

# International Passport Advantage Express 合約

本 IBM International Passport Advantage Express 合約（下稱「本合約」），包括任何適用「附件」、「使用條款」及「交易文件」在內，含有規範「客戶」向 IBM 或轉銷商取得「適用產品」交易之相關條款，並構成「客戶」取得「適用產品」之交易的完整合約，取代「客戶」與 IBM 之間關於 Passport Advantage Express 的任何先前口頭或書面協議、溝通、陳述、聲明、理解、擔保、承諾、契約、保證或承擔。

若「本合約」、「附件」、「使用條款」及「交易文件」的條款之間發生衝突，則「附件」的條款優先於「本合約」的條款，「使用條款」的條款優先於「附件」及「本合約」的條款，「交易文件」的條款優先於「本合約」、「使用條款」及「附件」的條款。

一旦接受「本合約」，1) 除非適用法令之禁止或另有規定，否則任何以可靠方式（例如，電子映像檔、影印或傳真）所製作之「本合約」或「交易文件」的複本皆可視為正本，且 2) 依「本合約」所訂購的所有「適用產品」皆受「本合約」之約束。

## 1. 一般條款

### 1.1 合約架構

「本合約」分為六部分：

第 1 部分 – 「一般條款」包括下列相關條款：「合約架構」、「附件與交易文件」、「定義」、「接受條款」、「交付」、「付款」、「稅金」、「適用產品」、「IBM 事業夥伴及轉銷商」、「智慧財產保護」、「賠償責任」、「雙方之責任」、「合約終止」、「程式查核」及「有效地區及準據法」。

第 2 部分 – 「保證」，包括下列相關條款：「IBM 程式之保證」、「IBM 軟體產品更新與技術支援及選定支援之保證」、「IBM 內建程式設備中 IBM 機器元件之保證」、「IBM SaaS 之保證」及「保證範圍」。

第 3 部分 – 「程式及產品更新與技術支援」，包括下列相關條款：「IBM 程式」、「虛擬化環境中之程式」、「固定期間授權」、「CEO 產品種類」及「軟體產品更新與技術支援和選定支援」。

第 4 部分 – 「內建程式設備」，包括下列相關條款：「虛擬內建程式設備」、「由程式元件和機器元件組成之內建程式設備」、「程式元件」及「機器元件」。

第 5 部分 – 「IBM SaaS」，包括下列相關條款：「所有權」、「客戶之使用權」、「IBM SaaS 之訂用」、「IBM SaaS 技術支援」、「內容」及「IBM SaaS 之終止」。

第 6 部分 – 「各國專有條款」。

### 1.2 附件與交易文件

「適用產品」之額外條款，載明於 IBM 所提供，稱為「附件」和「交易文件」之文件中。視使用的國家而定，「附件」可能有不同的名稱。一般而言，「附件」和「交易文件」（例如附約、表單、發票、附表或附錄）內含有關本交易之特定細節及條款。「客戶」可能就單一交易收受一或多份「交易文件」。「附件」與「交易文件」為「本合約」之一部分，惟僅適用於各該個別交易。各該個別交易彼此分開且獨立。

### 1.3 定義

**周年日 (Anniversary)** – 係指「生效日」滿一年後的下一個月的第一天，如果「生效日」是某月第一天，則「周年日」係指「生效日」滿一年之日。

**內建程式設備 (Appliance)** – 專為特定功能而非通用運算作業而設計的「適用產品」，它可能是「程式」（以「虛擬內建程式設備」而言），或由「程式元件」、「機器元件」及 IBM 可能提供給「客戶」的任何「機器碼元件」組成。

**審核報告 (Audit Reports)** – 可於 IBM License Metric Tool (“ILMT”) 中取得之報告，或經由 IBM 可接受，如下列網頁所指定的方法所取得之報告：

<http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>。這些報告根據「適用子容量產品」可用的「虛擬化容量」提供「處理器價值單位 (“PVU”)」授權要求。

