machine Code license agreements may be amended by IBM from time to time. Such amended license terms will apply only to Machine Code Component that is supplied after such amended terms become effective.

A Machine Code Component is licensed only for use to enable a Machine Component to function in accordance with its Specifications and only for the capacity and capability for which Customer has acquired IBM's written authorization. Customer agrees to use the Machine Code Component only as specified in this Agreement and as may be further authorized or restricted in its applicable license agreement. Without limiting additional restrictions in the applicable license, Customer may not

- a. otherwise copy, display, transfer, adapt, modify, or distribute (electronically or otherwise) the Machine Code Component, except as IBM may authorize in the Machine Component's user documentation or in writing to Customer;
- b. reverse assemble, reverse compile, otherwise translate, or reverse engineer the Machine Code Component unless expressly permitted by applicable law without the possibility of contractual waiver;
- c. sublicense or assign the license for the Machine Code Component; or
- d. lease the Machine Code Component or any copy of it.

International Business Machines Corporation, one of its subsidiaries, or a third party owns the Machine Code Component including all copyrights in the Machine Code Component and all copies of the Machine Code Component (this includes the original Machine Code Component, copies of the original Machine Code Component, and copies made from copies). The Machine Code Component is copyrighted and licensed (not sold).

Title will not be transferred when IBM supplies features, conversions, or upgrades that consist solely of Machine Code Component.

The capacity of certain Machine Components may be limited by technological measures in the Machine Code Component. Customer agrees to IBM's implementation of such technological measures to limit Machine Component capacity.

4.4.5 Delivery

Delivery dates for Appliances with Machine Components are estimates unless otherwise specifically agreed in a Transaction Document. Transportation charges, if applicable, will be specified in a Transaction Document.

5. IBM SaaS

Customer agrees that IBM is not providing it with access to the Internet in order to use IBM SaaS and that Customer remains responsible for Internet access.

Customer acknowledges that International Business Machines Corporation and its subsidiaries (1) do not control the transfer of data over telecommunications facilities, including the Internet, and (2) in a public Internet environment cannot commit to particular confidentiality obligations.

The exchange of any confidential information made under a separate, signed confidentiality agreement, pursuant to 1.12 of this Agreement, does not apply to Content. IBM assumes no confidentiality obligations regarding Content, notwithstanding the terms of any separate confidentiality agreement between Customer and IBM.

5.1 Ownership

IBM and its suppliers own IBM SaaS. Customer agrees that title to, ownership of and all rights in and to patents, copyrights, trademarks, and all other intellectual property rights in IBM SaaS, and any copy or part of IBM SaaS will remain with IBM and its suppliers. IBM may subcontract IBM SaaS, or any part of it, including technical support, to subcontractors selected by IBM.

5.2 Customer's Right to Use

Customer may use an IBM SaaS offering in accordance with its Terms of Use, up to the specified level of use authorized in the Proof of Entitlement, on condition that:

- a. Customer accepts the Terms of Use of the IBM SaaS offering;
- b. Customer ensures that anyone who uses the IBM SaaS offering does so only on Customer's behalf and complies with the terms of this Agreement and the applicable Terms of Use; and
- c. Customer does not
 - (1) use, copy, modify, or make the IBM SaaS offering available, in whole or on part, to third parties except as expressly permitted in this Agreement and the applicable Terms of Use;
 - (2) reverse assemble, reverse compile, otherwise translate, or reverse engineer the IBM SaaS offering, unless expressly permitted by applicable law without the possibility of contractual waiver;
 - (3) use any of the IBM SaaS offering's components, files, modules, audio-visual content, or related licensed materials separately from that of the IBM SaaS offering;
 - (4) rent, sublicense, or lease the IBM SaaS offering;
 - (5) create Internet "links" to or from the IBM SaaS offering; or
 - (6) "frame" or "mirror" any content forming part of an IBM SaaS offering, other than on Customer's own intranets in connection with Customer's authorized use of the IBM SaaS offering.

5.3 Subscription to IBM SaaS

5.3.1 Terms for a Specific IBM SaaS Offering

The terms of a specific IBM SaaS offering are provided in its Terms of Use and may include without limitation definitions, description of subscription and services, charge metrics, and restrictions.

5.3.2 IBM SaaS Subscription Period

An IBM SaaS Subscription Period begins on the date that IBM notifies Customer that Customer has access to the subscribed offering. The end date of a Subscription Period as specified in a Transaction Document is the last day of a month.

During an IBM SaaS Subscription Period, Customer may increase Customer's subscribed level of an IBM SaaS offering.

Customer may not decrease Customer's subscribed level of an IBM SaaS offering during a Subscription Period but may decrease in a subsequent Subscription Period.

5.3.3 IBM SaaS Subscription Period Renewal

Customer may renew an IBM SaaS offering at the end of a Subscription Period, unless otherwise specified in the offering's Terms of Use. Some IBM SaaS offerings, as specified in the IBM SaaS offering's Terms of Use or Transaction Document, automatically renew at the end of the Subscription

Period unless, prior to the end of the Subscription Period, IBM receives, either directly or through Customer's reseller, as applicable, Customer's written notification not to renew.

5.4 IBM SaaS Technical Support

During an IBM SaaS Subscription Period:

- a. IBM provides assistance, as specified in the ToU, for Customer's offering-specific, task-oriented questions regarding the use of IBM SaaS; and
- b. IBM SaaS technical support is available only for the currently supported versions of IBM SaaS, client operating systems, Internet browsers, and software. IBM technical support is available during the normal business hours (published prime shift hours) of the IBM SaaS support center. Consult the Terms of Use for details applicable to a specific IBM SaaS offering.

5.5 Content

IBM provides only services for Content. IBM is not the publisher of Content transmitted within IBM SaaS. Customer has sole responsibility for the following:

- a. ensuring the adequacy of any IBM SaaS elements to satisfy any Customer requirements;
- b. all Content including, without limitation, its selection, creation, design, licensing, installation, accuracy, maintenance, testing, backup and support;
- c. having all necessary authorizations to allow IBM and its subcontractors to host, cache, record, copy, and display Content, and Customer represents that it has and will keep in effect during its use of IBM SaaS all such authorizations and approvals necessary to grant IBM and its subcontractors these rights, and that such rights are provided at no charge to IBM. Customer retains all right, title, and interest in and to its Content; and
- d. the selection and implementation of procedures and controls regarding access, security, encryption, use, transmission, and backup and recovery of Content.

Customer grants to IBM and its subcontractors a nonexclusive, irrevocable, worldwide, royalty-free, fully-paid, transferable license to host, cache, record, copy, and display Content, solely for the purpose of making IBM SaaS available.

5.6 Termination of IBM SaaS

IBM may withdraw the IBM SaaS in its entirety on 12 months' written notice to all then current Customers by letter or e-mail.

Notwithstanding anything to the contrary in this Agreement, if IBM terminates Customer's access to the IBM SaaS due to Customer's breach of any of the applicable terms of this Agreement, IBM is not obligated to issue a refund or credit for any unused portion of IBM SaaS.

6. Country-unique Terms

For transactions performed in the countries specified below, the following terms replace or modify the referenced terms in Parts 1 through 5. All terms in Parts 1 through 5 that are not changed by these amendments remain unchanged and in effect. This part 6 is organized as follows:

- Section 6.1 contains multiple country amendments to section 1.15 (Geographic Scope and Governing Law);
- Section 6.2 contains the Americas country amendments to other Agreement terms;
- Section 6.3 contains the Asia Pacific country amendments to other Agreement terms; and
- Section 6.4 contains the Europe, Middle East, and Africa country amendments to other Agreement terms.

6.1 Multiple country amendments to section 1.15 (Geographic Scope and Governing Law)

6.1.1 Geographic Scope

EUROPE, MIDDLE EAST, AND AFRICA

In South Africa, Namibia, Lesotho, and Swaziland, the following paragraph pertains to geographic scope and replaces the first paragraph in section 1.15 Governing Law:

The rights, duties, and obligations of each party are valid only in South Africa, Namibia, Lesotho, and Swaziland, unless otherwise stated in a Transaction Document, except that all licenses are valid as specifically granted.

6.1.2 Governing Law

In the second paragraph of section 1.15 Governing Law, the phrase, "the laws of the country in which the transaction is performed" is replaced with the following:

AMERICAS

- a. in **Canada**: the laws in the Province of Ontario;
- b. in **Mexico**: the federal laws of the Republic of Mexico;
- c. in the **United States, Anguilla, Antigua/Barbuda, Aruba, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Maarten, and Saint Vincent and the Grenadines**: the laws of the State of New York, United States;
- d. in **Venezuela**: the laws of the Bolivarian Republic of Venezuela;

ASIA PACIFIC

- e. in **Cambodia and Laos**: the laws of the State of New York, United States;
- f. in **Australia**: the laws of the State or Territory in which the transaction is performed;
- g. in **Hong Kong SAR and Macau SAR**: the laws of Hong Kong Special Administrative Region ("SAR");
- h. in **Taiwan**: the laws of Taiwan;

EUROPE, MIDDLE EAST, AND AFRICA

- i. in **Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan**: the laws of Austria;
- j. in **Algeria, Andorra, Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna**: the laws of France;
- k. in **Estonia, Latvia, and Lithuania**: the laws of Finland;
- l. in **Angola, Bahrain, Botswana, Burundi, Egypt, Eritrea, Ethiopia, Ghana, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, the United Kingdom, West Bank/Gaza, Yemen, Zambia, and Zimbabwe**: the laws of England; and
- m. in **South Africa, Namibia, Lesotho and Swaziland**: the laws of the Republic of South Africa.

6.1.3 Jurisdiction

The following paragraph pertains to jurisdiction and is added to section 1.15 as it applies for the countries identified in bold print below:

All rights, duties, and obligations under this Agreement are subject to the courts of the country in which the transaction is performed except that in the countries identified below, all disputes arising out of or related to this Agreement, including summary proceedings, will be brought before and subject to the exclusive jurisdiction of the following courts of competent jurisdiction:

AMERICAS

- a. in **Argentina**: the Ordinary Commercial Court of the city of Buenos Aires,
- b. in **Brazil**: the court of Rio de Janeiro, RJ;
- c. in **Chile**: the Civil Courts of Justice of Santiago;
- d. in **Colombia**: the judges and courts of general jurisdiction of Bogota, Colombia;
- e. in **Ecuador**: the civil judges of Quito for executory or summary proceedings (as applicable);

- f. in **Mexico**: the courts located in Mexico City, Federal District;
- g. in **Peru**: the judges and tribunals of the judicial district of Lima, Cercado;
- h. in **Uruguay**: the courts of the city of Montevideo;
- i. in **Venezuela**: the courts of the metropolitan area of the city of Caracas;

EUROPE, MIDDLE EAST, AND AFRICA

- j. in **Austria**: the court of law in Vienna, Austria (Inner-City);
- k. in **Algeria, Andorra, Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, France, French Guiana, French Polynesia, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Monaco, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna**: the Commercial Court of Paris;
- l. in **Angola, Bahrain, Botswana, Burundi, Egypt, Eritrea, Ethiopia, Ghana, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, the United Kingdom, West Bank/Gaza, Yemen, Zambia, and Zimbabwe**: the English courts;
- m. in **South Africa, Namibia, Lesotho and Swaziland**: the High Court in Johannesburg;
- n. in **Greece**: the competent court of Athens;
- o. in **Israel**: the courts of Tel Aviv-Jaffa;
- p. in **Italy**: the courts of Milan;
- q. in **Portugal**: the courts of Lisbon;
- r. in **Spain**: the courts of Madrid; and
- s. in **Turkey**: the Istanbul Central Courts and Execution Directorates of Istanbul, the Republic of Turkey.

6.1.4 Arbitration

The following terms pertain to arbitration and are added to section 1.15 as they apply for the countries identified in bold print below. The provisions of these paragraphs apply to the extent permitted by applicable governing law and rules of procedure:

ASIA PACIFIC

- a. in Cambodia, India, Laos, Philippines, and Vietnam: Disputes arising out of or in connection with this Agreement will be finally settled by arbitration, which will be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center (“SIAC Rules”) then in effect. The arbitration award will be final and binding for the parties without appeal and will be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators will be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties will appoint a third arbitrator who will act as chairman of the proceedings. Vacancies in the post of chairman will be filled by the president of the SIAC. Other vacancies will be filled by the respective nominating party. Proceedings will continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator will be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings will be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version.

- b. in the People’s Republic of China: In the event of a dispute, in case no settlement can be reached, the disputes will be submitted to China International Economic and Trade Arbitration Commission for arbitration according to the then effective rules of the said Arbitration Commission. The arbitration will take place in Beijing and be conducted in Chinese. The arbitration award will be final and binding on

both parties. During the course of arbitration, this Agreement will continue to be performed except for the part that the parties are disputing and which is undergoing arbitration.

- c. in Indonesia: Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse.

Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration that shall be held in Jakarta, Indonesia in accordance with the rules of Board of the Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia or "BANI") then in effect. The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators shall be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the chairman of the BANI. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings shall be conducted, including all documents presented in such proceedings, in the English and/or Indonesian language.

EUROPE, MIDDLE EAST, AND AFRICA

- d. in Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan: All disputes arising out of this Agreement or related to its violation, termination or nullity will be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Center of the Federal Economic Chamber in Vienna (Vienna Rules) by three arbitrators appointed in accordance with these rules. The arbitration will be held in Vienna, Austria, and the official language of the proceedings will be English. The decision of the arbitrators will be final and binding upon both parties. Therefore, pursuant to paragraph 598 (2) of the Austrian Code of Civil Procedure, the parties expressly waive the application of paragraph 595 (1) figure 7 of the Code. IBM may, however, institute proceedings in a competent court in the country of installation; and
- e. in Estonia, Latvia, and Lithuania: All disputes arising in connection with this Agreement will be finally settled in arbitration that will be held in Helsinki, Finland in accordance with the arbitration laws of Finland then in effect. Each party will appoint one arbitrator. The arbitrators will then jointly appoint the chairman. If arbitrators cannot agree on the chairman, then the Central Chamber of Commerce in Helsinki will appoint the chairman.

6.2 AMERICAS COUNTRY AMENDMENTS

BELIZE, COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, HAITI, HONDURAS, GUATEMALA, NICARAGUA, AND PANAMA

3.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE":

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer's Program licenses and Selected Support for all of Customer's Selected Program licenses to the next Anniversary if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

3.3 Automatic Renewal of Fixed Term Licenses

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE":

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer's Program licenses for the same duration as the expiring term if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the Fixed Term License invoice for the next term.

ALL AMERICAS (EXCEPT BRAZIL, CANADA, MEXICO, AND THE UNITED STATES)

The following terms apply to all Americas countries (except Brazil, Canada and the United States), unless a specific country term states otherwise.

1.6 Payment

The following replaces 1.6:

Amounts are due upon receipt of invoice and payable as IBM specifies in a Transaction Document. The currency for payment of amounts due is US dollars or the equivalent in local currency as follows:

1. As long as the country operates in a free currency exchange market, Customer and IBM agree that IBM will accept payment in the applicable country national currency calculated at the country official exchange rate published by the bank specified in a Transaction Document on the date payment is made.
2. If the government of a country establishes any restriction or limitation on its free currency exchange markets, Customer agrees to make payments to IBM in US dollars to a bank account in New York, NY, USA, designated by IBM in the Transaction Document, provided that such payment is not illegal under country law. If such method of payment is forbidden by country law, Customer agrees to pay the amount indicated in the Transaction Document in country national currency, calculated at the official exchange rate that is in use for the remittance of dividends and net earnings to foreign investors outside the country.

Customer agrees to pay accordingly, including any late payment fee. The late payment fee is calculated and payable in US dollars at two percent (or the maximum rate allowed by local law if such is less than two percent) of the delinquent amount due per each thirty day period during which any delinquent balance remains unpaid.

LATIN AMERICA

The following term applies to all countries in Latin America, except for Argentina and Brazil.

1.4 Acceptance of Terms

The following replaces the first sentence:

Customer accepts the terms in Attachments and Transaction Documents by signing them.

ARGENTINA, BRAZIL, CHILE, COLOMBIA, ECUADOR, MEXICO, PERU, URUGUAY, VENEZUELA

3.3 Automatic Renewal of Fixed Term Licenses and 3.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

Does not apply for Public Bodies who are subject to the applicable Public Sector Procurement Legislation.

BRAZIL AND COLOMBIA

1.13 Agreement Termination

The following is added after the fourth paragraph:

All notices will be sent to the other party by registered letter.

ARGENTINA

1.4 Acceptance of Terms

The following replaces the second sentence:

A Product or Service becomes subject to this Agreement when IBM accepts Customer's order by signing a Transaction Document.

1.7 Taxes

Both IBM and the Customer will pay the stamp tax in equal amounts and when applicable Impuesto de Sellos).

BRAZIL

1.4 Acceptance of Terms

The following replaces the second paragraph in this section:

An Eligible Product becomes subject to this Agreement when IBM accepts Customer's order by signing a Transaction Document.

1.6 Payment

The following replaces 1.6:

Amounts due are expressed in local currency.

Amounts are due upon receipt of invoice and payable in local currency as IBM specifies in a Transaction Document. Customer agrees to pay accordingly, including any late payment fee. Delinquent amounts are subject to monetary correction based on the inflation index called the "General Price Index" calculated by Getulio Vargas Foundation (IGP-M/FGV), plus interest at the rate of one percent per month, both calculated "pro rata die." The late payment fee is calculated against the resultant delinquent amount at the following rates:

1. two percent of the delinquent amount due per the first thirty day period during which any delinquent balance remains unpaid, plus
2. ten percent for each successive thirty day period during which any delinquent balance remains unpaid.

1.12 Notices and Communications

The following replaces 1.12:

Each of us may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;

1.8 Eligible Products

The following replaces the first sentence in the second paragraph in this section:

IBM may add or withdraw Eligible Products at any time. IBM's ability to increase such charges, rates, and minimums will be subject to the requirements of Brazilian law.

3.3 Automatic Renewal of Fixed Term Licenses and 3.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

The following is added after the second paragraphs of both sections:

The transaction document will describe the process of the written communication to Customer containing the applicable price and other information for the renewal period.

3.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

The following is added to this section

Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support: Portuguese version of the Support Handbook will be provided upon written request.

COLOMBIA

1.7 Taxes

Customer and IBM accepts to pay, each one, fifty percent (50%) of legalization costs of the Proposal.

MEXICO

1.6 Payment

The following replaces 1.6:

Amounts are due upon receipt of invoice and payable as IBM specifies in a Transaction Document. The currency for payment of amounts due is US dollars or the equivalent in local currency as follows:

The payment must be made in United States Dollars or the equivalent in local currency at the exchange rate published by the "Banco de México" in the Diario Oficial de la Federacion correspondent to the payment date of the invoice.

Customer agrees to pay accordingly, including any late payment fee. The late payment fee is calculated and payable in US dollars at two percent (or the maximum rate allowed by local law if such is less than two percent) of the delinquent amount due per each thirty day period during which any delinquent balance remains unpaid.

PERU

1.11 Limitation of Liability

The following is added to the end of this section:

Except as expressly required by law without the possibility of contractual waiver, Customer and IBM intend that the limitation of liability in this Limitation of Liability section applies to damages caused by all types of claims and causes of action. If any limitation on or exclusion from liability in this section is held by a court of competent jurisdiction to be unenforceable with respect to a particular claim or cause of action, the parties intend that it nonetheless apply to the maximum extent permitted by applicable law to all other claims and causes of action. In accordance with Article 1328 of the Peruvian Civil Code, the limitations and exclusions specified in this section will not apply to damages caused by IBM's willful misconduct ("dolo") or gross negligence ("culpa inexcusable").

NORTH AMERICA

CANADA

1.11 Limitation of Liability

1.11 Items for which IBM May be Liable

The following replaces the last sentence in this section 1.11:

Damages for bodily injury (including death) and physical harm to real property and tangible personal property caused by IBM's negligence for which IBM is legally liable are not subject to a cap on the amount of damages.

1.4 General Principles of Our Relationship

1.12 Compliance with Laws

The following replaces the one-sentence paragraph at the end of this section:

Each party will comply with applicable export and import laws and regulations, including those that apply to goods of US origin and those that restrict or prohibit or limit export for certain uses or to certain users.

1.12 Other Principles of Our Relationship

The following replaces item 1.12:

No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except or as permitted by the Limitation of Liability section above for bodily injury (including death) or physical harm to real or tangible personal property caused by IBM's negligence for which IBM is legally liable to that third party.

The following subsection is added:

1.14.6 Data Privacy

For purposes of this section, "Personal Data" refers to information relating to an identified or identifiable individual made available by one of the parties, its personnel, or any other individual to the other in connection with this Agreement. The following provisions apply in the event that one party makes Personal Data available to the other:

a. General

- (1) Each party is responsible for complying with any obligations applying to it under applicable Canadian data privacy laws and regulations ("Laws").

(2) Neither party will request Personal Data beyond what is necessary to fulfill the purpose(s) for which it is requested. The purpose(s) for requesting Personal Data must be reasonable. Each party will agree in advance as to the type of Personal Data that is required to be made available.

b. Security Safeguards

- (1) Each party acknowledges that it is solely responsible for determining and communicating to the other the appropriate technological, physical, and organizational security measures required to protect Personal Data.
- (2) Each party will ensure that Personal Data is protected in accordance with the security safeguards communicated and agreed to by the other.
- (3) Each party will ensure that any third party to whom Personal Data is transferred is bound by the applicable terms of this section.
- (4) Additional or different services required to comply with the Laws will be deemed a request for new services.

c. Use

Each party agrees that Personal Data will only be used, accessed, managed, transferred, disclosed to third parties, or otherwise processed to fulfill the purpose(s) for which it was made available.

d. Access Requests

- (1) Each party agrees to reasonably cooperate with the other in connection with requests to access or amend Personal Data.
- (2) Each party agrees to reimburse the other for any reasonable charges incurred in providing each other assistance.
- (3) Each party agrees to amend Personal Data only upon receiving instructions to do so from the other party or its personnel.

e. Retention

Each party will promptly return to the other or destroy all Personal Data that is no longer necessary to fulfill the purpose(s) for which it was made available, unless otherwise instructed by the other or its personnel or required by law.

f. Public Bodies Who Are Subject to Public Sector Privacy Legislation

For Customers who are public bodies subject to public sector privacy legislation, this section 1.14.6 applies only to Personal Data made available to Customer in connection with this Agreement, and the obligations in this section apply only to Customer, except that: 1) section b(1) applies only to IBM; 2) sections a(1) and d(1) apply to both parties; and 3) section d(2) and the last sentence in a(2) do not apply.

UNITED STATES OF AMERICA

1.7 Taxes

The following is added at the end of this section

For Programs delivered electronically in the United States for which Customer claims a state sales and use tax exemption, Customer agrees not to receive any tangible personal property (e.g., media and publications) associated with the electronic program.

1.12 General Principles of Our Relationship

1.12 Dispute Resolution

The following is added to the end of this section:

Each party waives any right to a jury trial in any proceeding arising out of or related to this Agreement.

1.12 Other Principles of Our Relationship

The following is added as 1.12.m:

U.S. Government Users Restricted Rights - Use, duplication or disclosure is restricted by the GSA IT Schedule 70 Contract with the IBM Corporation.

3. Programs and Subscription and Support

The following sentence is added at the end of the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

CUSTOMER MAY TERMINATE SOFTWARE SUBSCRIPTION AND SUPPORT FOR A PROGRAM OR SELECTED SUPPORT FOR A SELECTED PROGRAM LICENSE AT ANY TIME AFTER THE FIRST ANNIVERSARY ON ONE MONTH'S WRITTEN NOTICE, EITHER DIRECTLY TO IBM OR THROUGH CUSTOMER'S IBM RESELLER, AS APPLICABLE, IF IBM HAS NOT RECEIVED CUSTOMER'S WRITTEN AUTHORIZATION (e.g., order form, order letter, purchase order) TO RENEW CUSTOMER'S EXPIRING SOFTWARE SUBSCRIPTION AND SUPPORT OR SELECTED SUPPORT. IN SUCH EVENT, CUSTOMER MAY OBTAIN A PRORATED REFUND.

The following sentence is added at the end of the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.3 Automatic Renewal of Fixed Term Licenses:

CUSTOMER MAY TERMINATE A PROGRAM'S FIXED TERM LICENSE AT ANY TIME AFTER ITS INITIAL TERM ON ONE MONTH'S WRITTEN NOTICE, EITHER DIRECTLY TO IBM OR THROUGH CUSTOMER'S IBM RESELLER, AS APPLICABLE, IF IBM HAS NOT RECEIVED CUSTOMER'S WRITTEN AUTHORIZATION (e.g., order form, order letter, purchase order) TO RENEW CUSTOMER'S EXPIRING FIXED TERM LICENSE. IN SUCH EVENT, CUSTOMER MAY OBTAIN A PRORATED REFUND.

2.3 Extent of Warranty

The following is added as the first paragraph:

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

4.4 Machine Components

4.4 Title and Risk of Loss

The following replaces the first paragraph:

When IBM accepts Customer's order, IBM agrees to sell Customer the Machine Component described in a Transaction Document. IBM transfers title to Customer or, if applicable, Customer's lessor when the Machine Component is shipped to Customer or its designated location. However, IBM reserves a purchase money security interest in the Machine Component until IBM receives the amounts due. For a feature, conversion, or upgrade involving the removal of parts that become IBM's property, IBM reserves a security interest until IBM receives payment of all the amounts due and the removed parts. Customer authorizes IBM to file appropriate documents to permit IBM to perfect its security interest.

6.3 ASIA PACIFIC COUNTRY AMENDMENTS

AUSTRALIA

1.3 Definitions - Definition of "Personal Data"

The definition is amended and replaced with the following:

"Personal Data – any information that can be used to identify a specific individual such as name, email address, home address or phone number that is provided to IBM to store, process or transfer and includes Personal Information as defined by the Privacy Act 1988 (Cth)."

1.6 Payment

The following paragraph is added after 1.6 as 1.6d:

All charges or other amounts payable under this Agreement are specified to include applicable goods and services tax ("GST").

1.7 Taxes

The following paragraph replaces 1.7 in its entirety:

If any government or authority imposes a duty, tax (other than income tax), levy, or fee, on this Agreement or on the Eligible Product itself, that is not otherwise provided for in the amount payable, Customer agrees to pay it when IBM invoices Customer. If the rate of GST changes, IBM may

adjust the charge or other amount payable to take into account that change from the date the change becomes effective.

1.10 Intellectual Property Protection

1.10 Claims for which IBM is Not Responsible

The following replaces the second from last sentence:

Subject to any rights Customer may have under the Trade Practices Act 1974, this Intellectual Property Protection section states IBM's entire obligation to Customer and Customer's exclusive remedy regarding any third party intellectual property claims.

1.11 Limitation of Liability

The following paragraph is included at the end of 1.11:

Where IBM is in breach of a guarantee implied by the Competition and Consumer Act 2010, IBM's liability is limited to, at IBM's discretion:

(a) for services:

- (1) the supplying of the services again or
- (2) the payment of the cost of having the services supplied again; and

(b) for goods:

- (1) the repair or replacement of the goods or the supply of equivalent goods; or
- (2) the payment of the cost of replacing the goods or having the goods repaired

Where a guarantee relates to the right to sell, quiet possession or clear title of a good under schedule 2 of the Competition and Consumer Act, or the goods or services are of a kind ordinarily acquired for personal, domestic, or household use or consumption, then none of the limitations in this section apply.

2.5 Extent of Warranty

The following paragraph is added after the paragraph that begins "These warranties are customer's exclusive warranties.."

The warranties specified this Section are in addition to any rights Customer may have under the Competition and Consumer Act 2010 or other legislation and are only limited to the extent permitted by the applicable legislation. The reference to warranties and conditions throughout this agreement includes a reference to guarantees for the purpose of the Competition and Consumer Act 2010.

The following paragraph replaces the paragraph that begins "Unless otherwise specified in an Attachment or Transaction Document.."

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, without warranties, conditions, or guarantees of any kind. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Customer.

5.5 Content

The following paragraph is added after the paragraph that begins "IBM provides only storage and delivery services for Content."

To the extent IBM is collecting any Personal Data, Customer acknowledges that in disclosing the Personal Data to IBM, it has undertaken all steps necessary to comply with the disclosure and collection requirements of the National Privacy Principles contained in the Privacy Act 1988, Customer agrees and acknowledges that it has taken reasonable steps to disclose to the relevant individuals such information about IBM that is prescribed under National Privacy Principle 1.3 that Customer reasonably believes is necessary for Customer to comply with the National Privacy Principle.

NEW ZEALAND

1.3 Definitions - Definition of "Personal Data"

The definition is amended and replaced with the following:

"Personal Data – any information that can be used to identify a specific individual such as name, email address, home address or phone number that is provided to IBM to store, process or transfer

and includes Personal Information as defined by the Privacy and Personal Information Protection Act.”

1.6 Payment

The following paragraph is added after 1.6 as 1.6d:

All charges or other amounts payable under this Agreement are specified to include applicable goods and services tax (“GST”).

1.7 Taxes

The following paragraph replaces 1.7 in its entirety:

If any government or authority imposes a duty, tax (other than income tax), levy, or fee, on this Agreement or on the Eligible Product itself, that is not otherwise provided for in the amount payable, Customer agrees to pay it when IBM invoices Customer. If the rate of GST changes, IBM may adjust the charge or other amount payable to take into account that change from the date the change becomes effective.

2.5 Extent of Warranty

The following paragraph is added after the paragraph that begins “These warranties are customer’s exclusive warranties..”

The warranties specified in this section are in addition to any rights Customer may have under the Consumer Guarantee Act 1993 or other legislation that cannot be excluded or limited by law.

The following paragraph replaces the paragraph that begins “Unless otherwise specified in an Attachment or Transaction Document..”

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, without warranties, conditions, or guarantees of any kind. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Customer.

BANGLADESH, BHUTAN, AND NEPAL 3.5 Programs and Subscription and Support

The following replaces the paragraph that begins “IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE” in 3.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer’s Program licenses or Selected Support for all of Customer’s Selected Program licenses to the next Anniversary if IBM or Customer’s reseller receives (1) Customer’s order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer’s payment within 30 days of Customer’s receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

The following replaces the paragraph that begins “IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE” in 3.3 Automatic Renewal of Fixed Term Licenses:

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer’s Program licenses for the same duration as the expiring term if IBM or Customer’s reseller receives (1) Customer’s order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer’s payment within 30 days of Customer’s receipt of the Fixed Term License invoice for the next term.

HONG KONG SAR, MACAU SAR, AND TAIWAN

As applies to transactions initiated and performed in Taiwan and the Special Administration Regions “SARs” specified, phrases throughout this Agreement containing the word “country” (for example, “country of acquisition” and “country of installation”) are replaced with the following:

- 1) In **Hong Kong SAR**: “Hong Kong SAR”
- 2) In **Macau SAR**: “Macau SAR,” except under section 1.15 (Governing Law) above; and
- 3) In **Taiwan**: “Taiwan.”

INDIA

1.12 Dispute Resolution

The following replaces the final sentence in 1.12:

If no suit or other legal action is brought, within three years after the cause of action arose, in respect of any claim that either party may have against the other, the rights of the concerned party in respect of such claim will be forfeited and the other party will stand released from its obligations in respect of such claim.

INDONESIA

1.13 Agreement Termination

The following paragraph is added:

Both parties waive the provisions of article 1266 of the Indonesian Civil Code to the extent the article requires such court decree for the termination of an agreement creating mutual obligations.

JAPAN

1.6 Payment

Add the following sentence:

Customer agrees to pay within 30 days from our invoice date.

1.12 Dispute Resolution

The following is inserted at the end of 1.12:

Any doubts concerning this Agreement will be initially resolved between us in good faith and in accordance with the principle of mutual trust.

PEOPLE'S REPUBLIC OF CHINA

1.3 Definitions - Definition of "Date of Installation"

The following replaces the definition of Date of Installation:

Date of Installation —

- a. for an IBM Machine Component IBM is responsible for installing, the business day after the day IBM installs it.
- b. for a Customer-set-up (CSU) Machine Component, the earlier of i) the second business day after arrival at Customer's installation location or ii) two months after the date of delivery. When a CSU Machine Component is delivered for connection to a non-CSU Machine or Machine Component delivered by IBM, the Date of Installation of the CSU Machine Component will be the later of these two installation dates.

SINGAPORE

1.12 Other Principles of Our Relationship

The following replaces the terms of 1.12:

Subject to the rights provided to IBM's Eligible Product developers and suppliers as provided in 1.11 above (Limitation of Liability), a person who is not a party to this Agreement will have no right under the Contracts (Right of Third Parties) Act to enforce any of its terms.

6.4 EUROPE, MIDDLE EAST, AFRICA COUNTRY AMENDMENTS

Amendments Applicable to Many Countries

EUROPE, MIDDLE EAST, AND AFRICA

The following term applies to all countries in Europe, the Middle East, and Africa, unless a specific country term states otherwise.

1.11 Items for which IBM May be Liable

In the first paragraph, the following replaces "U.S. \$100,000":

EUR 500,000 (five hundred thousand euro)

EU MEMBER STATES AND ADDITIONAL COUNTRIES SPECIFIED

The following term applies to all EU Member States, Iceland, Liechtenstein, Norway, Switzerland, Turkey, and any other European country that has enacted local data privacy or protection legislation similar to the EU model.

1.12 Other Principles of Our Relationship

The following replaces 1.12:

- a. Definitions – For the purposes of 1.12, the following additional definitions shall apply:
 - (1) Business Contact Information – business-related contact information disclosed by Customer to IBM, including names, job titles, business addresses, telephone numbers and email addresses of Customer’s employees and contractors.
 - (2) Business Contact Personnel – Customer employees and contractors to whom the Business Contact Information relates. For Austria, Italy, and Switzerland, Business Contact Information also includes information about Customer and its contractors as legal entities (for example, Customer’s revenue data and other transactional information).
 - (3) Data Protection Authority – the authority established by the Data Protection and Electronic Communications Legislation in the applicable country or, for non-EU countries, the authority responsible for supervising the protection of personal data in that country, or (for any of the foregoing) any duly appointed successor entity thereto.
 - (4) Data Protection & Electronic Communications Legislation – i) the applicable local legislation and regulations in force implementing the requirements of EU Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) and of EU Directive 2002/58/EC (concerning the processing of personal data and the protection of privacy in the electronic communications sector); or ii) for non-EU countries, the legislation and/or regulations passed in the applicable country relating to the protection of personal data and the regulation of electronic communications involving personal data, including (for any of the foregoing) any statutory replacement or modification thereof.
 - (5) IBM Group – International Business Machines Corporation of Armonk, New York, USA, its subsidiaries, and their respective Business Partners and subcontractors.
- b. Customer authorises IBM:
 - (1) to process and use Business Contact Information within IBM Group in support of Customer, including the provision of support services, and for the purpose of furthering the business relationship between Customer and IBM Group, including, without limitation, contacting Business Contact Personnel (by email or otherwise) and marketing IBM Group products and services (the “Specified Purpose”); and
 - (2) to disclose Business Contact Information to other members of IBM Group in pursuit of the Specified Purpose only.
- c. IBM agrees that all Business Contact Information will be processed in accordance with the Data Protection & Electronic Communications Legislation and will be used only for the Specified Purpose.
- d. To the extent required by the Data Protection & Electronic Communications Legislation, Customer represents that it has obtained (or will obtain) any consents from (and has issued (or will issue) any notices to the Business Contact Personnel as are necessary in order to enable IBM Group to process and use the Business Contact Information for the Specified Purpose.
- e. Customer authorizes IBM to transfer Business Contact Information outside the European Economic Area, provided that the transfer is made on contractual terms approved by the Data Protection Authority or the transfer is otherwise permitted under the Data Protection & Electronic Communications Legislation.

The following terms are added as a new section 4.4.6 for Iceland, Norway, and all Member States of the European Union (“EU”), except Germany:

4.4.6 Disposal of Machines

As from the effective date in Customer's country of local laws and regulations implementing Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), the following applies:

4.4.6.1 When any Machine supplied under this Agreement replaces a machine put on the market before August 13, 2005, then IBM will collect and dispose of such replaced machine, provided that IBM is required to do so by applicable law. IBM may charge for such collection and disposal, to the extent permitted by applicable law.

4.4.6.2 For all WEEE, Customer is responsible for making the WEEE available for collection from Customer's premises within 30 days after supply of the replacement Machine. Whenever IBM collects and disposes of Customer WEEE, based on a legal or contractual obligation, Customer agrees:

- a. to securely erase from any WEEE all programs not provided by IBM with the original equipment and data, including without limitation, the following: i) information about identified or identifiable individuals or legal entities ("Personal Data"); and ii) Customer's confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, Customer agrees to transform such information (e.g., by making it anonymous) so that it no longer qualifies as Personal Data under applicable law;
- b. to remove all funds, if any, from WEEE, returned to IBM;
- c. that IBM is not responsible for saving or protecting any funds, programs not provided by IBM with the original equipment, or any data contained in a WEEE that Customer returns to IBM; and
- d. that IBM may ship all or part of the WEEE or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

WESTERN EUROPEAN COUNTRIES

2.3 Warranty for IBM Machine Components of IBM Appliances

The following paragraph is added after the second paragraph for all countries listed in the definition of Western Europe below:

The warranty for IBM Machines acquired in Western Europe will be valid and applicable in all Western European countries provided the Machines have been announced and made available in such countries. For purposes of this paragraph, "Western Europe" means Andorra, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Vatican State, and any country subsequently that subsequently joins the European Union, as from the date of accession.

EMEA-WIDE

1.6 Payment

The following replaces 1.6 for the following countries except as noted:

Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment charges.

If payment is not made within 30 days from the date of invoice, (or in the case of quarterly advance billing of recurring charges, within 60 days from the date of invoice), Customer may be subject to late payment charges.

The late payment charges are calculated as follows:

Belgium and Luxembourg:

Replace the first sentence in the second paragraph of the above EMEA-wide text with the following:

Any amounts not paid within the terms stated on the IBM invoice will be subject to a late payment fee that will be equal to 1% per period of 30 days, based on the outstanding balance VAT included, until paid in full. Late payment fees due will have to be paid at the end of each period of 30 days.

Denmark and Sweden:

Interest according to the Late Payment Interest Act apportioned to the number of days of delay.

Estonia, Latvia, and Lithuania:

2% per month apportioned to the number of days of delay.

Finland:

Interest according to the Act on interest rate apportioned to the number of days of delay.

France:

In compliance with article 441-6 of the Code of Commerce, a late payment fee is payable, without any need for IBM to issue a reminder, in respect of the period commencing on the day following the payment due date specified on IBM's invoice, and ending on the date when full payment of the invoiced amount is made; such late payment fee shall be calculated on the basis of a rate equal to the European Central Bank's rate for its most recent refinancing operation, plus 10 points.

Germany:

Late payment fees will be calculated according to the German statutory rate.

In the second paragraph of the above EMEA-wide text replace both usages of "date of invoice" with the following:

due date

Greece:

The following replaces the above EMEA-wide text:

Amounts are due and payable upon receipt of invoice. If payment is not made within 30 days from the date of invoice, Customer may be subject to late payment fees.

The late payment fees will be calculated, per day of actual delay, from the due date of the invoice, based on the maximum rate of late payment fee allowed by law.

Italy:

Replace the final paragraph of the above EMEA-wide text with the following:

The late payment charges will be calculated, per day of actual delay, based on the prime rate published by the Italian Banking Association ABI in effect on the last day of the month the payment has been received by IBM, increased by three points.

In case of no payment or partial payment and following a formal credit claim procedure or trial IBM might initiate, the late payment fee will be calculated from the due date of the invoice based on the prime rate published by the Italian Banking Association ABI in effect on the last day of the month the payment was due, increased by three points. IBM can transfer the credit to a factoring company; if IBM does so, it will advise Customer in writing.

Netherlands:

The following replaces the second and third sentences of the EMEA-wide text:

If payment is not made within 30 days from the date of invoice, Customer will be in default without the necessity of a default notice. In such case Customer will be subject to late payment fees of 1% per month.

Norway:

Interest according to the Late Payment Interest Act apportioned to the number of days of delay.

South Africa, Namibia, Lesotho, Swaziland:

Such charges accrue daily from the date payment must have been received by IBM, and will be equal to 2% (two percent) above the ruling prime rate (of a bank designated by IBM) on any outstanding payment.

Spain:

Such fees will be calculated applying 1% of the charges per month to the number of days of delay.

UK and Ireland:

Such charges will be calculated at a monthly rate of 2% of the invoice amount, or as permitted by applicable law.

UK, Ireland, South Africa, Namibia, Lesotho, Swaziland:

Add the following:

IBM's rights relating to late payment charges shall be in addition to any other right that IBM may have in the event that Customer fails to make any payment due to IBM under this Agreement.

IBM reserves the right to require payment in advance of delivery or other security for payment.

BAHRAIN , KUWAIT, OMAN, QATAR, SAUDI ARABIA, AND UNITED ARAB EMIRATES

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer's Program licenses or Selected Support for all of Customer's Selected Program licenses to the next Anniversary if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.3 Automatic Renewal of Fixed Term Licenses:

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer's Program licenses for the same duration as the expiring term if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the Fixed Term License invoice for the next term.

AUSTRIA

1.6 Payment

Replace the above EMEA-wide text in 1.6 with the following:

Payment in full is due and payable without deduction upon receipt of invoice. Customer agrees to pay accordingly, including any late payment fees. If the invoice amount is not received on IBM's account within 30 days, upon due date, IBM may charge late payment fees at the rate indicated in the Transaction Document.

1.11 Limitation of Liability

The following sentence is added:

The following limitations and exclusions of IBM's liability do not apply for damages caused by gross negligence or willful misconduct.

1.11 Items for which IBM May Be Liable

The following replaces the first sentence:

Circumstances may arise where, because of a default by IBM in the performance of its obligations under this Agreement or other liability, Customer is entitled to recover damages from IBM.

In the second sentence of the first paragraph, delete entirely the parenthetical phrase "(including fundamental breach, negligence, misrepresentation, or other contract or tort claim)."

1.11 Items for which IBM Is Not Liable

The following replaces 1.11:

indirect damages or consequential damages; or

2.5 Extent of Warranty

The following replaces the last paragraph

Warranty for non-IBM Eligible Products:

- (a) Warranty is provided for a period of twelve months, beginning at the date of delivery. Consumers are at least entitled to claim warranty defects within the limitation period provided by law.
- (b) IBM warrants that each non-IBM Eligible Product, when used in the specified operating environment, relates to its functions and conforms to its specifications. In case a non-

IBM Eligible Product is delivered without specifications, IBM only warrants that the non-IBM Eligible Product information correctly describes the non-IBM Eligible Product, and that the non-IBM Eligible Product can be used according to the non-IBM Eligible Product information.

- (c) IBM does not warrant uninterrupted or error-free operation of a non-IBM Eligible Product or that IBM will correct all program defects. The Customer is responsible for the results of the use of a non-IBM Eligible Product. IBM does not warrant uninterrupted or error-free operation of an Eligible Product or that IBM will correct all defects.
- (d) At IBM's discretion, warranty may also be provided by the third party provider himself.
- (e) In the event that IBM is unable to remedy a warranty defect within a reasonable period of time - even after an appropriate grace period - the Customer may in respect of this defect (at his discretion) demand a reduction of price, or rescission of contract. In case of minor defects or deviations, the Customer shall not be entitled to demand a rescission of the contract.
- (f) In addition, the limitation of liability provision will apply.
- (g) However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranty to Customer.

AUSTRIA, DENMARK, ESTONIA, FINLAND, LATVIA, LITHUANIA, NORWAY, SWEDEN:

1.7 Taxes

Delete the last sentence:

This excludes those taxes based on IBM's net income.

BELGIUM, FRANCE, UK, IRELAND, SOUTH AFRICA, NAMIBIA, LESOTHO, SWAZILAND:

1.7 Taxes

Delete 1.7.

EGYPT

1.12. General Principles of Our Relationship

Delete 1.12.

GERMANY

1.11. Limitation of Liability

The following replaces the Limitation of Liability section in its entirety:

- a. IBM will be liable without limit for 1) loss or damage caused by a breach of an express guarantee; 2) damages or losses resulting in bodily injury (including death); and 3) damages caused intentionally or by gross negligence.
- b. In the event of loss, damage and frustrated expenditures caused by slight negligence or in breach of essential contractual obligations, IBM will be liable, regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), per claim only up to the greater of 500,000 euro or the charges (if the Eligible Product is IBM SaaS or subject to Fixed Term charges, up to 12 months' charges) Customer paid for the Eligible Product that caused the loss or damage. A number of defaults which together result in, or contribute to, substantially the same loss or damage will be treated as one default.
- c. In the event of loss, damage and frustrated expenditures caused by slight negligence, IBM will not be liable for indirect or consequential damages, even if IBM was informed about the possibility of such loss or damage.
- d. In case of delay on IBM's part: 1) IBM will pay to Customer an amount not exceeding the loss or damage caused by IBM's delay and 2) IBM will be liable only in respect of the resulting damages that Customer suffers, subject to the provisions of Items a and b above.

1.12. Dispute Resolution

The following replaces the third sentence of 1.12:

Any claims resulting from this Agreement are subject to a limitation period of three years, except as stated in Section 2 (Warranties) of this Agreement.

1.12 Other Principles of Relationship

The following replaces 1.12:

No right or cause of action for any third party is created by this Agreement, nor is IBM responsible for any third party claims against Customer, except (to the extent permitted in Section 1.11 (Limitation of Liability) for: i) bodily injury (including death); or ii) damage to real or tangible personal property for which (in either case) IBM is legally liable to that third party.

2.2 Warranty for IBM Software Subscription and Support and Selected Support

The following replaces 2.2

IBM warrants that Software Maintenance will be provided using reasonable care and skill, and according to its current description and the provisions of this Agreement.

The Customer agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action.