**CEO 使用者 (CEO User)** – 被指派使用機器的個人，可以複製、使用或延伸使用「CEO 產品種類」中的「程式」。

**內容 (Content)** – 資訊、軟體及資料，包括但不限於「客戶」及「客戶」所授權之任何使用者建立、提供、上傳或傳送之任何「個人資料」、超文字標記語言檔案、Script、程式、錄影、聲音、音樂、圖形、影像、Applet 或 Servlet。

**客戶 (Customer)** – 訂購「適用產品」的客戶「企業」公司。

**客戶安裝機器元件 (Customer-set-up Machine Component)** – 由「客戶」負責依所附指示自行安裝之「IBM 機器元件」。

**安裝完成日 (Date of Installation)** –

- a. 針對「客戶安裝機器元件」，除非 IBM 或「客戶」的 IBM 轉銷商另外通知「客戶」，否則，該「內建程式設備」之「客戶」購買發票或銷售收據上的日期即為「安裝完成日」。
- b. 針對 IBM 負責安裝之「IBM 機器元件」，該日期係指 IBM 完成機器安裝之次一工作日，若因「客戶」延遲安裝作業，則係指 IBM 完成安裝該「機器元件」準備之次一工作日。

**生效日 (Effective Date)** – IBM 接受「客戶」對「適用產品」訂購的日期（不論是由「客戶」直接訂購或由「客戶」透過轉銷商訂購）。

**適用作業系統技術 (Eligible Operating System Technology)** – 可使用「子容量授權」的作業系統，載明於 <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>。

**適用處理器技術 (Eligible Processor Technology)** – 可使用「子容量授權」的處理器技術，載明於 <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>。

**適用產品 (Eligible Products)** – 於市場上所供應的「IBM 程式」、「非 IBM 廠牌程式」、「選定支援」、增加「客戶」使用「程式」的授權、「IBM 折價換購 (Trade-ups)」、「替代性折價換購」、「IBM 軟體產品更新與技術支援年度展延」、「IBM 軟體產品更新與技術支援回復」、「第三人軟體產品更新與技術支援年度展延」、「第三人軟體產品更新與技術支援回復」、「選定支援」展延、IBM SaaS 及「內建程式設備」。

**適用于容量產品 (Eligible Sub-Capacity Product)** – 可使用「子容量授權」的「產品」，載明於 <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>。

**適用虛擬化環境 (Eligible Virtualization Environment)** – 一個伺服器或一組協作成爲單一運算實體的伺服器，其包含「適用處理器技術」、「適用作業系統技術」及「適用虛擬化技術」。

**適用虛擬化技術 (Eligible Virtualization Technology)** – 可使用「子容量授權」的虛擬化技術，載明於 <http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html>。「適用虛擬化技術」能夠將處理器容量限制爲總實體容量的一個子集(subset)，該子集有時候稱爲分割區、LPAR 或虛擬機器。

**工程變更 (Engineering Change)** – 修改已安裝的「機器元件」設計之某些部分的一種更新，包括但不限於特定「機器元件」零件或「機器碼元件」設計之更新。

**企業 (Enterprise)** – 任何擁有「客戶」所登記之「實體」50% 以上股權之法律實體，或由「客戶」所登記之「實體」擁有 50% 以上股權之法律實體，或與「客戶」所登記之「實體」受相同之控制(指由法律實體擁有其 50% 以上股權)之任何法律實體。