IBM will remedy any defects covered by warranty, of which written notice has been given by Customer. If a defect is not remedied within a reasonable period of time, the Customer may in respect to such defect, provided that the value of the serviceability of the work is impaired, either request a reduction of price, or, rescind this Agreement. In case of minor defects or deviations, the Customer shall not be entitled to rescind this Agreement. In case the Customer should be entitled to liability claims because of a warranty defect, the Limitation of Liability section shall apply. However the Customer shall not be entitled to liability claims resulting from minor warranty defects.

2.3 Warranty for IBM Machine Components of IBM Appliances

The following replaces 2.3:

IBM warrants that each IBM Machine Component is free from defects at the time of delivery and conforms to its Specifications. The warranty period for a Machine Component commences on the Date of Installation, however at the earliest upon delivery. During the warranty period, IBM will remedy any warranty defects, through repair or exchange.

In the event that IBM is unable to remedy a warranty defect or defect correction fails within a reasonable period of time, the Customer may in respect of such defect, provided the value or the serviceability of the Machine Component is impaired, either request a reduction of price, or rescind this Agreement. In case of minor warranty defects, the Customer shall not be entitled to rescind this Agreement.

In case the Customer should be entitled to liability claims because of a warranty defect, the Limitation of Liability section shall apply. However the Customer shall not be entitled to liability claims resulting from minor warranty defects.

2.5 Extent of Warranty

The second paragraph is deleted.

The following replaces the last paragraph:

Warranty for Non-IBM Eligible Products may, at IBM's discretion, also be provided by non-IBM manufacturers, developers, suppliers, or publishers themselves.

4.4.6 Disposal of Machines

The following terms are added as a new section 4.4.6:

In accordance with the law for the placing on the market, the return, and the environmentally compatible disposal of Electrical and Electronic Equipment (Electrical and Electronic Equipment Law - ElektroG), for machines the following will apply:

4.4.6.1 IBM is prepared to take back IBM waste electrical and electronic equipment (WEEE) that were put on the market as new machines after August 13, 2005, and IBM will be responsible for the disposal of such machines.

4.4.6.2 According to German law, Customer is responsible to dispose of WEEE, which is not covered by the preceding sentence. In such case, IBM is prepared to take back and dispose of, in compliance with applicable law, such WEEE by charging the applicable disposal fee to the Customer, based on a separate agreement.

Customer is responsible for making the WEEE available for collection from Customer's premises within 30 days after supply of the replacement Machine.

4.4.6.3 Whenever IBM collects and disposes of Customer WEEE, based on a legal or contractual obligation, Customer agrees:

- a. Customer is responsible to remove all funds, if any, from WEEE returned to IBM, and to securely erase any data that Customer considers sensitive (including personal data), existing in/on waste machines (e.g. hard disk, storage devices, memory chips, etc.), before making them available for collection by IBM or its designated assignee. In the event that Customer is unable to comply with this obligation due to technical reasons, Customer will inform IBM thereof in writing. In this case, IBM shall be entitled to delete all data stored in/on the waste machines, as instructed and requested by Customer and according to the "IBM Supplementary Terms and Conditions for Processing of Customer Data by Order according to § 11 BDSG";
- b. IBM is not responsible for saving or protecting any funds, programs not provided by IBM with the original equipment, or any data contained in a WEEE that Customer returns to IBM; and
- c. IBM may ship all or part of the WEEE or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

NETHERLANDS

1.6. Payment

Add the following paragraphs to 1.6:

We may apply Customer's payment to Customer's other outstanding invoices.

Our rights relating to late payment charges shall be in addition to any other right that we may have in the event that Customer fails to make any payment due to us under this Agreement.

We reserve the right to also base our decision on the conclusion of an agreement with Customer on Customer's solvency and to require payment in advance of delivery or other security for payment.

Customer's obligation to pay is unconditional and shall not be subject to any abatement, reduction, set-off, defense, counter-claim interruption, deferment, or recoupment.

Replace 1.7 with the following:

Customer agrees to pay all taxes and duties, regardless of their qualification, unless specified otherwise on the invoice.

SOUTH AFRICA, NAMIBIA, LESOTHO, SWAZILAND

1.6 Payment

Add the following additional sentence:

When Customer makes payment by cheque, payment is deemed to have been made only when Customer's cheque has been received by IBM and its relevant account has been credited by IBM's authorised bankers.

SWITZERLAND

1.3 Definitions - Definition of "Non-IBM Program"

The following is added to definition of. Non-IBM Programs:

No liability of whatever sort is accepted or warranty granted by IBM.

1.12. General Principles of Our Relationship

Delete 1.12.

TURKEY

1.6 Payment

The following replaces 1.6

Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment charges.

If payment is not made within 30 days from the date of invoice, Customer may be subject to late payment charges.

Add the following to the end of this section:

Customer is responsible for all banking charges (including, but not limited to, LC charges, commissions, stamps, and extensions) incurred within and outside of Turkey.

IRELAND AND UNITED KINGDOM

The following sentence is added to the first paragraph of the preamble:

Nothing in this paragraph shall have the effect of excluding or limiting liability for fraud.

1.11 Limitation of Liability

1.11 Items for Which IBM May Be Liable

The following replaces the first paragraph of the Subsection:

For the purposes of this section, a "Default" means any act, statement, omission or negligence on the part of IBM in connection with, or relating to, any Program license granted, any goods old or services rendered by IBM under this Agreement in respect of which IBM is legally liable to Customer, whether in contract or in tort. A number of Defaults which together result in, or contribute to, substantially the same loss or damage will be treated as one Default.

Circumstances may arise where, because of a Default by IBM in the performance of its obligations under this Agreement or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM and except as expressly required by law without the possibility of contractual waiver, IBM's entire liability for any one Default will not exceed the amount of any direct damages, to the extent actually suffered by Customer as an immediate and direct consequence of the default, up to the greater of (1) 500,000 euro (or the equivalent in local currency) or (2) 125% of the charges (if the Eligible Product is subject to fixed term charges, up to 12 months' charges) for the Eligible Product that is the subject of the claim. Notwithstanding the foregoing, the amount of any damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable is not subject to such limitation. In addition, the amount (if any) payable by IBM under the provisions of section 1.10 shall not be subject to any limitation or exclusion set forth in this section 1.11.

1.11 Items for Which IBM is Not Liable

The following replaces Items 1.11 and 1.11:

- b. special, incidental, exemplary, or indirect damages or consequential damages; or
- d. wasted management time or lost profits, business, revenue, goodwill, or anticipated savings.

Le présent Contrat Passport Advantage Express international IBM (le «contrat»), y compris tous les documents annexes, conditions d'utilisation et documents transactionnels applicables, régit la présente transaction dans le cadre de laquelle le client obtient certains produits admissibles auprès d'IBM ou d'un intermédiaire. Il constitue l'entente intégrale intervenue entre les parties à l'égard de la présente transaction par laquelle le client acquiert des produits admissibles, et remplace tous les contrats, communications, déclarations, énoncés, ententes, garanties, promesses, clauses restrictives, entreprises ou engagements, verbaux ou écrits, entre les parties relativement à Passport Advantage Express.

Advenant une incompatibilité entre les modalités du présent contrat et celles d'un document annexe, des conditions d'utilisation et d'un document transactionnel, les modalités d'un document annexe ont préséance sur celles du présent contrat, les modalités des conditions d'utilisation ont préséance sur celles d'un document annexe et du présent contrat, et les modalités d'un document transactionnel ont préséance à la fois sur celles du présent contrat, des conditions d'utilisation et d'un document annexe.

Une fois le présent contrat accepté, 1) à moins d'une interdiction prévue par la loi applicable ou d'une indication contraire, toute reproduction de ce contrat ou d'un document transactionnel faite par des moyens fiables (par exemple, par imagerie électronique, photocopie ou télécopie) est considérée comme un original, et 2) tous les produits admissibles commandés en vertu du présent contrat sont assujettis à celui-ci.

7. Dispositions générales

7.1 Structure du contrat

Le présent contrat est divisé en six sections :

Section 1 – Dispositions générales – énonce les modalités régissant la structure du contrat, les documents annexes et documents transactionnels, les définitions, l'acceptation des modalités, la livraison, le paiement, les taxes, les produits admissibles, les partenaires commerciaux et intermédiaires IBM, la protection de la propriété intellectuelle, la limitation de responsabilité, les principes généraux régissant la relation des parties, la résiliation du contrat, la vérification de la conformité, ainsi que la portée géographique et les lois applicables.

Section 2 – Garanties – énonce les modalités régissant la garantie relative aux programmes IBM, la garantie relative à l'abonnement aux logiciels et assistance et au soutien désigné IBM, la garantie relative aux composants machines IBM pour les appareils IBM, la garantie relative aux logiciels sous forme de services IBM, et l'étendue de la garantie.

Section 3 – Programmes et abonnement et assistance – énonce les modalités régissant les programmes IBM, les programmes dans un environnement de virtualisation, les permis à durée déterminée, les catégories de produits OEG, et l'abonnement aux logiciels et assistance et soutien désigné.

Section 4 – Appareils – énonce les modalités régissant les appareils virtuels, les appareils comportant à la fois des composants programmes et des composants machines, les composants programmes et les composants machines.

Section 5 – Logiciels sous forme de services IBM – énonce les modalités régissant la propriété, le droit d'utilisation du client, l'abonnement aux logiciels sous forme de services IBM, l'assistance technique pour les logiciels sous forme de services IBM, le contenu et la résiliation de l'accès aux logiciels sous forme de services IBM.

Section 6 – Dispositions nationales particulières.

7.2 Documents annexes et documents transactionnels

Les modalités supplémentaires relatives aux produits admissibles sont énoncées dans des documents appelés «documents annexes» et «documents transactionnels» fournis par IBM. Les documents annexes peuvent s'appeler différemment selon le pays dans lequel ils sont utilisés. En général, les documents annexes et les documents transactionnels (par exemple, un supplément, un calendrier, une facture, une annexe ou un addenda) contiennent des détails et des modalités propres à la présente transaction. Le client peut recevoir un ou plusieurs documents transactionnels dans le cadre d'une seule transaction. Les documents annexes et les documents transactionnels font partie du présent contrat seulement pour les transactions auxquelles ils s'appliquent. Chaque transaction est distincte et indépendante des autres transactions.

7.3 Définitions

Abonnement aux logiciels et assistance de tiers – Abonnement aux logiciels et assistance de tiers fournis en vertu des modalités de tiers pour les programmes non IBM. Voir **9.5 Abonnement aux logiciels et assistance** pour plus de détails.

Abonnement aux logiciels et assistance IBM – Abonnement aux logiciels et assistance fournis pour les programmes IBM autorisés en vertu de l'IPLA. Voir **9.5 Abonnement aux logiciels et assistance IBM** pour plus de détails.

Anniversaire – Premier jour du mois qui suit l'anniversaire de la date d'entrée en vigueur, à moins que celle-ci ne tombe le premier jour d'un mois, auquel cas l'anniversaire correspond à l'anniversaire de la date d'entrée en vigueur.

Appareil – Produit admissible qui est conçu pour une fonction en particulier et non à des fins informatiques générales; l'appareil peut être un programme (dans les cas d'un «appareil virtuel») ou être composé d'un composant programme, d'un composant machine et de tout composant code machine qu'IBM peut fournir au client.

Autorisation d'utilisation – Document dans lequel IBM indique le niveau d'utilisation autorisé d'un produit admissible. Cette autorisation d'utilisation, accompagnée de la facture acquittée ou du reçu correspondant du client, constitue la preuve du niveau d'utilisation autorisé.

Capacité de virtualisation – Pointe de capacité d'un processeur disponible pour un produit admissible à une utilisation partielle de la capacité déployé dans un environnement de virtualisation admissible, conformément aux règles indiquées à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Client – Entreprise cliente qui commande les produits admissibles.

Cœur de processeur – Unité fonctionnelle physique incorporée dans un appareil informatique qui interprète et exécute les instructions des programmes et qui se compose d'au moins une unité de commande et d'une ou de plusieurs unités arithmétiques et logiques. La technologie multicœur permet d'activer deux ou plusieurs cœurs d'un processeur sur une même puce de processeur. Un moteur IFL (System z Integrated Facility for Linux) est considéré comme un seul cœur de processeur.

Composant code machine – Microcode, code système d'entrée-sortie de base (appelé «BIOS»), programmes utilitaires, pilotes de périphériques, programmes de diagnostics et tout autre code (tous assujettis aux exclusions dans le permis d'utilisation qui les accompagne) fournis avec un composant machine IBM dans le but d'activer la fonction du composant machine, comme il est indiqué dans ses spécifications.

Composant machine – Unité matérielle, ses dispositifs, conversions de modèles, mises à niveau, composants ou accessoires, ou toute combinaison de ceux-ci. Le terme «composant machine» comprend un composant machine IBM et tout composant machine non IBM (y compris d'autres types de matériel) qu'IBM peut fournir au client.

Composant machine devant être installé par le client – Composant machine IBM que le client a la responsabilité d'installer conformément aux instructions qui l'accompagnent.

Composant machine IBM – Composant machine qui porte le logo IBM.

Composant programme – Programme IBM ou programme non IBM qui est préinstallé dans un composant machine.

Conditions d'utilisation – Modalités supplémentaires en vertu desquelles IBM met des offres de logiciels sous forme de services IBM à la disposition du client, disponibles à l'adresse <http://www.ibm.com/software/sla/sladb.nsf/sla/tou/>.

Connecteur pour processeur – Ensemble de circuits électroniques dans lequel se branche une puce de processeur.

Contenu – Informations, logiciels et données, y compris, notamment, des données personnelles, des fichiers HTML, des scripts, des programmes, des enregistrements, du son, de la musique, des graphiques, des images, des applets ou des servlets qui sont créés, fournis, téléchargés ou transférés par le client et tout utilisateur autorisé par le client.

Date d'entrée en vigueur – Date à laquelle IBM accepte la commande du client pour des produits admissibles, soit directement du client ou de l'intermédiaire du client.

Date d'installation –

- a. Dans le cas d'un composant machine devant être installé par le client, la date indiquée sur la facture d'achat ou le reçu de vente du client pour l'appareil est la date d'installation, à moins d'indication contraire au client de la part d'IBM ou de l'intermédiaire IBM du client.
- b. Dans le cas d'un composant machine IBM devant être installé par IBM, jour ouvrable suivant la journée où IBM effectue l'installation. Si le client reporte l'installation, la date d'installation correspond au jour suivant la journée où IBM met la machine à la disposition du client pour une installation subséquente par IBM.

Données personnelles – Toute information pouvant servir à identifier une personne, comme un nom, une adresse courriel, une adresse à domicile ou un numéro de téléphone, qui est fournie à IBM et qui peut être enregistrée, traitée ou transférée au nom du client.

Durée déterminée – Période de temps définie par IBM dans un document transactionnel, par exemple, dans l'autorisation d'utilisation d'un programme.

Entreprise – Toute entité juridique qui, à plus de cinquante pour cent (50 %), est propriétaire du «site» du client inscrit au dossier, appartient à ce dernier, ou appartient avec lui à un propriétaire commun.

Environnement de virtualisation admissible – Serveur ou groupe de serveurs coopérant comme une seule entité informatique, qui sont dotés d'un processeur admissible, d'un système d'exploitation admissible et d'une technologie de virtualisation admissible.

Fournisseur de services – Entité qui fournit des services TI aux clients utilisateurs finals, que ce soit directement ou par un intermédiaire.

IBM – Entreprise IBM qui fournit les produits admissibles.

Informations sur la licence – Document qui donne des renseignements et qui indique toute modalité supplémentaire au sujet d'un programme. Cette information se trouve à l'adresse <http://www.ibm.com/software/sla/>. On peut aussi la trouver dans le répertoire du programme, en utilisant une commande système, ou dans une brochure incluse avec le programme.

IPLA – Conditions internationales d'utilisation des logiciels IBM. L'IPLA est inclus avec chaque programme IBM dans le répertoire du programme, dans une bibliothèque, une brochure ou un CD. L'IPLA est également disponible sur Internet à l'adresse <http://www.ibm.com/software/sla> et auprès d'IBM et de ses intermédiaires.

Logiciels sous forme de services IBM («Saas IBM») – Offres faites au client à distance par IBM, au moyen d'Internet, qui lui donnent accès (i) aux fonctions des programmes, (ii) à l'infrastructure et (iii) à l'assistance technique. Ces offres d'IBM ne sont pas un programme; cependant, pour les utiliser, le client peut avoir à télécharger du logiciel. Les logiciels sous forme de services IBM sont un produit admissible.

Mise à niveau – Changement apporté à un composant machine pour modifier, ajouter, retirer, activer ou désactiver une ressource ou un dispositif du composant machine. Un tel changement peut être effectué par l'entremise d'une conversion de composant machine ou d'une conversion, d'un ajout, d'un retrait ou d'un échange d'un ou de plusieurs dispositifs d'un composant machine, mais seulement dans la mesure annoncée et soutenue par IBM pour le composant machine.

Modification technique – Mise à jour visant à modifier certains aspects de la conception d'un composant machine installé, y compris la conception de certaines pièces du composant machine ou d'un composant code machine.

Partenaire commercial IBM – Organisation qui a signé des contrats avec IBM afin d'assurer la promotion, la mise en marché et, parfois, le soutien de certains produits admissibles.

Période contractuelle – Période qui commence soit à la date à laquelle IBM accepte la commande initiale du client (dans le cas de la période contractuelle initiale), soit à la date anniversaire (dans le cas de périodes contractuelles subséquentes), et se termine le jour qui précède immédiatement l'anniversaire suivant.

Période d'abonnement – Période pendant laquelle les logiciels sous forme de services IBM sont offerts au client selon les indications du document transactionnel applicable.

Permis pour capacité partielle – Permis d'utilisation des produits admissibles à une utilisation partielle de la capacité fondé sur la capacité de virtualisation.

Pleine capacité – Capacité correspondant au nombre total de cœurs de processeurs physiques activés et pouvant être utilisés dans un serveur.

Processeur admissible – Processeur doté d'une technologie pour laquelle est offert un permis pour capacité partielle, indiqué à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Produit admissible à une utilisation partielle de la capacité – Produit pour lequel est offert un permis pour capacité partielle, indiqué à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Produits admissibles – Programmes IBM disponibles sur le marché, programmes non IBM, soutien désigné, autorisations pour augmenter l'utilisation d'un programme par le client, mises à niveau de programmes IBM, mises à niveau de programmes concurrentiels, renouvellements annuels de l'abonnement aux logiciels et assistance IBM, réactivations de l'abonnement aux logiciels et assistance IBM, renouvellements annuels de l'abonnement aux logiciels et assistance de tiers, réactivations de l'abonnement aux logiciels et assistance de tiers, ainsi que renouvellements du soutien désigné, logiciels sous forme de services (SaaS) et appareils.

Programme – Éléments suivants, y compris les originaux et toute copie intégrale ou partielle de ceux-ci : 1) instructions et données assimilables par machine; 2) composants; 3) contenu audiovisuel (p. ex. images, texte, enregistrements ou photos); 4) articles autorisés connexes; et 5) documents et clés liés aux permis d'utilisation, ainsi que la documentation.

Programme désigné – Programme non IBM ou programme IBM autorisés aux termes du contrat relatif aux permis d'utilisation IBM pour les programmes non garantis.

Programme IBM – Programme acquis en vertu du présent contrat et régi par l'IPLA, y compris le document Informations sur la licence y afférent.

Programme non IBM – Programme régi par les modalités du contrat relatif aux permis d'utilisation de tiers qui l'accompagne. IBM n'est pas partie au contrat relatif aux permis d'utilisation de tiers et n'assume aucune obligation à cet égard.

Puce de processeur – Ensemble de circuits électroniques comprenant un ou plusieurs cœurs de processeur et qui se branche dans un connecteur pour processeur.

Rapports de vérification – Ensemble de rapports disponibles dans l'outil ILMT (IBM License Metric Tool) ou obtenus au moyen d'une autre méthode acceptable par IBM selon les indications qui se trouvent à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. Ces rapports fournissent les exigences de permis en termes d'unités de valeur par processeur (ou PVU - Processor Value Unit) en fonction de la capacité de virtualisation disponible pour le produit admissible à une utilisation partielle de la capacité.

Site – Toute entité définie, telle qu'un emplacement physique ou une unité organisationnelle (p. ex., un service, une division, une filiale ou un centre de coûts) que le client fournit à IBM ou à l'intermédiaire, et pour laquelle IBM attribue un numéro de site Passport Advantage.

Soutien désigné – Soutien pour les programmes désignés spécifiés.

Spécifications – Renseignements propres à un composant machine. Les spécifications des composants machines IBM se trouvent dans un document portant sur les spécifications officielles publiées («Official Published Specifications»).

Système d'exploitation admissible – Système d'exploitation pour lequel est offert un permis pour capacité partielle, indiqué à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>.

Technologie de virtualisation admissible – Technologie de virtualisation pour laquelle est offert un permis pour capacité partielle, et indiqué à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. Une telle technologie permet de restreindre la capacité du processeur à un sous-ensemble de la capacité physique totale, parfois appelé partition, LPAR ou machine virtuelle.

Unité de valeur par processeur (PVU) – Mesure qu'utilise IBM pour attribuer une valeur à un cœur de processeur. Le modèle de permis d'utilisation fondé sur les PVU est décrit à l'adresse http://www.ibm.com/software/lotus/passportadvantage/pvu_licensing_for_customers.html.

Utilisateur de produit OEG – Personne à qui on a attribué une machine, qui peut copier ou utiliser les programmes d'une catégorie de produits selon l'option Entreprise globale (OEG), ou en prolonger l'utilisation.

Utilisateur de SaaS IBM – Personne qui accède à des logiciels sous forme de services IBM en utilisant une ID et un mot de passe de compte utilisateur associés au compte SaaS IBM et fournis par le client.

7.4 Acceptation des modalités

Le client accepte le présent contrat sans modification en faisant l'acquisition de produits admissibles auprès d'IBM ou d'un intermédiaire. Les modalités supplémentaires ou différentes contenues dans toute commande ou communication écrite du client sont nulles. Un produit admissible est assujéti au présent contrat à partir du moment où IBM accepte la commande du client i) en lui envoyant un document transactionnel, ii) en mettant à sa disposition le programme ou le logiciel sous forme de services IBM ou, le cas échéant, en lui expédiant l'appareil, ou iii) en lui fournissant l'assistance, le service ou la solution. Un produit admissible est assujéti au présent contrat à partir du moment où IBM accepte la commande du client i) en lui envoyant un document transactionnel, ii) en mettant à sa disposition le programme ou le logiciel sous forme de services IBM ou, le cas échéant, en lui expédiant l'appareil, ou iii) en fournissant l'assistance, le service ou la solution.

Tout document annexe ou document transactionnel sera signé par les deux parties si l'une des parties en fait la demande.

7.5 Livraison

Les frais de transport, s'il y a lieu, seront indiqués dans un document transactionnel. Pour les programmes qu'IBM fournit au client de façon tangible, IBM remplit ses obligations d'expédition et de livraison au moment de la livraison de ces programmes au transporteur qu'elle désigne, à moins d'un accord différent conclu entre le client et IBM par écrit.