**固定期間 (Fixed Term)** – IBM 在「交易文件」中，例如在「程式」的 PoE 中，載明的一段明確期間。

**全容量 (Full Capacity)** – 一伺服器上已啓動並可使用的實體處理器核心總數。

**IBM** – 提供「適用產品」的 IBM 「企業」公司。

**IBM 事業夥伴 (IBM Business Partner)** – 與 IBM 簽有合約的機構，這些機構可推廣、銷售及在某些情況下支援某些「適用產品」。

**IBM 機器元件 (IBM Machine Component)** – 印有 IBM 標誌的「機器元件」。

**IBM 程式 (IBM Program)** – 依據「本合約」而取得的「程式」，其應受 IPLA (包括它的 LI) 的拘束。

**IBM 軟體即服務 (IBM Software as a Service; “IBM SaaS”)** – IBM 透過網際網路遠端提供給「客戶」，可供存取 (i) 「程式」的功能，(ii) 基礎架構，以及 (iii) 技術支援的一種供應項目。IBM SaaS 並不是「程式」，但「客戶」可能需要下載啓用軟體才能使用它。IBM SaaS 屬於「適用產品」。

**IBM SaaS 使用者 (IBM SaaS User)** – 利用使用者帳戶 ID 和密碼存取 IBM SaaS 的人員，該 ID 和密碼與「客戶」的 IBM SaaS 帳戶相關聯，並由「客戶」提供。

**IBM 軟體產品更新與技術支援 (IBM Software Subscription and Support)** – 針對依 IPLA 授權的「IBM 程式」所提供的軟體產品更新與技術支援。請參閱 3.5.1 「軟體產品更新與技術支援」，以取得進一步說明。

**IPLA** – IBM 國際程式授權合約 (IBM International Program License Agreement)。每一個「IBM 程式」都附有一份 IPLA 於「程式」目錄中、標示為“License”的程式庫中、小冊子中或 CD 上。它也可以從網際網路的 <http://www.ibm.com/software/sla> 網站取得，以及向 IBM 和其轉銷商索取。

**授權手冊 (License Information; “LI”)** – 內含某「程式」特定資訊及任何附加條款之文件。「程式」之 LI 可於 <http://www.ibm.com/software/sla/> 網站取得。LI 亦可能位於「程式」之某目錄內，以使用系統指令方式取得，此外，亦可能以小冊子形式檢附於「程式」。

**機器碼元件 (Machine Code Component)** – 基於啓用依其「規格」所述「機器元件」功能之目的而與「IBM 機器元件」一併交付之微碼、基本輸入/輸出系統程式碼（簡稱“BIOS”）、公用程式、裝置驅動程式、診斷程式及任何其他程式碼（均適用其所附授權合約之特別規定）。

**機器元件 (Machine Component)** – 硬體設備、裝置、轉換、「升級」、元件或配件，或此等項目之組合。「機器元件」一詞包括 IBM 可能提供予「客戶」之「IBM 機器元件」及任何「非 IBM 廠牌機器元件」（包括其他設備）。

**非 IBM 廠牌程式 (Non-IBM Program)** – 受所附之第三人終端使用者授權合約條款規範的「程式」。IBM 並非第三人終端使用者授權合約的當事人，並不承擔任何義務。

**個人資料 (Personal Data)** – 可用來識別特定個人的任何資訊，例如提供給 IBM 為「客戶」儲存、處理或傳送的姓名、電子郵件位址、住家地址或電話號碼。

**處理器晶片 (Processor Chip)** – 包含一或多個「處理器核心」的電子電路，它插入「處理器插槽」中。

**處理器核心 (Processor Core)** – 運算裝置內的一個實體功能單元，負責解譯及執行程式指令，由至少一個指令控制單元和一或多個算術及邏輯單元所組成。多核心技術可讓兩個以上的「處理器核心」作用於單一「處理器晶片」。一個 System z Integrated Facility for Linux (IFL) 引擎視為單一「處理器核心」。

**處理器插槽 (Processor Socket)** – 接受「處理器晶片」的電子電路。

**處理器價值單位 (Processor Value Unit; “PVU”)** – IBM 用來指定「處理器核心」價值的度量單位。「處理器價值單位」授權方式說明於

[http://www.ibm.com/software/lotus/passportadvantage/pvu\\_licensing\\_for\\_customers.html](http://www.ibm.com/software/lotus/passportadvantage/pvu_licensing_for_customers.html)。

**程式 (Program)** – 係指下列各項，包含其正本及其全部或部分複本：1) 可供機器閱讀的指令及資料，2) 元件，3) 影音內容（如圖像、文稿、錄音、錄影或照片等），4) 授權予客戶使用之資料，以及 5) 授权使用文件或授權碼和文件。

**程式元件 (Program Component)** – 預先安裝在「機器元件」上的「IBM 程式」或「非 IBM 廠牌程式」。

**權利證明書 (Proof of Entitlement; “PoE”)** – IBM 在其中載明「適用產品」的授权使用層級的文件。此 PoE，配合「客戶」相應的已付款發票或收據，可作為「客戶」授权使用層級的證明。

**選定程式 (Selected Program)** – 指「非 IBM 廠牌程式」，或依「IBM 國際授權合約 - 無保證程式」(IBM License Agreement for Non-Warranted Programs) 合約條款所授權的「IBM 程式」。

**選定支援 (Selected Support)** – 為指定的「選定程式」所提供的支援。

**服務提供者 (Service Provider)** – 以直接方式或透過轉銷商，為終端使用者客戶提供資訊科技服務的實體。

**實體 (Site)** – 任何定義的實體，例如「客戶」的場地或組織單位，如部門、分支機構、子公司或成本中心，經「客戶」向 IBM 或轉銷商通知，且 IBM 為其指定 Passport Advantage Site Number 者。

**規格 (Specification)** – 係指「機器元件」特定資訊。「IBM 機器元件規格」記載於名為「正式公佈規格」之文件。

**子容量授權 (Sub-Capacity Licensing)** – 根據「虛擬化容量」的「適用子容量產品」授權。

**訂用期 (Subscription Period)** – IBM SaaS 可供「客戶」使用的一段期間，載明於適用的「交易文件」中。

**期間 (Term)** – 指一段期間，開始於 IBM 接受「客戶」初次訂購的日期（如為首次「期間」時）或「周年日」（如為後續「期間」時），並結束於最近之下一個「周年日」之前一日。

**使用條款 (Terms of Use; “ToU”)** – IBM 提供 IBM SaaS 供應項目可供「客戶」使用之附加條款，可於 <http://www.ibm.com/software/sla/slabd.nsf/sla/tou/> 檢視。

**第三人軟體產品更新與技術支援 (Third Party Software Subscription and Support)** – 對於「非 IBM 廠牌程式」，依第三人之條款所提供的軟體產品更新與技術支援。請參閱 3.5.1 「軟體產品更新與技術支援」，以取得進一步說明。

**升級 (Upgrade)** – 對「機器元件」的變更，以修改、增加、移除、啟用或停用特定「機器元件」資源或功能。每一項此等變更均可透過「機器元件」轉換或透過「機器元件」裝置的轉換、增加、移除或交換來達成，惟不得超出 IBM 針對「機器元件」所宣佈及支援的範圍。

**虛擬化容量 (Virtualization Capacity)** – 根據

<http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> 中所載明的規則，「適用子容量產品」部署在「適用虛擬化環境」時可用的最高尖峰處理器容量。

## 1.4 接受條款

當「客戶」向 IBM 或轉銷商取得「適用產品」時，即表示接受「本合約」條款，且未對內容有任何修訂。「客戶」以訂單或其他任何方式提出的額外或不同的條款，均屬無效。當 IBM 採取下列任一行為，即表示接受「客戶」訂購「適用產品」，該交易與「適用產品」即受「本合約」之規範：i) 將「交易文件」交付「客戶」，ii) 使「程式」或 IBM SaaS 可供「客戶」使用，或運送「內建程式設備」（於適用時），或 iii) 開始提供支援、服務或解決方案。

任一方提出簽署之要求時，雙方將簽署「附件」或「交易文件」。

## 1.5 交付

如有運輸費用，將在「交易文件」中載明。若為 IBM 以有體之形式提供予「客戶」之「程式」，IBM 於交付該等「程式」予 IBM 指定之運輸公司，即完成其出貨及交付之義務，但「客戶」與 IBM 以書面另為約定者不在此限。