7.6 Paiement

- a. Quand le client acquiert les produits admissibles auprès d'un intermédiaire, il paie directement ce dernier;
- b. Quand le client acquiert les produits admissibles auprès d'IBM, il convient de payer conformément à ce qu'IBM précise sur la facture ou un document équivalent, y compris les suppléments de retard; et
- c. Le montant à payer pour un permis d'utilisation de programme peut être versé sous forme de paiement unique ou d'un paiement applicable à une durée déterminée, selon le type de permis.

7.7 Taxes

Si, en raison du fait que le client a déplacé ou utilisé un produit admissible ou y a accédé au-delà d'une frontière, une autorité impose des droits, des taxes, des impôts ou d'autres frais (y compris en retenant des taxes pour l'importation ou l'exportation de tels produits admissibles), le client convient qu'il est responsable du paiement de ces droits, taxes, impôts ou autres frais et qu'il les paiera. Cela exclut les taxes fondées sur le bénéfice net d'IBM.

7.8 Produits admissibles

IBM peut en tout temps ajouter ou retirer des produits admissibles.

Si IBM cesse de mettre en marché un programme ou une version d'un programme, le client ne pourra plus, à compter de la date de cessation, augmenter l'utilisation au-delà des autorisations déjà acquises, sans le consentement écrit préalable d'IBM, et IBM ne peut refuser de donner un tel consentement de façon déraisonnable.

7.9 Partenaires commerciaux et intermédiaires IBM

En plus d'acquérir des produits admissibles auprès d'IBM, le client peut les acquérir auprès des partenaires commerciaux et des intermédiaires IBM. Cependant, ce ne sont pas tous les intermédiaires qui sont autorisés à revendre tous les produits admissibles.

Lorsque le client commande des produits admissibles auprès d'un partenaire commercial ou d'un intermédiaire IBM, IBM n'est pas responsable 1) de leurs actes, 2) de toute obligation supplémentaire qu'ils ont envers le client, ni 3) de tout produit ou service qu'ils fournissent au client aux termes de leurs propres ententes. Lorsque le client fait l'acquisition de produits admissibles auprès d'un partenaire commercial ou d'un intermédiaire IBM, c'est celui-ci qui fixe les redevances et les modalités de paiement.

7.10 Protection de la propriété intellectuelle

Aux fins du présent article 7.10, le terme «produit» désigne un programme IBM, un composant code machine ou un composant machine IBM.

7.10.1 Réclamation d'un tiers

Si un tiers formule contre le client une réclamation selon laquelle un produit contrevient à l'un des brevets ou viole les droits d'auteur du tiers en question, IBM défendra le client aux frais d'IBM contre cette réclamation et paiera tous les frais qui en résultent, y compris les frais d'avocat ainsi que les dommages-intérêts accordés en dernier ressort par un tribunal contre le client ou compris dans un règlement approuvé à l'avance par IBM, à condition que le client :

- a. avise sans délai IBM par écrit d'une telle réclamation;
- b. coopère pleinement avec IBM et lui permette de mener seule la défense et toutes les négociations entamées en vue de régler le litige; et
- c. soit et demeure en conformité avec le permis d'utilisation du produit et les autres modalités, ainsi qu'avec ses autres obligations prévues à l'article Recours ci-dessous.

7.10.2 Recours

Si une telle réclamation est faite ou paraît probable, le client convient de permettre à IBM, à la discrétion de celle-ci, i) de donner au client la possibilité de continuer à utiliser le produit, ii) de le modifier ou iii) de le remplacer par un produit qui offre au moins des fonctions équivalentes. Si IBM estime qu'aucune de ces solutions n'est raisonnablement possible, le client convient de cesser immédiatement l'utilisation du produit et de le retourner à IBM, ainsi que toutes les copies, à la demande écrite d'IBM. IBM accordera alors au client un crédit équivalent au montant qu'il aura payé à IBM pour le produit retourné (si le produit est constitué de logiciels sous forme de services IBM ou fait l'objet de redevances à durée déterminée, jusqu'à douze (12) mois de redevances).

7.10.3 Réclamations pour lesquelles IBM n'assume aucune responsabilité

IBM n'assume aucune obligation à l'égard des réclamations fondées sur l'un ou l'autre des motifs suivants :

- a. un élément quelconque fourni par le client ou par un tiers au nom du client et qui est intégré dans un produit, ou la conformité d'IBM aux plans, aux spécifications ou aux directives fournis par le client ou par un tiers au nom du client;
- b. la modification d'un produit par le client ou par un tiers au nom du client;
- c. l'utilisation d'un produit sans se conformer aux restrictions et aux permis d'utilisation applicables, ou l'utilisation d'une version ou d'une édition non courante d'un produit, alors qu'une réclamation aurait pu être évitée ou que le risque d'une réclamation aurait pu être réduit par l'utilisation de la version ou de l'édition courante;
- d. la combinaison, l'exploitation ou l'utilisation d'un produit avec tout autre produit, unité matérielle, donnée ou appareil, ou selon une autre méthode ou un autre procédé;
- e. la distribution, l'exploitation ou l'utilisation du produit à l'extérieur de l'entreprise du client ou au bénéfice d'un tiers; ou
- f. du code faisant l'objet d'un permis d'utilisation distinct, le cas échéant, selon le document Informations sur la licence du produit.

Le document Informations sur la licence du produit ou d'autres documents peuvent autoriser le client à copier, à modifier ou à redistribuer le produit, en tout ou en partie, sans payer de frais supplémentaires de permis à IBM. L'obligation d'indemnisation en vertu du présent contrat ne s'applique qu'aux copies du produit fournies au client par IBM et aux copies supplémentaires expressément autorisées dans une autorisation d'utilisation. IBM n'assume aucune obligation à l'égard de réclamations relatives aux copies du produit qu'elle n'a pas fournies et qui n'ont pas été autorisées spécifiquement par une autorisation d'utilisation, même si cela est autorisé par le document Informations sur la licence du produit ou par d'autres documents.

Cet article sur la protection de la propriété intellectuelle décrit toutes les obligations d'IBM et le recours exclusif du client au sujet de réclamations en matière de propriété intellectuelle de tiers. Il n'indique aucune obligation pour un fournisseur tiers de code (y compris de code faisant l'objet d'un permis d'utilisation distinct) inclus avec le produit ou une partie du produit.

7.11 Limitation de responsabilité

Les limitations et les exclusions du présent article **7.11 (Limitation de responsabilité)** s'appliquent dans la mesure où elles ne sont pas interdites par la législation applicable sans possibilité de renonciation contractuelle.

7.11.1 Éléments dont IBM peut être responsable

Des circonstances peuvent survenir où, en raison d'un défaut d'IBM ou d'une autre forme de responsabilité, le client est en droit de réclamer des dommages-intérêts à IBM. Peu importe le fondement de la réclamation (y compris une contravention essentielle au contrat, la négligence, des déclarations inexactes ou un autre fondement contractuel ou délictuel), l'entière responsabilité d'IBM à l'égard de l'ensemble des réclamations attribuables ou liées à chaque produit admissible, ou découlant autrement du présent contrat n'excédera pas la somme des dommages directs réels, jusqu'à concurrence du plus élevé des montants suivants : cent mille dollars américains (100 000 \$ US) (ou l'équivalent en monnaie locale) ou les redevances qui s'appliquent au produit admissible faisant l'objet de la réclamation (si le produit admissible consiste en logiciels sous forme de services IBM ou fait l'objet de redevances pendant une durée déterminée, jusqu'à douze (12) mois de redevances s'appliqueront).

Cette limite s'applique également à tous les développeurs et fournisseurs de produits IBM admissibles. Il s'agit du montant maximal dont IBM et ses développeurs et fournisseurs de produits admissibles sont collectivement responsables. Les lésions corporelles (y compris le décès) et les dommages à des biens immeubles et à des biens personnels matériels dont IBM est légalement responsable ne sont pas assujettis au plafond fixé à l'égard des dommages.

7.11.2 Éléments dont IBM n'est pas responsable

IBM, SES DÉVELOPPEURS OU SES FOURNISSEURS DE PRODUITS ADMISSIBLES NE PEUVENT EN AUCUN CAS ÊTRE TENUS RESPONSABLES DES ÉLÉMENTS SUIVANTS, MÊME S'ILS ONT ÉTÉ INFORMÉS DE LEUR ÉVENTUALITÉ :

- a. **LA PERTE DE DONNÉES OU LES DOMMAGES CAUSÉS À CELLES-CI;**
- b. **LES DOMMAGES SPÉCIAUX, ACCESSOIRES, EXEMPLAIRES OU INDIRECTS, OU LES DOMMAGES INDIRECTS ÉCONOMIQUES; OU**
- c. **LA PERTE DE PROFITS, D'AFFAIRES, DE REVENUS, DE FONDS COMMERCIAL OU D'ÉPARGNES PRÉVUES.**

7.12 Principes généraux régissant la relation des parties

7.12.1 Avis et communications

Dans la mesure autorisée en vertu des lois applicables, les parties consentent à utiliser des moyens électroniques et de transmissions par télécopieur pour envoyer et recevoir des communications relativement à leur relation d'affaires découlant du présent contrat, et ces communications sont acceptables à titre d'écrit signé. La présence d'un code d'identification (appelé «ID utilisateur») dans un document électronique suffit pour établir l'identité de l'émetteur et l'authenticité du document.

7.12.2 Cession et revente

Aucune des parties ne peut céder le présent contrat, en totalité ou en partie, sans le consentement écrit préalable de l'autre partie. Toute tentative de cession sans consentement est nulle. La cession du présent contrat, en totalité ou en partie, au sein de l'entreprise dont l'une des parties est membre ou à une organisation qui lui succède par fusion ou par acquisition ne nécessite pas le consentement de l'autre partie. IBM peut céder ses droits relatifs aux paiements sans le consentement du client. Le fait, pour IBM, de se départir d'une partie de ses activités commerciales d'une façon ayant des répercussions similaires sur tous ses clients ne sera pas considéré comme une cession.

Le client convient que les produits admissibles sont destinés à être utilisés dans son entreprise seulement et ne peuvent pas être revendus, loués ni transférés à des tiers. Toute tentative en ce sens, qui contredit ces dispositions, est nulle.

7.12.3 Conformité aux lois

IBM se conformera aux lois qui lui sont applicables de façon générale à titre de fournisseur de produits et services informatiques. IBM n'a pas la responsabilité de déterminer les exigences des lois applicables aux activités du client, y compris celles relatives aux produits admissibles que le client acquiert en vertu du présent contrat, ni de s'assurer que la fourniture par IBM ou la réception par le client de produits admissibles en particulier en vertu du présent contrat répondent aux exigences de ces lois. Nonobstant toute disposition contraire dans le présent contrat, aucune des parties n'est tenue de prendre des mesures qui violeraient les lois qui lui sont applicables.

Chacune des parties convient de se conformer à toutes les lois et réglementations applicables en matière d'exportation et d'importation, y compris, notamment, celles des États-Unis liées à l'embargo et aux

sanctions, et les interdictions relatives à l'exportation à certaines fins ou auprès de certains utilisateurs finals.

7.12.4 Règlement des différends

Chacune des parties convient d'offrir à l'autre une occasion raisonnable de remplir ses obligations en vertu du présent contrat avant d'en invoquer l'inexécution. Les parties tenteront de bonne foi de régler tous leurs différends, désaccords ou réclamations en rapport avec le présent contrat. À moins qu'une loi applicable ne l'exige sans possibilité de renonciation ou de limitation contractuelle, i) aucune des parties n'intentera une action, de quelque forme que ce soit, découlant du présent contrat ou de toute transaction visée par les présentes, ou s'y rapportant, plus de deux (2) ans après la date de l'événement qui lui aura donné naissance; et ii) après ce délai, toute action découlant du présent contrat ou de toute transaction visée par les présentes, et tous les droits respectifs liés à cette action cesseront d'être valides.

7.12.5 Autres principes régissant la relation des parties

- a. Aucune des parties n'accorde à l'autre le droit d'utiliser ses marques de commerce, noms commerciaux ou autres désignations (ni ceux de son entreprise) dans une promotion ou une publication, à moins d'avoir donné son consentement écrit préalable.
- b. L'échange de renseignements confidentiels se fera aux termes d'une entente de confidentialité distincte signée. Toutefois, dans la mesure où les renseignements confidentiels sont échangés en rapport avec tout produit admissible en vertu du présent contrat, l'entente de confidentialité applicable est incorporée et assujettie au présent contrat.
- c. Le présent contrat et toute transaction visée par les présentes ne crée aucun mandat, coentreprise ni partenariat entre le client et IBM. Chacune des parties est libre de conclure des ententes similaires avec des tiers en vue de développer, d'acquérir ou de fournir des produits et des services concurrentiels.
- d. Le client autorise International Business Machines Corporation et ses filiales (ainsi que leurs successeurs, ayants droit et sous-traitants, et les partenaires commerciaux et intermédiaires IBM) à conserver et à utiliser les renseignements sur les contacts professionnels du client partout où ils font affaire, que ce soit en relation avec les produits admissibles IBM ou dans le cadre de la relation d'affaires d'IBM avec le client.
- e. Le présent contrat ou toute transaction visée par les présentes ne crée aucun droit ni cause d'action pour un tiers et IBM ne peut en aucun cas être tenue responsable des réclamations présentées contre le client par un tiers, sauf tel qu'il est indiqué ci-dessus à l'article 7.11 (Limitation de responsabilité) pour les lésions corporelles (y compris le décès) ou les dommages à des biens immeubles ou à des biens personnels matériels dont IBM est légalement responsable envers ce tiers.
- f. Il incombe au client de choisir les produits admissibles qui répondent à ses besoins et d'assumer la responsabilité des résultats obtenus de l'utilisation des produits admissibles, y compris de sa décision de mettre en œuvre des recommandations au sujet de ses pratiques et activités commerciales.
- g. Les produits admissibles ne peuvent être utilisés pour offrir des services d'hébergement ou d'autres services informatiques commerciaux à des tiers.
- h. Lorsque l'une ou l'autre partie doit donner son autorisation, son acceptation, son consentement ou poser un geste semblable en vertu du présent contrat, elle ne peut retarder cette action ni refuser de l'exécuter de manière déraisonnable.
- i. Aucune des parties ne peut être tenue responsable du défaut de remplir ses obligations non monétaires lorsque des événements indépendants de sa volonté l'empêchent de s'en acquitter.
- j. Le client convient que son utilisation des logiciels sous forme de services IBM sera conforme à la politique d'utilisation acceptable d'IBM décrite à l'adresse <http://www.ibm.com/services/us/imc/html/aup.html> et aux lois applicables de protection des données.
- k. Dans la mesure où IBM le demande de façon raisonnable pour remplir ses obligations en vertu du présent contrat, le client convient d'accorder à IBM un accès suffisant et sécuritaire (y compris un accès à distance) à ses installations, à ses systèmes, à ses informations, à son personnel et à ses ressources, et ce, sans frais pour IBM. IBM ne peut être tenue responsable d'un retard dans les services, ni de l'omission de fournir les services en raison d'un retard du client à lui fournir l'accès demandé ou à s'acquitter de ses autres responsabilités aux termes du présent contrat.
- l. En signant le présent contrat, y compris chaque document annexe, document de conditions d'utilisation et document transactionnel, aucune des parties ne se fie à des déclarations qui ne sont

pas énoncées aux présentes, y compris, notamment, toute déclaration concernant i) les performances ou le fonctionnement de tout produit admissible qui n'est pas expressément garanti dans le présent contrat; ii) les expériences ou les recommandations d'autres parties; ou iii) les résultats que le client peut atteindre ou les économies qu'il peut réaliser.

7.13 Résiliation du contrat

IBM peut résilier le présent contrat en tout temps, avec ou sans motif, immédiatement et sans avis, dès l'expiration de la période contractuelle initiale de l'abonnement aux logiciels et assistance ou de la période d'abonnement aux logiciels sous forme de services IBM. Si le client a renouvelé l'abonnement aux logiciels et assistance IBM pour des programmes IBM ou des logiciels sous forme de services IBM avant l'émission de l'avis de résiliation, IBM peut, à sa seule discrétion, continuer d'assurer l'abonnement aux logiciels et assistance IBM pour ces programmes ou ces offres relatives aux logiciels sous forme de services IBM, jusqu'à la fin de la période de couverture alors en vigueur, ou accorder au client un remboursement calculé au prorata. Si le client a renouvelé l'abonnement aux logiciels et assistance de tiers pour des programmes non IBM avant l'émission de l'avis de résiliation, le tiers peut continuer d'assurer l'abonnement aux logiciels et assistance de tiers pour ce permis d'utilisation de programme non IBM jusqu'à la fin de la période de couverture alors en vigueur. Autrement, le client peut obtenir un remboursement calculé au prorata.

Le client sera réputé avoir résilié le présent contrat s'il ne dispose d'aucun abonnement aux logiciels et assistance en vigueur. L'une ou l'autre des parties peut résilier le présent contrat si l'autre n'en respecte pas les modalités, à condition que la partie contrevenante en soit avisée par écrit et bénéficie d'un délai raisonnable pour remédier au manquement.

Les modalités du présent contrat de nature à s'appliquer après la résiliation de celui-ci demeurent en vigueur jusqu'à leur exécution intégrale, et lient les successeurs et les ayants droit respectifs des parties.

7.14 Vérification de la conformité

Aux fins du présent article **1.14 (Vérification de la conformité)**, les «modalités de Passport Advantage» signifient 1) le présent contrat et les documents annexes, les documents transactionnels et les conditions d'utilisation applicables fournis par IBM, et 2) les politiques relatives aux logiciels IBM qui se trouvent sur le site Web correspondant (<http://www.ibm.com/softwarepolicies/>), y compris, notamment, les politiques concernant la sauvegarde, la tarification fondée sur la capacité partielle et la migration.

Les droits et les obligations prévus au présent article **1.14** demeureront en vigueur durant la période où le client est en possession du produit admissible ou en assure le contrôle, et pendant deux (2) ans par la suite.

7.14.1 Processus de vérification

Le client convient de créer, de conserver et de fournir à IBM et à ses vérificateurs des documents écrits exacts, des rapports systèmes et autres informations générées par les utilitaires systèmes, dans une mesure suffisante pour permettre à IBM de vérifier que l'utilisation par le client des produits admissibles est conforme aux modalités de Passport Advantage, y compris, notamment, à toutes les modalités applicables d'IBM relatives à l'octroi de permis et à la qualification pour la tarification. Le client a la responsabilité de s'assurer 1) qu'il ne dépasse pas le niveau d'utilisation pour lequel il est autorisé, et 2) qu'il reste conforme aux modalités de Passport Advantage.

Sur avis raisonnable, IBM peut vérifier la conformité du client aux modalités de Passport Advantage, et ce, pour tous les sites et tous les environnements dans lesquels le client utilise (à n'importe quelle fin) les produits admissibles régis par lesdites modalités. Une telle vérification sera effectuée de manière à déranger le moins possible les activités du client et peut se faire chez le client durant ses heures normales d'ouverture. IBM peut retenir les services d'un vérificateur indépendant pour lui prêter main-forte dans la vérification, à condition que ce vérificateur signe une entente de confidentialité écrite avec IBM.

7.14.2 Résolution

IBM avisera le client par écrit si une telle vérification révèle que celui-ci a utilisé des produits admissibles au-delà du niveau d'utilisation autorisé ou s'il ne respecte pas autrement les modalités de Passport Advantage. Le client convient de payer sans délai et directement à IBM les redevances qu'indiquera IBM sur une facture pour 1) toute utilisation au-delà du niveau autorisé, 2) l'abonnement aux logiciels et assistance pour l'utilisation au-delà du niveau autorisé pendant la plus courte des périodes suivantes : la période d'utilisation au-delà du niveau autorisé ou deux (2) ans, et 3) tous les frais supplémentaires et autres indemnités qui découleront de la vérification.

7.15 Portée géographique et lois applicables

7.15.1 Portée géographique

Les modalités du présent contrat s'appliquent dans les pays où 1) IBM fait directement la mise en marché de ses produits admissibles ou 2) ses produits admissibles ont été annoncés et sont disponibles.

7.15.2 Lois applicables

Les droits, devoirs et obligations de chacune des parties ne sont valides que dans le pays où la transaction est effectuée, ou bien, si IBM l'accepte, le pays où le produit admissible est utilisé à des fins productives, à l'exception du fait que tous les permis sont valides aux termes des conditions auxquelles ils ont été accordés.

Les deux parties consentent à l'application des lois du pays où la transaction est effectuée pour régir, interpréter et faire valoir tous leurs droits, obligations et devoirs respectifs qui découlent du présent contrat ou qui y sont liés de quelque façon que ce soit, sans égard aux principes de conflits de lois.

Dans le cas où une des clauses du présent contrat serait déclarée invalide ou inexécutable, toutes les autres clauses demeurent en vigueur.

Le présent contrat n'a aucune incidence sur les droits que confèrent les lois sur la protection du consommateur, lorsque ces droits ne peuvent faire l'objet d'une renonciation ou d'une limitation contractuelle.

La Convention des Nations Unies sur les contrats de vente internationale de marchandises ne s'applique pas.

8. Garanties

À moins d'indication contraire de la part d'IBM, les garanties suivantes s'appliquent uniquement dans le pays où a lieu l'acquisition.

8.1 Garantie relative aux programmes IBM

La garantie qui s'applique à un programme IBM est énoncée dans le permis d'utilisation du programme en question.

8.2 Garantie relative à l'abonnement aux logiciels et assistance et au soutien désigné IBM

IBM garantit qu'elle fournit l'abonnement aux logiciels et assistance et le soutien désigné en faisant preuve de soins et de compétences raisonnables.

8.3 Garantie relative aux composants machines IBM pour les appareils IBM

IBM garantit que chaque composant machine IBM est exempt de défauts de matériaux et de fabrication, et conforme à ses spécifications.

La période de garantie pour un composant machine IBM est une période fixe qui commence à la date d'installation du composant (aussi appelée «date de début de la garantie») et elle est indiquée dans un document transactionnel. Pendant la période de garantie, IBM fournit sans frais un service de réparation et de remplacement du composant machine IBM, selon le type de service qu'elle spécifie pour ce composant dans un document transactionnel. Si, pendant cette période, un composant machine IBM ne fonctionne pas comme le prévoit la garantie et qu'IBM ne peut i) le faire fonctionner correctement ou ii) le remplacer par un composant machine présentant au moins des fonctions équivalentes, le client peut retourner ce composant machine là où il en a fait l'acquisition pour se faire rembourser.

Dans le cas d'un composant machine IBM pour lequel IBM assume la responsabilité de l'installation, si le client choisit d'installer lui-même ce composant ou de le faire installer par un tiers, IBM peut décider d'inspecter le composant machine IBM, aux frais du client, avant de fournir le service prévu par la garantie pour ce composant. Si l'état du composant machine IBM n'est pas acceptable pour le service prévu par la garantie, selon ce que déterminera IBM, à sa seule discrétion, le client peut demander à IBM de remettre le composant dans un état acceptable pour ledit service ou retirer sa demande de service prévu par la garantie. IBM déterminera, à sa seule discrétion, s'il est possible de restaurer le composant. La restauration est fournie en tant que service facturable.

Si, pendant la période de garantie, le composant machine IBM ne fonctionne pas comme le prévoit la garantie, le client doit consulter la documentation sur le service qui a été expédiée avec le composant machine IBM, afin de prendre connaissance des procédures à suivre pour obtenir de l'assistance et déterminer la cause du problème.

Si le client est incapable de résoudre le problème à l'aide de la documentation sur le service, il doit communiquer avec IBM ou l'intermédiaire en vue d'obtenir le service prévu par la garantie. Les coordonnées pour joindre IBM sont indiquées dans les «renseignements sur la garantie» qui sont expédiés avec le composant machine IBM. Si le client n'enregistre pas le composant machine IBM auprès d'IBM, il se peut qu'il doive présenter une preuve d'achat pour confirmer qu'il a droit au service prévu par la garantie.

8.4 Garantie relative aux logiciels sous forme de services IBM

La garantie relative aux logiciels sous forme de services IBM est énoncée dans les conditions d'utilisation.

8.5 Étendue de la garantie

CES GARANTIES CONSTITUENT LES GARANTIES EXCLUSIVES DU CLIENT ET REMPLACENT TOUTES LES AUTRES GARANTIES OU CONDITIONS, EXPRESSES OU IMPLICITES, NOTAMMENT, LES GARANTIES OU CONDITIONS IMPLICITES RELATIVES À LA QUALITÉ MARCHANDE, À LA QUALITÉ SATISFAISANTE ET À LA CONVENANCE À UN USAGE PARTICULIER, ET TOUTE GARANTIE OU CONDITION DE NON-CONTREFAÇON.

Toute utilisation abusive (y compris l'utilisation de capacités ou de fonctions d'un composant machine autres que celles autorisées par écrit par IBM), tout accident, environnement physique ou d'exploitation inadéquat, toute exploitation dans un environnement autre que l'environnement d'exploitation spécifié, tout entretien inadéquat effectué par le client ou un tiers, toute modification, toute défaillance ou tout dommage causé par un produit dont IBM n'est pas responsable, entraînera l'annulation des garanties indiquées à l'article 2.3 plus haut. Tout retrait ou toute modification des étiquettes servant à l'identification des composants machines IBM ou des pièces entraînera l'annulation de la garantie relative aux composants machines IBM.

Articles non visés par la garantie

IBM ne garantit pas qu'un produit admissible fonctionnera sans erreur ou sans interruption, ni qu'elle corrigera tous les défauts.

IBM indiquera les produits admissibles IBM qu'elle ne garantit pas.

À moins d'indication contraire dans une annexe ou un document transactionnel, IBM fournit les produits non IBM admissibles, **SANS GARANTIE NI CONDITION, DE QUELQUE NATURE QUE CE SOIT**. Toutefois, les autres fabricants, concepteurs, fournisseurs ou éditeurs peuvent fournir leurs propres garanties au client.

9. Programmes et abonnement et assistance

9.1 Programmes IBM

Les programmes IBM acquis en vertu du présent contrat sont régis par les modalités de l'IPLA.

9.1.1 Versions et plateformes

Le client peut utiliser les programmes et la documentation sur l'utilisation associée conformément aux modalités du présent contrat dans toute version linguistique disponible sur le marché, et ce, jusqu'au niveau d'utilisation autorisée indiqué dans l'autorisation d'utilisation. Le client est autorisé à utiliser le ou les programmes qu'il acquiert aux termes du présent contrat sur une plateforme ou un système d'exploitation pour lequel IBM offre actuellement des codes de programmes en vertu du présent contrat, à moins que le programme ne soit désigné comme étant particulier à une plateforme ou à un système d'exploitation au moment où le client l'obtient.

9.1.2 Mises à niveau de programmes IBM

Il est possible d'obtenir à prix réduit les permis d'utilisation de certains programmes qui remplacent les programmes IBM admissibles. Le client convient de cesser l'utilisation des programmes IBM remplacés lorsqu'il installe les programmes de remplacement.

9.1.3 Mises à niveau de programmes concurrentiels

Il est possible d'obtenir à prix réduit les permis d'utilisation de certains programmes qui remplacent les programmes non IBM admissibles. Le client convient de cesser l'utilisation des programmes non IBM remplacés lorsqu'il installe les programmes de remplacement.

9.2 Programmes dans un environnement de virtualisation

9.2.1 Autorisations

- a. Il faut obtenir une autorisation d'utilisation pour le nombre total d'unités de valeur par processeur associées à la capacité de virtualisation disponible pour un produit admissible à une utilisation partielle de la capacité.
- b. Avant d'augmenter la capacité de virtualisation d'un produit admissible à utilisation partielle de la capacité, le client doit d'abord obtenir suffisamment d'autorisations supplémentaires pour couvrir cette augmentation, y compris un abonnement aux logiciels et assistance, s'il y a lieu.
- c. IBM n'offre aucun crédit ou remboursement pour les redevances déjà exigibles ou acquittées si le taux d'utilisation d'un programme admissible devient inférieur à la limite autorisée.

9.2.2 Responsabilités d'IBM

IBM mettra à la disposition du client et lui permettra d'utiliser :

- a. l'outil ILMT sans frais, lorsqu'il est commandé par le client ou un intermédiaire IBM. IBM fournit au client l'outil ILMT afin qu'il puisse se conformer aux présentes modalités relatives au permis pour capacité partielle; et
- b. l'Information Center (le «centre d'information»), inclus dans l'outil ILMT, visant à aider le client à se conformer aux modalités relatives au permis pour capacité partielle.

Le client peut faire des copies de l'outil ILMT et du centre d'information aux fins de conformité aux modalités relatives au permis pour capacité partielle.

9.2.3 Responsabilités du client à l'égard des modalités relatives au permis pour capacité partielle

Le client s'engage à :

- a. installer et configurer la version la plus récente de l'outil ILMT, conformément aux instructions du centre d'information, dans les quatre-vingt-dix (90) jours suivant le premier déploiement d'un produit admissible à une utilisation partielle de la capacité dans un environnement de virtualisation admissible, afin de pouvoir recueillir les données sur la capacité de virtualisation par produit admissible à une utilisation partielle de la capacité et de produire les rapports de vérification aux termes des modalités relatives au permis pour capacité partielle. Le client n'est pas tenu de respecter cette exigence dans les situations suivantes :
 - (1) L'outil ILMT ne prend pas encore en charge l'environnement de virtualisation admissible.
 - (2) L'entreprise du client compte moins de mille (1 000) employés et sous-traitants, le client n'est pas un fournisseur de services et n'a pas confié à un fournisseur de services la gestion de son environnement de virtualisation admissible.
 - (3) La capacité physique totale des serveurs d'entreprise du client dans un environnement de virtualisation admissible, mesurée sur la base d'une pleine capacité, mais régie par les modalités du permis pour capacité partielle, correspond à moins de mille (1 000) PVU.
 - (4) Le permis d'utilisation des produits admissibles à une utilisation partielle de la capacité dans les serveurs du client couvre la pleine capacité de ses serveurs.

Dans les situations précitées, l'utilisation de l'outil ILMT est recommandée, mais n'est pas exigée en vue d'obtenir un permis pour capacité partielle. S'il n'utilise pas l'outil ILMT, le client doit toutefois gérer et suivre manuellement son environnement de virtualisation admissible. Il doit en outre produire manuellement les rapports de vérification documentant la capacité de virtualisation par produit admissible à une utilisation partielle de la capacité dans cet environnement, au cours de chaque trimestre civil ou de l'année financière de son entreprise. Ces rapports de vérification doivent contenir l'information indiquée dans l'exemple de rapport de vérification fourni à l'adresse <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>. La production de ces rapports doit se faire aussi souvent que nécessaire pour maintenir un historique des augmentations de la capacité de virtualisation et au moins une fois par trimestre. Le client est tenu de conserver ces rapports pour une période d'au moins deux (2) ans, afin de faire la preuve de sa conformité continue avec les modalités relatives au permis pour capacité partielle;

- b. installer sans délai les nouvelles versions, éditions, modifications ou corrections de code («correctifs») de l'outil ILMT mises en disponibilité par IBM. Le client doit s'inscrire aux notifications de Tivoli sur le site <http://www.ibm.com/support/mynotifications> pour être avisé de la mise en disponibilité de ces éléments;

- c. ne pas modifier, omettre, supprimer ou falsifier directement ou indirectement et de quelque façon que ce soit :
 - (1) les enregistrements de vérification de l'outil ILMT;
 - (2) l'outil ILMT, sauf dans le cas des modifications fournies par IBM; ou
 - (3) les rapports de vérification qu'il remet à IBM;
- d. produire les rapports de vérification, à l'aide de l'outil ILMT ou manuellement, au moins chaque trimestre civil ou de l'année financière de son entreprise. Le client doit également conserver ces rapports pour une période d'au moins deux (2) ans et mettre ces rapports à la disposition d'IBM suivant la réception d'un avis à cette fin, tel qu'indiqué à l'article 1.14. Si le client omet de produire les rapports de vérification ou de mettre ces rapports à la disposition d'IBM, la tarification des produits admissibles à une utilisation partielle de la capacité sera établie en fonction des modalités régissant l'utilisation à pleine capacité;
- e. confier à une personne dans son entreprise la tâche de traiter et de résoudre rapidement tout problème concernant les rapports de vérification ou leurs divergences, l'octroi des permis d'utilisation ou la configuration de l'outil ILMT;
- f. passer sans délai une commande auprès d'IBM ou de l'intermédiaire IBM si les rapports de vérification reflètent une utilisation d'un produit admissible à une utilisation partielle de la capacité au-delà du niveau autorisé. L'abonnement aux logiciels et assistance sera réputé avoir commencé au moment où le client a excédé son niveau d'utilisation autorisée.

9.2.4 Modalités supplémentaires

Les déploiements de produits qui ne répondent pas aux exigences du permis pour capacité partielle nécessitent un permis dont les modalités régissent l'utilisation à pleine capacité.

9.3 Permis à durée déterminée

La durée d'un permis à durée déterminée commence à la date à laquelle IBM accepte la commande du client ou le jour civil suivant l'expiration d'une durée déterminée antérieure.

9.3.1 Renouvellement automatique de permis à durée déterminée

Le client peut renouveler son permis à durée déterminée venant à expiration, en remettant une autorisation écrite de renouvellement (par exemple, un formulaire, une lettre ou un bon de commande), avant la date d'expiration, conformément aux modalités du présent contrat.

SI IBM NE REÇOIT PAS UNE TELLE AUTORISATION AVANT LA DATE D'EXPIRATION, LES PERMIS À DURÉE DÉTERMINÉE VENANT À EXPIRATION SONT AUTOMATIQUEMENT RENOUVELÉS POUR UNE PÉRIODE DE MÊME DURÉE QUE CELLE VENANT À EXPIRATION, EN VERTU DES MODALITÉS DU CONTRAT ET AUX TARIFS DE RENOUVELLEMENT ALORS EN VIGUEUR POUR DE TELS PERMIS D'UTILISATION DE PROGRAMMES, À MOINS QU'IBM NE REÇOIVE, AVANT LA DATE D'EXPIRATION, DIRECTEMENT DE LA PART DU CLIENT OU DE LA PART DE SON INTERMÉDIAIRE, SELON LE CAS, UN AVIS ÉCRIT DU CLIENT INDIQUANT SON INTENTION DE NE PAS RENOUVELER LES SERVICES. LE CLIENT CONVIENT DE PAYER LES FRAIS DE RENOUVELLEMENT.

Si le client choisit de ne pas renouveler le permis à durée déterminée, il convient de cesser d'utiliser le programme à la date d'expiration.

Si, après la date d'expiration, le client choisit de reprendre l'utilisation du programme, il doit payer les frais associés à un permis à durée déterminée initial plutôt que ceux liés à un renouvellement de permis à durée déterminée.

9.3.2 Cessation de permis à durée déterminée pour un programme donné

Si IBM met fin à l'offre de permis à durée déterminée pour un programme IBM donné, le client comprend :

- a. qu'il ne peut pas renouveler le permis en question pour ledit programme; et
- b. que s'il a renouvelé le permis à durée déterminée pour ce programme IBM avant l'émission de l'avis de cessation, il peut (a) continuer à utiliser ce programme selon les mêmes modalités jusqu'à la fin de la période contractuelle alors en vigueur; ou (b) obtenir un remboursement calculé au prorata.

9.4 Catégories de produits OEG

L'acquisition de «catégories de produits OEG» (groupes de produits admissibles) se fait selon le nombre d'utilisateurs. Lorsque le client obtient sa première catégorie de produits OEG («catégorie de produits primaire»), il doit l'obtenir pour tous les utilisateurs dans son entreprise et, à tout le moins, pour le nombre d'utilisateurs précisé dans le tableau des catégories de produits OEG à l'adresse <http://www.ibm.com/software/passportadvantage>.

Le client peut obtenir d'autres catégories de produits OEG s'il répond aux critères concernant le nombre minimal d'utilisateurs précisé dans le tableau des catégories de produits OEG à l'adresse <http://www.ibm.com/software/passportadvantage>. Toutefois, le client n'a pas besoin d'obtenir d'autres catégories de produits OEG pour tous les utilisateurs dans son entreprise.

Un utilisateur peut utiliser un programme ou tous les programmes dans une catégorie de produits OEG choisie. Toutefois, tous les programmes IBM servant à l'accès client doivent être obtenus dans la même catégorie de produits OEG que le programme de serveur auquel l'utilisateur accède.

Catégories de produits OEG : ajouts et suppressions

IBM peut en tout temps ajouter des produits admissibles à toute catégorie de produits OEG, ou en supprimer. Si IBM supprime un produit admissible d'une catégorie de produits OEG, le client peut continuer à utiliser le produit supprimé, sans toutefois dépasser le nombre d'utilisateurs qui étaient inscrits avant la suppression.

Augmentation du nombre d'utilisateurs

Si le client augmente le nombre d'utilisateurs, il doit alors obtenir une autorisation pour utiliser la catégorie de produits OEG pour chaque nouvel utilisateur.

Diminution du nombre d'utilisateurs

Si le nombre total d'utilisateurs diminue, le client doit en aviser IBM par écrit avant l'anniversaire suivant. Une diminution peut résulter d'une réorganisation, d'une restructuration ou de la vente d'un ou de plusieurs des sites du client. Toutefois, une réduction du nombre d'utilisateurs qui est de nature temporaire ou saisonnière ne se qualifie pas comme une diminution. Si le niveau d'utilisation autorisée d'une catégorie de produits OEG diminue sous le seuil du nombre minimal d'utilisateurs qui s'applique à cette catégorie, le client ne peut pas renouveler l'abonnement aux logiciels et assistance IBM en fonction de la catégorie de produits OEG.

9.5 Abonnement aux logiciels et assistance et soutien désigné

9.5.1 Abonnement aux logiciels et assistance

- a. Aux fins du présent contrat, «l'abonnement aux logiciels et assistance» s'entend à la fois de l'abonnement aux logiciels et assistance IBM et de tiers. IBM fournit un abonnement aux logiciels et assistance IBM avec chaque programme IBM autorisé aux termes de l'IPLA. L'abonnement aux logiciels et assistance IBM est une offre unique qui n'est pas disponible séparément. IBM ne fournit pas l'abonnement aux logiciels et assistance IBM (i) pour les programmes non IBM; ni (ii) pour les programmes autorisés aux termes des Conditions d'utilisation de logiciels IBM sans garantie (conjointement appelés «programmes désignés»).
- b. L'abonnement aux logiciels et assistance IBM commence à la date d'acquisition et se termine le dernier jour du mois correspondant de l'année suivante, à moins que la date d'acquisition ne tombe le premier jour du mois, auquel cas la couverture se termine le dernier jour du mois précédent de l'année suivante.
- c. Pendant que l'abonnement aux logiciels et assistance IBM est en vigueur pour un permis d'utilisation de programme IBM :
 - (1) IBM met à la disposition du client les corrections de défauts, les restrictions et les contournements qu'elle crée, s'il y a lieu, pour les programmes IBM;
 - (2) IBM met à la disposition du client et l'autorise à utiliser la version, l'édition ou la mise à jour du programme la plus récente disponible sur le marché, le cas échéant;
 - (3) IBM fournit au client de l'assistance pour i) les questions courantes et de courte durée sur l'installation ou l'utilisation; et ii) les questions liées au code (globalement désignée par «soutien»). Ce soutien applicable à une version ou à une édition particulière d'un programme IBM donné est offert seulement jusqu'à ce qu'IBM ou le tiers, selon le cas, mette fin au soutien prévu pour la version ou l'édition en question du programme. Par la suite, le client doit passer à

une version ou à une édition prise en charge du programme IBM pour continuer à bénéficier du soutien. La politique d'IBM relative au cycle de vie du soutien des logiciels est publiée à l'adresse <http://www.ibm.com/software/info/supportlifecycle/>;

- (4) IBM fournit une assistance par voie électronique et, si possible, par téléphone, seulement au personnel de soutien technique du client responsable des systèmes d'information (SI), pendant les heures d'ouverture habituelles (heures de pointe publiées) du centre d'assistance IBM du client. Cette assistance n'est pas offerte aux utilisateurs finals du client. IBM fournit un service d'assistance pour les incidents de gravité 1, 24 heures sur 24, tous les jours de l'année. Pour plus de renseignements, le client doit consulter le guide d'assistance logicielle IBM à l'adresse <http://www.ibm.com/software/support/>;
 - (5) IBM peut demander au client la permission d'accéder à son système à distance pour l'aider à isoler la cause du problème logiciel. Le client demeure responsable de la protection adéquate de son système et de toutes les données qu'il contient lorsque IBM y accède à distance avec sa permission.
- d. L'abonnement aux logiciels et assistance IBM ne comprend pas l'assistance relative 1) à la conception et au développement d'applications; 2) à l'utilisation des programmes IBM ailleurs que dans l'environnement d'exploitation prescrit; ou 3) aux défaillances causées par des produits pour lesquels IBM n'assume aucune responsabilité en vertu du présent contrat.

POUR L'UTILISATION AUTORISÉE DE CHAQUE PROGRAMME IBM INSTALLÉ ET EN FONCTION AU SITE DU CLIENT, CE DERNIER PEUT MAINTENIR L'ABONNEMENT AUX LOGICIELS ET ASSISTANCE IBM POUR (a) L'ENSEMBLE DE L'UTILISATION AUTORISÉE; OU (b) AUCUNE PORTION DE L'UTILISATION AUTORISÉE.

IL N'EST PAS POSSIBLE DE MAINTENIR L'ABONNEMENT AUX LOGICIELS ET ASSISTANCE UNIQUEMENT POUR UNE PORTION DE L'UTILISATION AUTORISÉE D'UN PROGRAMME IBM INSTALLÉ ET EN FONCTION À UN SITE DU CLIENT.

LE CLIENT NE PEUT SE SERVIR DE L'UN OU L'AUTRE DES AVANTAGES DE L'ABONNEMENT AUX LOGICIELS ET ASSISTANCE IBM INDIQUÉS AU PARAGRAPHE C DU PRÉSENT ARTICLE 9.5, Y COMPRIS L'APPLICATION OU L'UTILISATION DE CORRECTIFS, DE MISES À JOUR OU DE MISES À NIVEAU DESTINÉS AUX PROGRAMMES IBM POUR LESQUELS IL N'A PAS PAYÉ INTÉGRALEMENT L'ABONNEMENT AUX LOGICIELS ET ASSISTANCE IBM. SI LE CLIENT SE SERT DE L'UN OU L'AUTRE DE CES AVANTAGES SANS EN AVOIR AU PRÉALABLE PAYÉ INTÉGRALEMENT LE COÛT, IL CONVIENT DE SE RÉABONNER AUX LOGICIELS ET ASSISTANCE DE MANIÈRE À COUVRIR L'UTILISATION NON AUTORISÉE DESDITS AVANTAGES, AU TARIF IBM APPLICABLE ALORS EN VIGUEUR.

9.5.2 Soutien désigné

Les programmes désignés admissibles au soutien désigné sont énumérés à l'adresse <http://www.ibm.com/lotus/PASelectedSupportPrograms>.

Le soutien désigné commence à la date où IBM accepte la commande du client relative à un tel soutien et se termine le dernier jour du mois correspondant de l'année suivante, à moins qu'IBM accepte la commande du client le premier jour d'un mois civil, auquel cas la couverture se termine le dernier jour du mois civil précédent de l'année suivante.

Pendant que le soutien désigné est en vigueur pour un programme désigné :

- a. IBM met à la disposition du client, s'il y a lieu, les correctifs qu'elle développe pour les programmes désignés;
- b. IBM fournit au client de l'assistance pour 1) les questions courantes et de courte durée sur l'installation ou l'utilisation; et 2) les questions liées au code. Le soutien désigné applicable à une version ou à une édition particulière d'un programme donné est offert seulement jusqu'à ce qu'IBM mette fin au soutien désigné prévu pour la version, l'édition ou la modification du programme en question. Par la suite, le client doit passer à une version ou à une édition prise en charge du programme pour continuer à bénéficier du soutien. La politique d'IBM relative au cycle de vie de soutien des logiciels ne s'applique pas au soutien désigné;
- c. IBM peut offrir au client de l'assistance relative à la conception et au développement d'applications, selon le niveau de son abonnement;

- d. IBM peut fournir de l'assistance par voie électronique et, si possible, par téléphone, selon l'emplacement et le niveau de l'abonnement du client. Une telle assistance est offerte seulement au personnel de soutien technique du client responsable des systèmes d'information (SI), pendant les heures d'ouverture habituelles (heures de pointe publiées) du centre d'assistance IBM du client. Pour plus de renseignements sur le soutien désigné, le client doit consulter le guide d'assistance logicielle IBM à l'adresse <http://www.ibm.com/software/support>;
- e. IBM peut demander au client la permission d'accéder à son système à distance pour l'aider à isoler la cause du problème logiciel. Le client demeure responsable de la protection adéquate de son système et de toutes les données qu'il contient lorsque IBM y accède à distance avec sa permission.

IBM ne fournit pas de permis d'utilisation en vertu du présent contrat pour les programmes désignés.

9.5.3 Données et bases de données du client

Pour aider le client à isoler la cause d'un problème avec un programme, que ce soit dans le cadre de l'abonnement aux logiciels et assistance IBM ou du soutien désigné, IBM peut demander au client 1) de lui donner un accès à distance à son système; ou 2) de lui envoyer de l'information ou des données sur son système. IBM se sert de l'information sur les erreurs et les problèmes pour améliorer ses produits et services et l'aider dans la prestation de ses services d'assistance qui se rattachent à ces produits et services. À ces fins, IBM peut recourir à des entités IBM et à des sous-traitants (y compris dans un ou plusieurs pays autres que le pays où se trouve le client), et le client autorise IBM à le faire.

Le client demeure responsable 1) des données et du contenu des bases de données que le client met à la disposition d'IBM; 2) du choix et de la mise en œuvre des procédures et des contrôles concernant la sécurité, le chiffrement, l'utilisation et la transmission des données (y compris des renseignements permettant d'identifier une personne) et de l'accès à celles-ci; et 3) de la sauvegarde et de la restauration d'une base de données et des données stockées. Le client ne transmettra pas à IBM des renseignements permettant d'identifier une personne et ne lui donnera pas accès à de tels renseignements, que ce soit sous forme de données ou une autre forme, et assumera la responsabilité des coûts raisonnables et des autres montants qu'IBM peut éventuellement devoir assumer en raison d'une transmission par erreur à IBM de tels renseignements ou de la perte ou de la divulgation desdits renseignements par IBM, y compris les coûts découlant de réclamations par des tiers.

9.5.4 Renouvellement annuel automatique de l'abonnement aux logiciels et assistance et du soutien désigné

Le client peut renouveler son abonnement aux logiciels et assistance ou le soutien désigné venant à expiration, en remettant une autorisation écrite de renouvellement (par exemple, un formulaire, une lettre ou un bon de commande), avant la date d'expiration, conformément aux modalités du présent contrat.

SI IBM NE REÇOIT PAS UNE TELLE AUTORISATION AVANT LA DATE D'EXPIRATION, L'ABONNEMENT AUX LOGICIELS ET ASSISTANCE ET LE SOUTIEN DÉSIGNÉ VENANT À EXPIRATION SONT AUTOMATIQUEMENT RENOUELÉS JUSQU'À LA DATE ANNIVERSAIRE SUIVANTE, EN VERTU DES MODALITÉS DU CONTRAT ET AUX TARIFS DE RENOUELEMENT ALORS EN VIGUEUR, À MOINS QU'IBM NE REÇOIVE, AVANT LA DATE D'EXPIRATION, DIRECTEMENT DE LA PART DU CLIENT OU DE LA PART DE SON INTERMÉDIAIRE, SELON LE CAS, UN AVIS ÉCRIT DU CLIENT INDIQUANT SON INTENTION DE NE PAS RENOUELER LES SERVICES. LE CLIENT CONVIENT DE PAYER LES FRAIS DE RENOUELEMENT.

Pour réactiver un abonnement aux logiciels et assistance échu, le client doit obtenir la réactivation de l'abonnement aux logiciels et assistance IBM ou de l'abonnement aux logiciels et assistance de tiers, selon le cas.

9.5.5 Cessation de l'abonnement aux logiciels et assistance ou du soutien désigné pour un programme donné

Si IBM ou le tiers, selon le cas, met fin à l'abonnement aux logiciels et assistance ou au soutien désigné pour un programme donné, le client comprend que

- a. IBM n'offrira aucun renouvellement de l'abonnement aux logiciels et assistance ou du soutien désigné pour le programme en question; et
- b. si le client a renouvelé l'abonnement aux logiciels et assistance IBM pour ce permis d'utilisation de programme IBM, ou s'il a renouvelé le soutien désigné pour un permis d'utilisation de programme désigné avant l'émission de l'avis de cessation, IBM peut continuer d'assurer l'abonnement aux logiciels et assistance IBM ou le soutien désigné pour ce permis d'utilisation, jusqu'à la fin de la

période de couverture alors en vigueur, ou accorder au client un remboursement calculé au prorata. Si le client a renouvelé l'abonnement aux logiciels et assistance de tiers pour ce permis d'utilisation de programme non IBM avant l'émission de l'avis, le tiers peut continuer d'assurer l'abonnement aux logiciels et assistance pour ce permis d'utilisation de programme non IBM jusqu'à la fin de la période de couverture alors en vigueur. Autrement, le client peut obtenir un remboursement calculé au prorata.

10. Appareils

10.1 Appareils virtuels

Le client est autorisé à utiliser le ou les programmes en vertu des modalités du présent contrat.

10.2 Appareils comportant à la fois des composants programmes et des composants machines

IBM fournit des appareils comportant à la fois des composants programmes et des composants machines sous la forme d'un produit unique. Le client n'utilisera pas un de ces composants indépendamment de l'appareil dont il est un élément, cela dans quelque but que ce soit.

10.3 Composants programmes

Le client est autorisé à utiliser le ou les composants programmes en vertu des modalités du présent contrat, mais seulement avec le composant machine fourni par IBM ou par un intermédiaire agréé, ou bien avec tout composant remplaçant un composant machine fourni au client par IBM ou par un intermédiaire agréé. Le client ne peut pas transférer à une autre entreprise sa licence l'autorisant à utiliser le ou les composants programmes.

10.4 Composants machines

10.4.1 État de la production

Chaque composant machine IBM est fabriqué à partir de pièces qui peuvent être neuves ou usagées. Dans certains cas, un composant machine IBM peut ne pas être neuf et avoir été précédemment installé. Quel que soit le cas, les modalités pertinentes de la garantie IBM énoncées à l'article 2.3 s'appliquent.

10.4.2 Titre et risque de perte

Lorsque le client acquiert un composant machine directement auprès d'IBM, IBM transfère le titre du composant machine au client ou, s'il y a lieu, au locateur du client, dès le règlement de tous les montants exigibles. Dans le cas d'un dispositif, d'une conversion ou d'un autre type de mise à niveau acquis relativement à un composant machine, IBM ne transférera le titre que lorsqu'IBM aura reçu le paiement de la totalité des montants exigibles et, s'il y a lieu, toutes les pièces enlevées, lesquelles pièces deviennent la propriété d'IBM.

Pour chaque composant machine, IBM assume le risque de perte ou d'endommagement jusqu'à sa livraison au transporteur désigné par IBM, qui doit l'expédier au client ou à l'établissement désigné par ce dernier. Par la suite, le client assume lui-même ce risque. Chaque composant machine sera couvert par une assurance qu'IBM aura souscrite et payée pour le client, le protégeant jusqu'à sa livraison chez le client ou à l'établissement désigné par ce dernier. En cas de perte ou de dommages, le client doit i) en aviser IBM par écrit dans les dix (10) jours ouvrables suivant la livraison et ii) suivre les directives de réclamation applicables.

10.4.3 Installation

a. Installation d'un composant machine

- (1) Le client convient de fournir un environnement qui respecte les exigences relatives au composant machine, tel que l'indique la documentation publiée.
- (2) Le client a la responsabilité d'installer un composant machine devant être installé par le client et un composant machine non IBM, conformément aux instructions fournies par IBM ou par le fabricant du composant machine.
- (3) Dans le cas d'un composant machine qu'IBM a la responsabilité d'installer, IBM dispose de procédures d'installation standards. IBM considérera qu'un composant machine IBM (autre qu'un composant machine dont le client reporte l'installation ou qu'il installe lui-même) est installé seulement lorsque toutes les étapes prévues par les procédures auront été accomplies avec succès. Dans le cas d'un composant machine IBM qu'IBM a la responsabilité d'installer, si

le composant machine IBM n'est pas rendu disponible pour IBM à des fins d'installation dans les six (6) mois suivant l'expédition, l'installation fera l'objet de frais.

b. Mises à niveau et modifications techniques

- (1) IBM vend des mises à niveau destinées à être installées sur les composants machines et, dans certains cas, uniquement sur un composant machine désigné portant un numéro de série. Dans les trente (30) jours suivant l'expédition d'une mise à niveau, le client convient d'installer cette mise à niveau ou de permettre à IBM d'installer cette mise à niveau si la responsabilité de cette installation incombe à IBM. Certaines commandes de mise à niveau peuvent être résiliées à la discrétion d'IBM si elles ne sont pas rendues disponibles pour IBM à des fins d'installation dans les trente (30) jours suivant l'expédition, auquel cas le client doit retourner la mise à niveau aux frais du client. Dans tous les cas, si la mise à niveau n'est pas rendue disponible pour IBM à des fins d'installation dans les six (6) mois suivant la date de l'expédition de la mise à niveau par IBM, l'installation fera l'objet de frais.
- (2) Le client convient de permettre à IBM d'installer les modifications techniques obligatoires (comme celles requises pour des raisons de sécurité) sur un composant machine dans les trente (30) jours suivant l'envoi d'un avis au client par IBM, sauf en cas d'entente contraire entre les parties.

De nombreuses mises à niveau et modifications techniques requièrent le retrait de pièces et le transfert de la propriété et de la possession des pièces retirées à IBM. Le client est responsable du retour de toutes les pièces enlevées à IBM dès l'installation de la mise à niveau ou de la modification technique. Selon ce qui s'applique, le client déclare qu'il a obtenu du propriétaire et de tout détenteur de privilège la permission i) d'installer les mises à niveau et les modifications techniques, et ii) de transférer la propriété et la possession des pièces retirées à IBM. Le client déclare en outre que toutes les pièces retirées sont des pièces d'origine non modifiées et en bon état de fonctionnement. La garantie ou le service d'entretien qui s'appliquait à une pièce remplacée se poursuit à l'égard de la pièce de remplacement.

10.4.4 Composant code machine

L'utilisation d'un composant code machine est autorisée en vertu des modalités et des restrictions du contrat de licence relatif au code machine (p. ex. le Contrat de licence relatif au code machine IBM, le Contrat relatif au code système autorisé IBM, ou l'équivalent) qui l'accompagne. L'acceptation par le client des modalités du présent contrat comprend l'acceptation des contrats de licence relatifs au code machine d'IBM dont les versions à jour sont disponibles à l'adresse http://www.ibm.com/servers/support/machine_warranties/support_by_product.html ou peuvent être obtenues en communiquant avec un représentant d'IBM. Les contrats de licence relatifs au code machine peuvent être modifiés par IBM de temps en temps. Les modalités relatives à la licence ainsi modifiées ne s'appliqueront qu'au composant code machine fourni après l'entrée en vigueur de ces modalités modifiées.

L'utilisation d'un composant code machine est autorisée seulement afin de permettre à un composant machine de fonctionner conformément à ses spécifications et seulement selon la capacité et les fonctions pour lesquelles le client a reçu une autorisation écrite d'IBM. Le client convient d'utiliser le composant code machine uniquement tel que le prévoit le présent contrat et selon les autorisations et les restrictions supplémentaires contenues dans le contrat de licence applicable. Sans limiter les restrictions supplémentaires prévues dans le contrat de licence applicable, le client convient de ne pas :

- a. copier, afficher, transférer, adapter, modifier ou distribuer autrement (par voie électronique ou autrement) le composant code machine, sauf tel qu'IBM peut l'autoriser dans la documentation d'utilisation du composant machine ou par écrit au client;
- b. désassembler, décompiler ou traduire autrement le composant code machine ou lui faire subir une ingénierie inverse, à moins qu'une loi applicable ne le permette expressément sans possibilité de renonciation contractuelle;
- c. accorder une sous-licence pour le composant code machine ou céder la licence relative au composant code machine; ou
- d. louer le composant code machine ou toute copie de ce composant.

Le composant code machine, incluant tous les droits d'auteur sur le composant code machine et sur toutes les copies du composant code machine (incluant le composant code machine original, les copies du composant code machine original et les copies faites à partir d'autres copies) est la propriété

d'International Business Machines Corporation, d'une de ses filiales ou d'un tiers. Le composant code machine est protégé par des droits d'auteur et autorisé sous licence (et non pas vendu).

Le titre de propriété ne sera pas transféré lorsque IBM fournira des dispositifs, des conversions ou des mises à niveau qui sont constitués uniquement du composant code machine.

La capacité de certains composants machines peut être limitée par les mesures technologiques intégrées au composant code machine. Le client convient de permettre à IBM de mettre en œuvre de telles mesures technologiques pour limiter la capacité des composants machines.

10.4.5 Livraison

Les dates de livraison des appareils avec des composants machines sont estimatives, à moins que les parties ne conviennent spécifiquement du contraire dans un document transactionnel. Les frais de transport, s'il y a lieu, seront indiqués dans un document transactionnel.

11. Logiciels sous forme de services IBM

Le client convient du fait qu'IBM ne lui fournit pas un accès à Internet à des fins d'utilisation des logiciels sous forme de services d'IBM et que la responsabilité de l'accès à Internet incombe au client.

Le client reconnaît qu'International Business Machines Corporation et ses filiales 1) ne contrôlent pas le transfert de données au moyen d'outils de télécommunications, incluant Internet, et que 2) dans un environnement Internet public, International Business Machines Corporation et ses filiales ne peuvent pas s'engager envers des obligations de confidentialité particulières.

L'échange de renseignements confidentiels fait aux termes d'une entente de confidentialité distincte signée, conformément au paragraphe 7.12 du présent contrat, ne s'applique pas au contenu. IBM n'assume aucune obligation de confidentialité au sujet du contenu, nonobstant les modalités de toute entente de confidentialité à part conclue entre le client et IBM.

11.1 Propriété

IBM et ses fournisseurs sont propriétaires des logiciels sous forme de services IBM. Le client convient du fait qu'IBM et ses fournisseurs conserveront le titre, la propriété et tous les droits relatifs aux brevets, aux droits d'auteur et aux marques de commerce, et tous les autres droits de propriété intellectuels sur les logiciels sous forme de services d'IBM, et toute copie ou partie desdits logiciels. IBM peut confier aux sous-traitants de son choix les activités relatives aux logiciels sous forme de services IBM ou à toute partie desdits logiciels, y compris l'assistance technique.

11.2 Droit d'utilisation du client

Le client peut utiliser une offre relative aux logiciels sous forme de services IBM conformément à ses conditions d'utilisation, jusqu'au niveau d'utilisation spécifié dans l'autorisation d'utilisation, aux conditions suivantes :

- a. Le client accepte les conditions d'utilisation de l'offre relative aux logiciels sous forme de services IBM;
- b. Le client s'assure que toute personne qui utilise l'offre relative aux logiciels sous forme de services IBM agit ainsi uniquement au nom du client et se conforme aux modalités du présent contrat et aux conditions d'utilisation applicables; et
- c. Le client ne peut pas :
 - (1) utiliser, copier, modifier ou rendre disponible l'offre relative aux logiciels sous forme de services IBM, en totalité ou en partie, pour des tiers, sauf lorsque cela est expressément autorisé dans le présent contrat et dans les conditions d'utilisation applicables;
 - (2) désassembler, décompiler ou traduire autrement l'offre relative aux logiciels sous forme de services IBM, ou faire subir à cette offre une ingénierie inverse, à moins qu'une loi applicable ne le permette expressément, sans possibilité de renonciation contractuelle;
 - (3) utiliser un des composants, fichiers, modules, contenus audiovisuels ou documents autorisés connexes de l'offre relative aux logiciels sous forme de services IBM indépendamment de ceux de l'offre relative aux logiciels sous forme de services IBM;
 - (4) accorder une sous-licence pour l'offre relative aux logiciels sous forme de services IBM ou louer l'offre relative aux logiciels sous forme de services IBM;
 - (5) créer des liens Internet à destination ou à partir de l'offre relative aux logiciels sous forme de services IBM; ou

- (6) «saisir» ou «écrire en miroir» tout contenu faisant partie d'une offre relative aux logiciels sous forme de services IBM, autre que celle contenue dans les propres intranets du client dans le cadre de l'utilisation autorisée pour le client de l'offre relative aux logiciels sous forme de services IBM.

11.3 Abonnement aux logiciels sous forme de services IBM

11.3.1 Modalités d'une offre relative aux logiciels sous forme de services IBM spécifique

Les modalités d'une offre relative aux logiciels sous forme de services IBM spécifique sont indiquées dans les conditions d'utilisation y afférentes et peuvent inclure, notamment, des définitions, la description de l'abonnement et des services, les paramètres de facturation et des restrictions.

11.3.2 Période d'abonnement aux logiciels sous forme de services IBM

Une période d'abonnement aux logiciels sous forme de services IBM commence à la date à laquelle IBM avise le client que ce dernier a accès à l'offre à laquelle il est abonné. La date de fin d'une période d'abonnement spécifiée dans un document transactionnel est le dernier jour d'un mois.

Pendant une période d'abonnement à des logiciels sous forme de services IBM, le client peut augmenter le niveau de son abonnement à une offre relative aux logiciels sous forme de services IBM.

Le client ne peut pas réduire le niveau de son abonnement à une offre relative aux logiciels sous forme de services IBM pendant une période d'abonnement, mais il peut le faire pendant une période d'abonnement subséquente.

11.3.3 Renouvellement d'une période d'abonnement à des logiciels sous forme de services IBM

Le client peut renouveler une offre relative aux logiciels sous forme de services IBM à la fin d'une période d'abonnement, sauf en cas d'avis contraire dans les conditions d'utilisation afférentes à l'offre. Certaines offres relatives aux logiciels sous forme de services IBM, tel que spécifié dans les conditions d'utilisation ou le document transactionnel afférents à l'offre en question, sont automatiquement renouvelées à la fin de la période d'abonnement, sauf si avant la fin de cette période, IBM reçoit, directement ou par l'entremise de l'intermédiaire du client, s'il y a lieu, un avis écrit de non-renouvellement du client.

11.4 Assistance technique pour les logiciels sous forme de services IBM

Pendant une période d'abonnement aux logiciels sous forme de services IBM :

- a. IBM fournit l'assistance indiquée dans les conditions d'utilisation pour ce qui est des questions portant sur les tâches propres à l'offre du client et touchant l'utilisation des logiciels sous forme de services IBM; et
- b. l'assistance technique pour les logiciels sous forme de services IBM est offerte seulement pour les versions actuellement prises en charge des systèmes d'exploitation client, des navigateurs Internet, des logiciels et des logiciels sous forme de services IBM. L'assistance technique IBM est offerte durant les heures d'ouverture habituelles (heures de pointe publiées) du centre d'assistance pour les logiciels sous forme de services IBM. Le client doit consulter les conditions d'utilisation pour connaître les détails propres à une offre relative aux logiciels sous forme de services IBM spécifique.

11.5 Contenu

IBM ne fournit des services que pour le contenu. IBM n'est pas le publicateur du contenu transmis dans les logiciels sous forme de services IBM.

Le client a la responsabilité exclusive de ce qui suit :

- a. il doit s'assurer que tous les éléments des logiciels sous forme de services IBM répondent à ses besoins;
- b. l'ensemble du contenu, y compris, notamment, sa sélection, sa création, sa conception, l'octroi d'une licence, son installation, son exactitude, sa maintenance, ses tests, sa sauvegarde et son assistance;
- c. toutes les autorisations nécessaires pour permettre à IBM et à ses sous-traitants d'héberger, de mettre en cache, d'enregistrer, de copier et d'afficher le contenu. Le client certifie également qu'il possède et qu'il gardera en vigueur pendant son utilisation des logiciels sous forme de services IBM toutes ces autorisations et approbations nécessaires pour accorder à IBM et à ses sous-traitants ces droits, et que ces droits sont accordés sans frais pour IBM. Le client conserve tous les droits, titres et intérêts relatifs à son contenu; et
- d. la sélection et la mise en œuvre de procédures et de contrôles au sujet de l'accès, de la sécurité, du chiffrement, de l'utilisation, de la transmission, de la sauvegarde et de la récupération du contenu.

Le client accorde à IBM et à ses sous-traitants un permis non exclusif, irrévocable, mondial, libre de redevances, entièrement payé et transférable permettant d'héberger, de mettre en cache, d'enregistrer, de copier et d'afficher le contenu, aux seules fins de rendre disponibles les logiciels sous forme de services IBM.

11.6 Résiliation de l'accès aux logiciels sous forme de services IBM

IBM peut retirer les logiciels sous forme de services IBM dans leur intégralité en envoyant, par lettre ou par courriel, un préavis écrit de douze (12) mois à tous les clients courants.

Nonobstant toute disposition contraire dans le présent contrat, si IBM résilie l'accès du client aux logiciels sous forme de services IBM en raison d'un manquement du client à une des modalités applicables du présent contrat, IBM n'est pas tenue d'accorder un remboursement ou un crédit pour toute portion inutilisée des logiciels sous forme de services IBM.

12. Dispositions nationales particulières

Pour les transactions effectuées dans les pays indiqués ci-dessous, les modalités qui suivent remplacent ou modifient celles qui sont décrites dans les sections 1 à 5. Toutes les modalités des sections 1 à 5 qui ne sont pas touchées par les modifications ci-dessous demeurent inchangées et en vigueur. La présente section 6 est structurée comme suit :

- L'article 6.1 comprend des modifications de l'article 7.15 (Portée géographique et lois applicables) pour de multiples pays.
- L'article 6.2 comprend des modifications d'autres modalités du contrat pour les pays des Amériques.
- L'article 6.3 comprend des modifications d'autres modalités du contrat pour les pays d'Asie-Pacifique.
- L'article 6.4 comprend des modifications d'autres modalités du contrat pour les pays d'Europe, du Moyen-Orient et de l'Afrique.

12.1 Modifications de l'article 7.15 (Portée géographique et lois applicables) pour de multiples pays

12.1.1 Geographic Scope

EUROPE, MIDDLE EAST, AND AFRICA

In South Africa, Namibia, Lesotho, and Swaziland, the following paragraph pertains to geographic scope and replaces the first paragraph in section 1.15 Governing Law:

The rights, duties, and obligations of each party are valid only in South Africa, Namibia, Lesotho, and Swaziland, unless otherwise stated in a Transaction Document, except that all licenses are valid as specifically granted.

12.1.2 Lois applicables

Dans le deuxième paragraphe de l'article 1.15 Lois applicables, la locution «des lois du pays où la transaction est effectuée» est remplacée par ce qui suit :

AMÉRIQUES

- au **Canada** : des lois de la province d'Ontario;
- in **Mexico**: the federal laws of the Republic of Mexico;
- in the **United States, Anguilla, Antigua/Barbuda, Aruba, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Maarten, and Saint Vincent and the Grenadines**: the laws of the State of New York, United States;
- in **Venezuela**: the laws of the Bolivarian Republic of Venezuela;

ASIA PACIFIC

- in **Cambodia** and **Laos**: the laws of the State of New York, United States;
- in **Australia**: the laws of the State or Territory in which the transaction is performed;
- in **Hong Kong SAR** and **Macau SAR**: the laws of Hong Kong Special Administrative Region ("SAR");
- in **Taiwan**: the laws of Taiwan;

EUROPE, MIDDLE EAST, AND AFRICA

- i. in **Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan**: the laws of Austria;
- j. in **Algeria, Andorra, Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, French Guiana, French Polynesia, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna**: the laws of France;
- k. in **Estonia, Latvia, and Lithuania**: the laws of Finland;
- l. in **Angola, Bahrain, Botswana, Burundi, Egypt, Eritrea, Ethiopia, Ghana, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, the United Kingdom, West Bank/Gaza, Yemen, Zambia, and Zimbabwe**: the laws of England; and
- m. in **South Africa, Namibia, Lesotho and Swaziland**: the laws of the Republic of South Africa.

12.1.3 Jurisdiction

The following paragraph pertains to jurisdiction and is added to section 7.15 as it applies for the countries identified in bold print below:

All rights, duties, and obligations under this Agreement are subject to the courts of the country in which the transaction is performed except that in the countries identified below, all disputes arising out of or related to this Agreement, including summary proceedings, will be brought before and subject to the exclusive jurisdiction of the following courts of competent jurisdiction:

AMERICAS

- a. in **Argentina**: the Ordinary Commercial Court of the city of Buenos Aires,
- b. in **Brazil**: the court of Rio de Janeiro, RJ;
- c. in **Chile**: the Civil Courts of Justice of Santiago;
- d. in **Columbia**: the judges and courts of general jurisdiction of Bogota, Colombia;
- e. in **Ecuador**: the civil judges of Quito for executory or summary proceedings (as applicable);
- f. in **Mexico**: the courts located in Mexico City, Federal District;
- g. in **Peru**: the judges and tribunals of the judicial district of Lima, Cercado;
- h. in **Uruguay**: the courts of the city of Montevideo;
- i. in **Venezuela**: the courts of the metropolitan area of the city of Caracas;

EUROPE, MIDDLE EAST, AND AFRICA

- j. in **Austria**: the court of law in Vienna, Austria (Inner-City);
- k. in **Algeria, Andorra, Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Djibouti, Democratic Republic of Congo, Equatorial Guinea, France, French Guiana, French Polynesia, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Lebanon, Madagascar, Mali, Mauritania, Mauritius, Mayotte, Monaco, Morocco, New Caledonia, Niger, Reunion, Senegal, Seychelles, Togo, Tunisia, Vanuatu, and Wallis and Futuna**: the Commercial Court of Paris;
- l. in **Angola, Bahrain, Botswana, Burundi, Egypt, Eritrea, Ethiopia, Ghana, Jordan, Kenya, Kuwait, Liberia, Malawi, Malta, Mozambique, Nigeria, Oman, Pakistan, Qatar, Rwanda, Sao Tome and Principe, Saudi Arabia, Sierra Leone, Somalia, Tanzania, Uganda, United Arab Emirates, the United Kingdom, West Bank/Gaza, Yemen, Zambia, and Zimbabwe**: the English courts;
- m. in **South Africa, Namibia, Lesotho and Swaziland**: the High Court in Johannesburg;
- n. in **Greece**: the competent court of Athens;

- o. in **Israel**: the courts of Tel Aviv-Jaffa;
- p. in **Italy**: the courts of Milan;
- q. in **Portugal**: the courts of Lisbon;
- r. in **Spain**: the courts of Madrid; and
- s. in **Turkey**: the Istanbul Central Courts and Execution Directorates of Istanbul, the Republic of Turkey.

12.1.4 Arbitration

The following terms pertain to arbitration and are added to section 7.15 as they apply for the countries identified in bold print below. The provisions of these paragraphs apply to the extent permitted by applicable governing law and rules of procedure:

ASIA PACIFIC

- a. in Cambodia, India, Laos, Philippines, and Vietnam: Disputes arising out of or in connection with this Agreement will be finally settled by arbitration, which will be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center (“SIAC Rules”) then in effect. The arbitration award will be final and binding for the parties without appeal and will be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators will be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties will appoint a third arbitrator who will act as chairman of the proceedings. Vacancies in the post of chairman will be filled by the president of the SIAC. Other vacancies will be filled by the respective nominating party. Proceedings will continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator will be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings will be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version.

- b. in the People’s Republic of China: In the event of a dispute, in case no settlement can be reached, the disputes will be submitted to China International Economic and Trade Arbitration Commission for arbitration according to the then effective rules of the said Arbitration Commission. The arbitration will take place in Beijing and be conducted in Chinese. The arbitration award will be final and binding on both parties. During the course of arbitration, this Agreement will continue to be performed except for the part that the parties are disputing and which is undergoing arbitration.
- c. in Indonesia: Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse.

Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration that shall be held in Jakarta, Indonesia in accordance with the rules of Board of the Indonesian National Board of Arbitration (Badan Arbitrase Nasional Indonesia or “BANI”) then in effect. The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law.

The number of arbitrators shall be three, with each side to the dispute being entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the chairman of the BANI. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage they were at when the vacancy occurred.

If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed.

All proceedings shall be conducted, including all documents presented in such proceedings, in the English and/or Indonesian language.

EUROPE, MIDDLE EAST, AND AFRICA

- d. in Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan: All disputes arising out of this Agreement or related to its violation, termination or nullity will be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Center of the Federal Economic Chamber in Vienna (Vienna Rules) by three arbitrators appointed in accordance with these rules. The arbitration will be held in Vienna, Austria, and the official language of the proceedings will be English. The decision of the arbitrators will be final and binding upon both parties. Therefore, pursuant to paragraph 598 (2) of the Austrian Code of Civil Procedure, the parties expressly waive the application of paragraph 595 (1) figure 7 of the Code. IBM may, however, institute proceedings in a competent court in the country of installation; and
- e. in Estonia, Latvia, and Lithuania: All disputes arising in connection with this Agreement will be finally settled in arbitration that will be held in Helsinki, Finland in accordance with the arbitration laws of Finland then in effect. Each party will appoint one arbitrator. The arbitrators will then jointly appoint the chairman. If arbitrators cannot agree on the chairman, then the Central Chamber of Commerce in Helsinki will appoint the chairman.

12.2 AMERICAS COUNTRY AMENDMENTS

BELIZE, COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, HAITI, HONDURAS, GUATEMALA, NICARAGUA, AND PANAMA

9.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE":

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer's Program licenses and Selected Support for all of Customer's Selected Program licenses to the next Anniversary if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

3.3 Automatic Renewal of Fixed Term Licenses

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE":

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer's Program licenses for the same duration as the expiring term if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the Fixed Term License invoice for the next term.

ALL AMERICAS (EXCEPT BRAZIL, CANADA, MEXICO, AND THE UNITED STATES)

The following terms apply to all Americas countries (except Brazil, Canada and the United States), unless a specific country term states otherwise.

1.6 Payment

The following replaces 7.6:

Amounts are due upon receipt of invoice and payable as IBM specifies in a Transaction Document. The currency for payment of amounts due is US dollars or the equivalent in local currency as follows:

1. As long as the country operates in a free currency exchange market, Customer and IBM agree that IBM will accept payment in the applicable country national currency calculated at the country

official exchange rate published by the bank specified in a Transaction Document on the date payment is made.

2. If the government of a country establishes any restriction or limitation on its free currency exchange markets, Customer agrees to make payments to IBM in US dollars to a bank account in New York, NY, USA, designated by IBM in the Transaction Document, provided that such payment is not illegal under country law. If such method of payment is forbidden by country law, Customer agrees to pay the amount indicated in the Transaction Document in country national currency, calculated at the official exchange rate that is in use for the remittance of dividends and net earnings to foreign investors outside the country.

Customer agrees to pay accordingly, including any late payment fee. The late payment fee is calculated and payable in US dollars at two percent (or the maximum rate allowed by local law if such is less than two percent) of the delinquent amount due per each thirty day period during which any delinquent balance remains unpaid.

LATIN AMERICA

The following term applies to all countries in Latin America, except for Argentina and Brazil.

1.4 Acceptance of Terms

The following replaces the first sentence:

Customer accepts the terms in Attachments and Transaction Documents by signing them.

ARGENTINA, BRAZIL, CHILE, COLOMBIA, ECUADOR, MEXICO, PERU, URUGUAY, VENEZUELA

3.3 Automatic Renewal of Fixed Term Licenses and 9.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

Does not apply for Public Bodies who are subject to the applicable Public Sector Procurement Legislation.

BRAZIL AND COLOMBIA

7.13 Agreement Termination

The following is added after the fourth paragraph:

All notices will be sent to the other party by registered letter.

ARGENTINA

1.4 Acceptance of Terms

The following replaces the second sentence:

A Product or Service becomes subject to this Agreement when IBM accepts Customer's order by signing a Transaction Document.

1.7 Taxes

If a transaction is subject to a stamp tax, both Customer and IBM will each pay 50% of such tax.

BRAZIL

7.4 Acceptance of Terms

The following replaces the second paragraph in this section:

An Eligible Product becomes subject to this Agreement when IBM accepts Customer's order by signing a Transaction Document.

1.6 Payment

The following replaces 7.6:

Amounts due are expressed in local currency.

Amounts are due upon receipt of invoice and payable in local currency as IBM specifies in a Transaction Document. Customer agrees to pay accordingly, including any late payment fee. Delinquent amounts are subject to monetary correction based on the inflation index called the "General Price Index" calculated by Getulio Vargas Foundation (IGP-M/FGV), plus interest at the rate of one percent per month, both calculated "pro rata die." The late payment fee is calculated against the resultant delinquent amount at the following rates:

1. two percent of the delinquent amount due per the first thirty day period during which any delinquent balance remains unpaid, plus
2. ten percent for each successive thirty day period during which any delinquent balance remains unpaid.

1.12 Notices and Communications

The following replaces 1.12:

Each of us may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;

7.8 Eligible Products

The following replaces the first sentence in the second paragraph in this section:

IBM may add or withdraw Eligible Products at any time. IBM's ability to increase such charges, rates, and minimums will be subject to the requirements of Brazilian law.

3.3 Automatic Renewal of Fixed Term Licenses and 9.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

The following is added after the second paragraphs of both sections:

The transaction document will describe the process of the written communication to Customer containing the applicable price and other information for the renewal period.

9.5 Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support

The following is added to this section

Automatic Annual Renewal of IBM Software Subscription and Support and Selected Support: Portuguese version of the Support Handbook will be provided upon written request.

COLOMBIA

7.7 Taxes

Customer and IBM accepts to pay, each one, fifty percent (50%) of legalization costs of the Proposal.

MEXICO

1.6 Payment

The following replaces 7.6:

Amounts are due upon receipt of invoice and payable as IBM specifies in a Transaction Document. The currency for payment of amounts due is US dollars or the equivalent in local currency as follows:

The payment must be made in United States Dollars or the equivalent in local currency at the exchange rate published by the "Banco de México" in the Diario Oficial de la Federacion correspondent to the payment date of the invoice.

Customer agrees to pay accordingly, including any late payment fee. The late payment fee is calculated and payable in US dollars at two percent (or the maximum rate allowed by local law if such is less than two percent) of the delinquent amount due per each thirty day period during which any delinquent balance remains unpaid.

PERU

7.11 Limitation of Liability

The following is added to the end of this section:

Except as expressly required by law without the possibility of contractual waiver, Customer and IBM intend that the limitation of liability in this Limitation of Liability section applies to damages caused by all types of claims and causes of action. If any limitation on or exclusion from liability in this section is held by a court of competent jurisdiction to be unenforceable with respect to a particular claim or cause of action, the parties intend that it nonetheless apply to the maximum extent permitted by applicable law to all other claims and causes of action. In accordance with Article 1328 of the Peruvian Civil Code, the limitations and exclusions specified in this section will not apply to damages caused by IBM's willful misconduct ("dolo") or gross negligence ("culpa inexcusable").

AMÉRIQUE DU NORD

CANADA

7.11 Limitation de responsabilité

1.11 Éléments dont IBM peut être responsable

Le texte qui suit remplace la dernière phrase de l'article 1.11 :

Les lésions corporelles (y compris le décès) et les dommages à des biens immeubles et à des biens personnels matériels résultant de la négligence d'IBM, dont IBM est légalement responsable, ne sont pas assujettis au plafond fixé à l'égard des dommages.

7.12 Principes généraux régissant la relation des parties

1.12 Conformité aux lois

Le texte qui suit remplace le dernier paragraphe de cet article :

Chacune des parties se conformera aux lois et aux réglementations applicables en matière d'exportation et d'importation, y compris celles qui s'appliquent aux marchandises provenant des États-Unis et celles qui interdisent ou limitent l'exportation à certaines fins ou auprès de certains utilisateurs.

1.12 Autres principes régissant la relation des parties

Le texte qui suit remplace le point 7.12 :

Le présent contrat ou toute transaction visée par les présentes ne crée aucun droit ni cause d'action pour un tiers, et IBM ne peut en aucun cas être tenue responsable des réclamations présentées contre le client par un tiers, sauf tel qu'il est décrit à l'article 1.12 (Protection de la propriété intellectuelle) ci-dessus ou tel qu'il est indiqué à l'article Limitation de responsabilité ci-dessus pour les lésions corporelles (y compris le décès) ou les dommages à des biens immeubles ou à des biens meubles matériels causés par la négligence d'IBM, dont IBM est légalement responsable envers ce tiers.

Le paragraphe qui suit s'ajoute :

1.12.6 Protection des renseignements personnels

Aux fins du présent article, le terme « renseignements personnels » désigne toute information concernant une personne dont l'identité est connue ou peut l'être et qu'une des parties, un membre de son personnel ou toute autre personne qui lui est rattachée met à la disposition de l'autre partie en relation avec le présent contrat. Les dispositions qui suivent s'appliquent quand l'une des parties met des renseignements personnels à la disposition de l'autre partie :

a. Dispositions générales

- (1) Chacune des parties est tenue de se conformer aux obligations qui lui incombent en vertu des lois et réglementations canadiennes sur la protection des renseignements personnels (les « lois »).
- (2) Chacune des parties s'engage à ne pas demander davantage de renseignements personnels que ce qui est nécessaire pour servir aux fins pour lesquelles ils sont demandés. Les renseignements demandés doivent l'être pour un motif raisonnable. Chaque partie conviendra à l'avance du type de renseignements personnels qui doivent pouvoir être mis à la disposition de l'autre partie.

b. Mesures de sécurité

- (1) Chacune des parties reconnaît que c'est à elle seule qu'il incombe de définir les mesures de sécurité appropriées pour protéger les renseignements personnels sur le plan technologique, matériel et organisationnel, et d'en informer l'autre partie.
- (2) Chacune des parties s'engage à faire en sorte que les renseignements personnels soient protégés conformément aux mesures de sécurité communiquées et convenues par l'autre partie.
- (3) Chacune des parties s'engage à veiller à ce que les tiers auxquels sont transmis les renseignements personnels se conforment aux dispositions pertinentes du présent article.
- (4) Les services supplémentaires ou différents qui sont requis afin d'assurer la conformité aux Lois seront considérés comme une demande de nouveaux services.

c. Utilisation des renseignements personnels

Chacune des parties convient que les renseignements personnels ne seront utilisés, consultés, gérés, transmis, divulgués à des tiers ou traités d'une quelconque autre façon que dans le but de servir aux fins pour lesquelles ils ont été mis à sa disposition.

d. Demandes d'accès

- (1) Chacune des parties consent à coopérer dans les limites raisonnables avec l'autre partie en ce qui a trait aux demandes d'accès aux renseignements ou de modification de ces renseignements.
- (2) Chacune des parties convient de rembourser à l'autre partie les frais raisonnables engagés pour fournir une aide mutuelle.
- (3) Chacune des parties s'engage à ne modifier les renseignements personnels qu'après y avoir été enjointe par l'autre partie ou par un membre de son personnel.

e. Conservation des données

Chacune des parties s'engage à supprimer ou à restituer rapidement à l'autre partie les renseignements personnels qui ne lui sont plus nécessaires aux fins pour lesquelles ils ont été mis à sa disposition, sauf indication contraire de l'autre partie, d'un membre de son personnel ou pour répondre aux exigences de la loi.

f. Organismes publics qui sont soumis à la législation sur la protection des renseignements personnels du secteur public

Pour les clients qui sont des organismes publics soumis à la législation sur la protection des renseignements personnels du secteur public, le présent article 1.12.6 s'applique uniquement aux renseignements personnels mis à la disposition du client en lien avec le présent contrat, et les obligations du présent article s'appliquent uniquement au client, sauf : 1) le paragraphe b(1), qui s'applique seulement à IBM; 2) les paragraphes a(1) et d(1), qui s'appliquent aux deux parties; et 3) le paragraphe d(2) et la dernière phrase du paragraphe a(2), qui ne s'appliquent pas.

UNITED STATES OF AMERICA

1.7 Taxes

The following is added at the end of this section

For Programs delivered electronically in the United States for which Customer claims a state sales and use tax exemption, Customer agrees not to receive any tangible personal property (e.g., media and publications) associated with the electronic program.

7.12 General Principles of Our Relationship

1.12 Dispute Resolution

The following is added to the end of this section:

Each party waives any right to a jury trial in any proceeding arising out of or related to this Agreement.

1.12 Other Principles of Our Relationship

The following is added as 1.12.m:

U.S. Government Users Restricted Rights - Use, duplication or disclosure is restricted by the GSA IT Schedule 70 Contract with the IBM Corporation.

9. Programs and Subscription and Support

The following sentence is added at the end of the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 9.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

CUSTOMER MAY TERMINATE SOFTWARE SUBSCRIPTION AND SUPPORT FOR A PROGRAM OR SELECTED SUPPORT FOR A SELECTED PROGRAM LICENSE AT ANY TIME AFTER THE FIRST ANNIVERSARY ON ONE MONTH'S WRITTEN NOTICE, EITHER DIRECTLY TO IBM OR THROUGH CUSTOMER'S IBM RESELLER, AS APPLICABLE, IF IBM HAS NOT RECEIVED CUSTOMER'S WRITTEN AUTHORIZATION (e.g., order form, order letter, purchase order) TO RENEW CUSTOMER'S EXPIRING SOFTWARE SUBSCRIPTION AND SUPPORT OR SELECTED SUPPORT. IN SUCH EVENT, CUSTOMER MAY OBTAIN A PRORATED REFUND.

The following sentence is added at the end of the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.3 Automatic Renewal of Fixed Term Licenses:

CUSTOMER MAY TERMINATE A PROGRAM'S FIXED TERM LICENSE AT ANY TIME AFTER ITS INITIAL TERM ON ONE MONTH'S WRITTEN NOTICE, EITHER DIRECTLY TO IBM OR THROUGH CUSTOMER'S IBM RESELLER, AS APPLICABLE, IF IBM HAS NOT RECEIVED CUSTOMER'S WRITTEN AUTHORIZATION (e.g., order form, order letter, purchase order) TO RENEW CUSTOMER'S EXPIRING FIXED TERM LICENSE. IN SUCH EVENT, CUSTOMER MAY OBTAIN A PRORATED REFUND.

2.3 Extent of Warranty

The following is added as the first paragraph:

If a Machine is subject to federal or state consumer warranty laws, IBM's statement of limited warranty included with the Machine applies in place of these Machine warranties.

10.4 Machine Components

10.4 Title and Risk of Loss

The following replaces the first paragraph:

When IBM accepts Customer's order, IBM agrees to sell Customer the Machine Component described in a Transaction Document. IBM transfers title to Customer or, if applicable, Customer's lessor when the Machine Component is shipped to Customer or its designated location. However, IBM reserves a purchase money security interest in the Machine Component until IBM receives the amounts due. For a feature, conversion, or upgrade involving the removal of parts that become IBM's property, IBM reserves a security interest until IBM receives payment of all the amounts due and the removed parts. Customer authorizes IBM to file appropriate documents to permit IBM to perfect its security interest.

12.3 ASIA PACIFIC COUNTRY AMENDMENTS

AUSTRALIA

1.3 Definitions - Definition of "Personal Data"

The definition is amended and replaced with the following:

"Personal Data – any information that can be used to identify a specific individual such as name, email address, home address or phone number that is provided to IBM to store, process or transfer and includes Personal Information as defined by the Privacy Act 1988 (Cth)."

1.6 Payment

The following paragraph is added after 7.6 as 1.6d:

All charges or other amounts payable under this Agreement are specified to include applicable goods and services tax ("GST").

7.7 Taxes

The following paragraph replaces 1.7 in its entirety:

If any government or authority imposes a duty, tax (other than income tax), levy, or fee, on this Agreement or on the Eligible Product itself, that is not otherwise provided for in the amount payable, Customer agrees to pay it when IBM invoices Customer. If the rate of GST changes, IBM may

adjust the charge or other amount payable to take into account that change from the date the change becomes effective.

7.10 Intellectual Property Protection

7.10 Claims for which IBM is Not Responsible

The following replaces the second from last sentence:

Subject to any rights Customer may have under the Competition and Consumer Act 2010, this Intellectual Property Protection section states IBM's entire obligation to Customer and Customer's exclusive remedy regarding any third party intellectual property claims.

7.11 Limitation of Liability

The following paragraph is included at the end of 1.11:

Where IBM is in breach of a guarantee implied by the Competition and Consumer Act 2010, IBM's liability is limited to, at IBM's discretion:

(a) for services:

- (1) the supplying of the services again or
- (2) the payment of the cost of having the services supplied again; and

(b) for goods:

- (3) the repair or replacement of the goods or the supply of equivalent goods; or
- (4) the payment of the cost of replacing the goods or having the goods repaired

Where a guarantee relates to the right to sell, quiet possession or clear title of a good under schedule 2 of the Competition and Consumer Act, or the goods or services are of a kind ordinarily acquired for personal, domestic, or household use or consumption, then none of the limitations in this section apply.

2.5 Extent of Warranty

The last sentence of the second paragraph ("The warranty for IBM Machine Components is voided by removal or alteration of Machine Components or parts identification labels") is deleted.

The following paragraph is added after the paragraph that begins "These warranties are customer's exclusive warranties.."

The warranties specified in this Section are in addition to any rights Customer may have under the Competition and Consumer Act 2010 or other legislation and are only limited to the extent permitted by the applicable legislation. The reference to warranties and conditions throughout this agreement includes a reference to guarantees for the purpose of the Competition and Consumer Act 2010.

The following paragraph replaces the paragraph that begins "Unless otherwise specified in an Attachment or Transaction Document.."

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, without warranties, conditions, or guarantees of any kind. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Customer.

11.5 Content

The following paragraph is added after the paragraph that begins "IBM provides only services for Content."

To the extent IBM is collecting any Personal Data, Customer acknowledges that in disclosing the Personal Data to IBM, it has undertaken all steps necessary to comply with the disclosure and collection requirements of the National Privacy Principles contained in the Privacy Act 1988, Customer agrees and acknowledges that it has taken reasonable steps to disclose to the relevant individuals such information about IBM that is prescribed under National Privacy Principle 1.3 that Customer reasonably believes is necessary for Customer to comply with the National Privacy Principle.

NEW ZEALAND

1.3 Definitions - Definition of "Personal Data"

The definition is amended and replaced with the following:

"Personal Data – any information that can be used to identify a specific individual such as name, email address, home address or phone number that is provided to IBM to store, process or transfer and includes Personal Information as defined by the Privacy and Personal Information Protection Act."

1.6 Payment

The following paragraph is added after 7.6 as 1.6d:

All charges or other amounts payable under this Agreement are specified to include applicable goods and services tax ("GST").

1.7 Taxes

The following paragraph replaces 1.7 in its entirety:

If any government or authority imposes a duty, tax (other than income tax), levy, or fee, on this Agreement or on the Eligible Product itself, that is not otherwise provided for in the amount payable, Customer agrees to pay it when IBM invoices Customer. If the rate of GST changes, IBM may adjust the charge or other amount payable to take into account that change from the date the change becomes effective.

2.5 Extent of Warranty

The following paragraph is added after the paragraph that begins "These warranties are customer's exclusive warranties.."

The warranties specified in this section are in addition to any rights Customer may have under the Consumer Guarantee Act 1993 or other legislation that cannot be excluded or limited by law.

The following paragraph replaces the paragraph that begins "Unless otherwise specified in an Attachment or Transaction Document.."

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Eligible Products, without warranties, conditions, or guarantees of any kind. However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranties to Customer.

BANGLADESH, BHUTAN, AND NEPAL 9.5 Programs and Subscription and Support

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 9.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer's Program licenses or Selected Support for all of Customer's Selected Program licenses to the next Anniversary if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.3 Automatic Renewal of Fixed Term Licenses:

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer's Program licenses for the same duration as the expiring term if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the Fixed Term License invoice for the next term.

HONG KONG SAR, MACAU SAR, AND TAIWAN

As applies to transactions initiated and performed in Taiwan and the Special Administration Regions "SARs" specified, phrases throughout this Agreement containing the word "country" (for example, "country of acquisition" and "country of installation") are replaced with the following:

- 1) In **Hong Kong SAR**: "Hong Kong SAR"
- 2) In **Macau SAR**: "Macau SAR," except under section 1.15 (Governing Law) above; and

3) In Taiwan: "Taiwan."

INDIA

1.12 Dispute Resolution

The following replaces the final sentence in 1.12:

If no suit or other legal action is brought, within three years after the cause of action arose, in respect of any claim that either party may have against the other, the rights of the concerned party in respect of such claim will be forfeited and the other party will stand released from its obligations in respect of such claim.

INDONESIA

7.13 Agreement Termination

The following paragraph is added:

Both parties waive the provisions of article 1266 of the Indonesian Civil Code to the extent the article requires such court decree for the termination of an agreement creating mutual obligations.

JAPAN

1.6 Payment

Add the following sentence:

Customer agrees to pay within 30 days from our invoice date.

1.12 Dispute Resolution

The following is inserted at the end of 1.12:

Any doubts concerning this Agreement will be initially resolved between us in good faith and in accordance with the principle of mutual trust.

PEOPLE'S REPUBLIC OF CHINA

1.3 Definitions - Definition of "Date of Installation"

The following replaces the definition of Date of Installation:

Date of Installation —

- a. for an IBM Machine Component IBM is responsible for installing, the business day after the day IBM installs it.
- b. for a Customer-set-up (CSU) Machine Component, the earlier of i) the second business day after arrival at Customer's installation location or ii) two months after the date of delivery. When a CSU Machine Component is delivered for connection to a non-CSU Machine or Machine Component delivered by IBM, the Date of Installation of the CSU Machine Component will be the later of these two installation dates.

SINGAPORE

1.12 Other Principles of Our Relationship

The following replaces the terms of 7.12:

Subject to the rights provided to IBM's Eligible Product developers and suppliers as provided in 7.11 above (Limitation of Liability), a person who is not a party to this Agreement will have no right under the Contracts (Right of Third Parties) Act to enforce any of its terms.

12.4 EUROPE, MIDDLE EAST, AFRICA COUNTRY AMENDMENTS

Amendments Applicable to Many Countries

EUROPE, MIDDLE EAST, AND AFRICA

The following term applies to all countries in Europe, the Middle East, and Africa, unless a specific country term states otherwise.

1.11 Items for which IBM May be Liable

In the first paragraph, the following replaces "U.S. \$100,000":

EUR 500,000 (five hundred thousand euro)

EU MEMBER STATES AND ADDITIONAL COUNTRIES SPECIFIED

The following term applies to all EU Member States, Iceland, Liechtenstein, Norway, Switzerland, Turkey, and any other European country that has enacted local data privacy or protection legislation similar to the EU model.

1.12 Other Principles of Our Relationship

The following replaces 7.12:

- a. Definitions – For the purposes of 7.12, the following additional definitions shall apply:
 - (1) Business Contact Information – business-related contact information disclosed by Customer to IBM, including names, job titles, business addresses, telephone numbers and email addresses of Customer’s employees and contractors.
 - (2) Business Contact Personnel – Customer employees and contractors to whom the Business Contact Information relates. For Austria, Italy, and Switzerland, Business Contact Information also includes information about Customer and its contractors as legal entities (for example, Customer’s revenue data and other transactional information).
 - (3) Data Protection Authority – the authority established by the Data Protection and Electronic Communications Legislation in the applicable country or, for non-EU countries, the authority responsible for supervising the protection of personal data in that country, or (for any of the foregoing) any duly appointed successor entity thereto.
 - (4) Data Protection & Electronic Communications Legislation – i) the applicable local legislation and regulations in force implementing the requirements of EU Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) and of EU Directive 2002/58/EC (concerning the processing of personal data and the protection of privacy in the electronic communications sector); or ii) for non-EU countries, the legislation and/or regulations passed in the applicable country relating to the protection of personal data and the regulation of electronic communications involving personal data, including (for any of the foregoing) any statutory replacement or modification thereof.
 - (5) IBM Group – International Business Machines Corporation of Armonk, New York, USA, its subsidiaries, and their respective Business Partners and subcontractors.
- b. Customer authorises IBM:
 - (1) to process and use Business Contact Information within IBM Group in support of Customer, including the provision of support services, and for the purpose of furthering the business relationship between Customer and IBM Group, including, without limitation, contacting Business Contact Personnel (by email or otherwise) and marketing IBM Group products and services (the “Specified Purpose”); and
 - (2) to disclose Business Contact Information to other members of IBM Group in pursuit of the Specified Purpose only.
- c. IBM agrees that all Business Contact Information will be processed in accordance with the Data Protection & Electronic Communications Legislation and will be used only for the Specified Purpose.
- d. To the extent required by the Data Protection & Electronic Communications Legislation, Customer represents that it has obtained (or will obtain) any consents from (and has issued (or will issue) any notices to the Business Contact Personnel as are necessary in order to enable IBM Group to process and use the Business Contact Information for the Specified Purpose.
- e. Customer authorizes IBM to transfer Business Contact Information outside the European Economic Area, provided that the transfer is made on contractual terms approved by the Data Protection Authority or the transfer is otherwise permitted under the Data Protection & Electronic Communications Legislation.

The following terms are added as a new section 4.4.6 for Iceland, Norway, and all Member States of the European Union (“EU”), except Germany:

10.4.6 Disposal of Machines

As from the effective date in Customer's country of local laws and regulations implementing Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), the following applies:

10.4.6.1 When any Machine supplied under this Agreement replaces a machine put on the market before August 13, 2005, then IBM will collect and dispose of such replaced machine, provided that IBM is required to do so by applicable law. IBM may charge for such collection and disposal, to the extent permitted by applicable law.

10.4.6.2 For all WEEE, Customer is responsible for making the WEEE available for collection from Customer's premises within 30 days after supply of the replacement Machine. Whenever IBM collects and disposes of Customer WEEE, based on a legal or contractual obligation, Customer agrees:

- f. to securely erase from any WEEE all programs not provided by IBM with the original equipment and data, including without limitation, the following: i) information about identified or identifiable individuals or legal entities ("Personal Data"); and ii) Customer's confidential or proprietary information and other data. If removing or deleting Personal Data is not possible, Customer agrees to transform such information (e.g., by making it anonymous) so that it no longer qualifies as Personal Data under applicable law;
- g. to remove all funds, if any, from WEEE, returned to IBM;
- h. that IBM is not responsible for saving or protecting any funds, programs not provided by IBM with the original equipment, or any data contained in a WEEE that Customer returns to IBM; and
- i. that IBM may ship all or part of the WEEE or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

WESTERN EUROPEAN COUNTRIES

2.3 Warranty for IBM Machine Components of IBM Appliances

The following paragraph is added after the second paragraph for all countries listed in the definition of Western Europe below:

The warranty for IBM Machines acquired in Western Europe will be valid and applicable in all Western European countries provided the Machines have been announced and made available in such countries. For purposes of this paragraph, "Western Europe" means Andorra, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Vatican State, and any country subsequently that subsequently joins the European Union, as from the date of accession.

EMEA-WIDE

1.6 Payment

The following replaces 7.6 for the following countries except as noted:

Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment charges.

If payment is not made within 30 days from the date of invoice, (or in the case of quarterly advance billing of recurring charges, within 60 days from the date of invoice), Customer may be subject to late payment charges.

The late payment charges are calculated as follows:

Belgium and Luxembourg:

Replace the first sentence in the second paragraph of the above EMEA-wide text with the following:

Any amounts not paid within the terms stated on the IBM invoice will be subject to a late payment fee that will be equal to 1% per period of 30 days, based on the outstanding balance VAT included, until paid in full. Late payment fees due will have to be paid at the end of each period of 30 days.

Denmark and Sweden:

Interest according to the Late Payment Interest Act apportioned to the number of days of delay.

Estonia, Latvia, and Lithuania:

2% per month apportioned to the number of days of delay.

Finland:

Interest according to the Act on interest rate apportioned to the number of days of delay.

France:

In compliance with article 441-6 of the Code of Commerce, a late payment fee is payable, without any need for IBM to issue a reminder, in respect of the period commencing on the day following the payment due date specified on IBM's invoice, and ending on the date when full payment of the invoiced amount is made; such late payment fee shall be calculated on the basis of a rate equal to the European Central Bank's rate for its most recent refinancing operation, plus 10 points.

Germany:

Late payment fees will be calculated according to the German statutory rate.

In the second paragraph of the above EMEA-wide text replace both usages of "date of invoice" with the following:

due date

Greece:

The following replaces the above EMEA-wide text:

Amounts are due and payable upon receipt of invoice. If payment is not made within 30 days from the date of invoice, Customer may be subject to late payment fees.

The late payment fees will be calculated, per day of actual delay, from the due date of the invoice, based on the maximum rate of late payment fee allowed by law.

Italy:

Replace the final paragraph of the above EMEA-wide text with the following:

The late payment charges will be calculated, per day of actual delay, based on the prime rate published by the Italian Banking Association ABI in effect on the last day of the month the payment has been received by IBM, increased by three points.

In case of no payment or partial payment and following a formal credit claim procedure or trial IBM might initiate, the late payment fee will be calculated from the due date of the invoice based on the prime rate published by the Italian Banking Association ABI in effect on the last day of the month the payment was due, increased by three points. IBM can transfer the credit to a factoring company; if IBM does so, it will advise Customer in writing.

Netherlands:

The following replaces the second and third sentences of the EMEA-wide text:

If payment is not made within 30 days from the date of invoice, Customer will be in default without the necessity of a default notice. In such case Customer will be subject to late payment fees of 1% per month.

Norway:

Interest according to the Late Payment Interest Act apportioned to the number of days of delay.

South Africa, Namibia, Lesotho, Swaziland:

Such charges accrue daily from the date payment must have been received by IBM, and will be equal to 2% (two percent) above the ruling prime rate (of a bank designated by IBM) on any outstanding payment.

Spain:

Such fees will be calculated applying 1% of the charges per month to the number of days of delay.

UK and Ireland:

Such charges will be calculated at a monthly rate of 2% of the invoice amount, or as permitted by applicable law.

UK, Ireland, South Africa, Namibia, Lesotho, Swaziland:

Add the following:

IBM's rights relating to late payment charges shall be in addition to any other right that IBM may have in the event that Customer fails to make any payment due to IBM under this Agreement.

IBM reserves the right to require payment in advance of delivery or other security for payment.

BAHRAIN , KUWAIT, OMAN, QATAR, SAUDI ARABIA, AND UNITED ARAB EMIRATES

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 9.5 Automatic Annual Renewal of Software Subscription and Support and Selected Support:

IBM will renew, for an additional payment, expiring software subscription and support for all of Customer's Program licenses or Selected Support for all of Customer's Selected Program licenses to the next Anniversary if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the software subscription and support or Selected Support, as applicable, invoice for the next term.

The following replaces the paragraph that begins "IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE" in 3.3 Automatic Renewal of Fixed Term Licenses:

IBM will renew, for an additional payment, expiring Fixed Term Licenses for all of Customer's Program licenses for the same duration as the expiring term if IBM or Customer's reseller receives (1) Customer's order to renew (e.g., order form, order letter, purchase order) prior to the expiration of the current term or (2) Customer's payment within 30 days of Customer's receipt of the Fixed Term License invoice for the next term.

AUSTRIA

1.6 Payment

Replace the above EMEA-wide text in 7.6 with the following:

Payment in full is due and payable without deduction upon receipt of invoice. Customer agrees to pay accordingly, including any late payment fees. If the invoice amount is not received on IBM's account within 30 days, upon due date, IBM may charge late payment fees at the rate indicated in the Transaction Document.

7.11 Limitation of Liability

The following sentence is added:

The following limitations and exclusions of IBM's liability do not apply for damages caused by gross negligence or willful misconduct.

1.11 Items for which IBM May Be Liable

The following replaces the first sentence:

Circumstances may arise where, because of a default by IBM in the performance of its obligations under this Agreement or other liability, Customer is entitled to recover damages from IBM.

In the second sentence of the first paragraph, delete entirely the parenthetical phrase "(including fundamental breach, negligence, misrepresentation, or other contract or tort claim)."

7.11 Items for which IBM Is Not Liable

The following replaces 7.11:

indirect damages or consequential damages; or

2.5 Extent of Warranty

The following replaces the last paragraph

Warranty for non-IBM Eligible Products:

- (a) Warranty is provided for a period of twelve months, beginning at the date of delivery. Consumers are at least entitled to claim warranty defects within the limitation period provided by law.
- (b) IBM warrants that each non-IBM Eligible Product, when used in the specified operating environment, relates to its functions and conforms to its specifications. In case a non-

IBM Eligible Product is delivered without specifications, IBM only warrants that the non-IBM Eligible Product information correctly describes the non-IBM Eligible Product, and that the non-IBM Eligible Product can be used according to the non-IBM Eligible Product information.

- (c) IBM does not warrant uninterrupted or error-free operation of a non-IBM Eligible Product or that IBM will correct all program defects. The Customer is responsible for the results of the use of a non-IBM Eligible Product. IBM does not warrant uninterrupted or error-free operation of an Eligible Product or that IBM will correct all defects.
- (d) At IBM's discretion, warranty may also be provided by the third party provider himself.
- (e) In the event that IBM is unable to remedy a warranty defect within a reasonable period of time - even after an appropriate grace period - the Customer may in respect of this defect (at his discretion) demand a reduction of price, or rescission of contract. In case of minor defects or deviations, the Customer shall not be entitled to demand a rescission of the contract.
- (f) In addition, the limitation of liability provision will apply.
- (g) However, non-IBM manufacturers, developers, suppliers, or publishers may provide their own warranty to Customer.

AUSTRIA, DENMARK, ESTONIA, FINLAND, LATVIA, LITHUANIA, NORWAY, SWEDEN:

1.7 Taxes

Delete the last sentence:

This excludes those taxes based on IBM's net income.

BELGIUM, FRANCE, UK, IRELAND, SOUTH AFRICA, NAMIBIA, LESOTHO, SWAZILAND:

1.7 Taxes

Delete 1.7.

EGYPT

7.12 General Principles of Our Relationship

Delete 1.12.

GERMANY

7.11 Limitation of Liability

The following replaces the Limitation of Liability section in its entirety:

- e. IBM will be liable without limit for 1) loss or damage caused by a breach of an express guarantee; 2) damages or losses resulting in bodily injury (including death); and 3) damages caused intentionally or by gross negligence.
- f. In the event of loss, damage and frustrated expenditures caused by slight negligence or in breach of essential contractual obligations, IBM will be liable, regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), per claim only up to the greater of 500,000 euro or the charges (if the Eligible Product is IBM SaaS or subject to Fixed Term charges, up to 12 months' charges) Customer paid for the Eligible Product that caused the loss or damage. A number of defaults which together result in, or contribute to, substantially the same loss or damage will be treated as one default.
- g. In the event of loss, damage and frustrated expenditures caused by slight negligence, IBM will not be liable for indirect or consequential damages, even if IBM was informed about the possibility of such loss or damage.
- h. In case of delay on IBM's part: 1) IBM will pay to Customer an amount not exceeding the loss or damage caused by IBM's delay and 2) IBM will be liable only in respect of the resulting damages that Customer suffers, subject to the provisions of Items a and b above.

1.12 Dispute Resolution

The following replaces the third sentence of 1.12:

Any claims resulting from this Agreement are subject to a limitation period of three years, except as stated in Section 2 (Warranties) of this Agreement.

1.12 Other Principles of Relationship

The following replaces 7.12:

No right or cause of action for any third party is created by this Agreement, nor is IBM responsible for any third party claims against Customer, except (to the extent permitted in Section 7.11 (Limitation of Liability) for: i) bodily injury (including death); or ii) damage to real or tangible personal property for which (in either case) IBM is legally liable to that third party.

2.2 Warranty for IBM Software Subscription and Support and Selected Support

The following replaces 2.2:

IBM warrants that Software Maintenance will be provided using reasonable care and skill, and according to its current description and the provisions of this Agreement.

The Customer agrees to provide timely written notice of any failure to comply with this warranty so that IBM can take corrective action.

IBM will remedy any defects covered by warranty, of which written notice has been given by Customer. If a defect is not remedied within a reasonable period of time, the Customer may in respect to such defect, provided that the value of the serviceability of the work is impaired, either request a reduction of price, or, rescind this Agreement. In case of minor defects or deviations, the Customer shall not be entitled to rescind this Agreement. In case the Customer should be entitled to liability claims because of a warranty defect, the Limitation of Liability section shall apply. However the Customer shall not be entitled to liability claims resulting from minor warranty defects.

2.3 Warranty for IBM Machine Components of IBM Appliances

The following replaces 2.3:

IBM warrants that each IBM Machine Component is free from defects at the time of delivery and conforms to its Specifications. The warranty period for a Machine Component commences on the Date of Installation, however at the earliest upon delivery. During the warranty period, IBM will remedy any warranty defects, through repair or exchange.

In the event that IBM is unable to remedy a warranty defect or defect correction fails within a reasonable period of time, the Customer may in respect of such defect, provided the value or the serviceability of the Machine Component is impaired, either request a reduction of price, or rescind this Agreement. In case of minor warranty defects, the Customer shall not be entitled to rescind this Agreement.

In case the Customer should be entitled to liability claims because of a warranty defect, the Limitation of Liability section shall apply. However the Customer shall not be entitled to liability claims resulting from minor warranty defects.

2.5 Extent of Warranty

The second paragraph is deleted.

The following replaces the last paragraph:

Warranty for Non-IBM Eligible Products may, at IBM's discretion, also be provided by non-IBM manufacturers, developers, suppliers, or publishers themselves.

10.4.6 Disposal of Machines

The following terms are added as a new section 10.4.6:

In accordance with the law for the placing on the market, the return, and the environmentally compatible disposal of Electrical and Electronic Equipment (Electrical and Electronic Equipment Law - ElektroG), for machines the following will apply:

10.4.6.1 IBM is prepared to take back IBM waste electrical and electronic equipment (WEEE) that were put on the market as new machines after August 13, 2005, and IBM will be responsible for the disposal of such machines.

10.4.6.2 According to German law, Customer is responsible to dispose of WEEE, which is not covered by the preceding sentence. In such case, IBM is prepared to take back and dispose of, in compliance with applicable law, such WEEE by charging the applicable disposal fee to the Customer, based on a separate agreement.

Customer is responsible for making the WEEE available for collection from Customer's premises within 30 days after supply of the replacement Machine.

10.4.6.3 Whenever IBM collects and disposes of Customer WEEE, based on a legal or contractual obligation, Customer agrees:

- j. Customer is responsible to remove all funds, if any, from WEEE returned to IBM, and to securely erase any data that Customer considers sensitive (including personal data), existing in/on waste machines (e.g. hard disk, storage devices, memory chips, etc.), before making them available for collection by IBM or its designated assignee. In the event that Customer is unable to comply with this obligation due to technical reasons, Customer will inform IBM thereof in writing. In this case, IBM shall be entitled to delete all data stored in/on the waste machines, as instructed and requested by Customer and according to the "IBM Supplementary Terms and Conditions for Processing of Customer Data by Order according to § 11 BDSG";
- k. IBM is not responsible for saving or protecting any funds, programs not provided by IBM with the original equipment, or any data contained in a WEEE that Customer returns to IBM; and
- l. IBM may ship all or part of the WEEE or its software to other IBM or third party locations around the world to perform its responsibilities under this Agreement, and Customer authorizes IBM to do so.

NETHERLANDS

1.6. Payment

Add the following paragraphs to 7.6:

We may apply Customer's payment to Customer's other outstanding invoices.

Our rights relating to late payment charges shall be in addition to any other right that we may have in the event that Customer fails to make any payment due to us under this Agreement.

We reserve the right to also base our decision on the conclusion of an agreement with Customer on Customer's solvency and to require payment in advance of delivery or other security for payment.

Customer's obligation to pay is unconditional and shall not be subject to any abatement, reduction, set-off, defense, counter-claim interruption, deferment, or recoupment.

Replace 1.7 with the following:

Customer agrees to pay all taxes and duties, regardless of their qualification, unless specified otherwise on the invoice.

SOUTH AFRICA, NAMIBIA, LESOTHO, SWAZILAND

1.6 Payment

Add the following additional sentence:

When Customer makes payment by cheque, payment is deemed to have been made only when Customer's cheque has been received by IBM and its relevant account has been credited by IBM's authorised bankers.

SWITZERLAND

1.3 Definitions - Definition of "Non-IBM Program"

The following is added to definition of. Non-IBM Programs:

No liability of whatever sort is accepted or warranty granted by IBM.

7.12 General Principles of Our Relationship

Delete 1.12.

TURKEY

1.6 Payment

The following replaces 7.6:

Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment charges.

If payment is not made within 30 days from the date of invoice, Customer may be subject to late payment charges.

Add the following to the end of this section:

Customer is responsible for all banking charges (including, but not limited to, LC charges, commissions, stamps, and extensions) incurred within and outside of Turkey.

IRELAND AND UNITED KINGDOM

The following sentence is added to the first paragraph of the preamble:

Nothing in this paragraph shall have the effect of excluding or limiting liability for fraud.

7.11 Limitation of Liability

1.11 Items for Which IBM May Be Liable

The following replaces the first paragraph of the Subsection:

For the purposes of this section, a "Default" means any act, statement, omission or negligence on the part of IBM in connection with, or relating to, any Program license granted, any goods sold or services rendered by IBM under this Agreement in respect of which IBM is legally liable to Customer, whether in contract or in tort. A number of Defaults which together result in, or contribute to, substantially the same loss or damage will be treated as one Default.

Circumstances may arise where, because of a Default by IBM in the performance of its obligations under this Agreement or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM and except as expressly required by law without the possibility of contractual waiver, IBM's entire liability for any one Default will not exceed the amount of any direct damages, to the extent actually suffered by Customer as an immediate and direct consequence of the default, up to the greater of (1) 500,000 euro (or the equivalent in local currency) or (2) 125% of the charges (if the Eligible Product is subject to fixed term charges, up to 12 months' charges) for the Eligible Product that is the subject of the claim. Notwithstanding the foregoing, the amount of any damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable is not subject to such limitation. In addition, the amount (if any) payable by IBM under the provisions of section 7.10 shall not be subject to any limitation or exclusion set forth in this section 7.11.

7.11 Items for Which IBM is Not Liable

The following replaces Items 7.11 and 7.11:

- c. special, incidental, exemplary, or indirect damages or consequential damages; or
- m. wasted management time or lost profits, business, revenue, goodwill, or anticipated savings.