## 1.6 付款

- a. 當「客戶」從轉銷商取得「適用產品」時，「客戶」應直接付款給轉銷商。
- b. 當「客戶」從 IBM 取得「適用產品」時，「客戶」同意依 IBM 在其發票或同等文件所規定之方式(含延遲費用)給付；以及
- c. 「程式」授權收費方式可能是一次付款或「固定期間」收費，視授權類型而定。

## 1.7 稅金

如果因為「客戶」跨國移動、存取或使用「適用產品」，而使任何主管機關課以關稅、稅金、公課或費用（包括任何「適用產品」進出口的預扣稅金），則「客戶」同意負責及支付任何這類關稅、稅金、公課或費用。惟不含對 IBM 之所得所課之稅款。

## 1.8 適用產品

IBM 得隨時新增或終止「適用產品」之銷售。

如果 IBM 終止「程式」或「程式」某一版本的銷售，則在終止銷售的生效日期及其後，未經 IBM 事先書面同意，「客戶」不得增加超出其已取得之授權的使用層級，IBM 不會無理不為該書面同意。

## 1.9 IBM 事業夥伴及轉銷商

除了向 IBM 取得「適用產品」之外，「客戶」也可以向「IBM 事業夥伴」和轉銷商取得「適用產品」。不過，並非所有轉銷商均獲授權轉銷所有「適用產品」。

當「客戶」向「客戶」的「IBM 事業夥伴」或轉銷商訂購「適用產品」時，IBM 不負責 1) 「IBM 事業夥伴」或轉銷商的行為，2) 「IBM 事業夥伴」或轉銷商對「客戶」的任何額外義務，或 3) 「IBM 事業夥伴」

或轉銷商依其合約提供予「客戶」的任何產品或服務。當「客戶」向「IBM 事業夥伴」或轉銷商取得「適用產品」時，由「IBM 事業夥伴」或轉銷商設定收費和付款條件。

## 1.10 智慧財產保護

「產品」一詞在本條款中係指「IBM 程式」、「機器碼元件」或「IBM 機器元件」。

### 1.10.1 第三人之指控

若第三人指控「產品」侵害其專利權或著作權而向「客戶」提出指控時，IBM 將就該項指控為「客戶」提出抗辯，並支付所有經法院判決確定「客戶」應支付的費用及損害賠償或經 IBM 事先同意之和解費，惟「客戶」應符合下列條件：

- a. 立即以書面通知 IBM 該指控；
- b. 允許 IBM 主導抗辯及有關之和解談判，並與 IBM 合作；以及
- c. 符合並持續遵循「產品」的授權和其他條款及「客戶」依下列「補救措施」條款所負之義務。

### 1.10.2 補救措施

當 IBM 認為前述指控已被提出或可能被提出時，「客戶」同意 IBM 得作適當安排，依 IBM 自行裁量以決定：i) 使「客戶」得繼續使用該「產品」；ii) 修改該「產品」；或 iii) 以功能不低於原來「產品」之替代品更換之。如 IBM 認為前述方法均不可行時，「客戶」同意於 IBM 書面通知後，立即停止使用該「產品」，並將該「產品」及所有複本均退還 IBM。其後 IBM 將以貸項通知方式，退還「客戶」就該退還「產品」已支付之金額（若該「產品」係依「固定期間」收費者，則以十二個月的費用為限）。

### 1.10.3 IBM 不負責之賠償

IBM 對於因下列任一情事所發生或相關之任何指控並不負責：

- a. 由「客戶」提供之物件，或由第三人為「客戶」提供之物件，而併入「產品」或 IBM 依「客戶」所提供或第三人為「客戶」所提供之任何設計、規格或指示所為者；
- b. 「客戶」所為或第三人為「客戶」所為之「產品」修改；
- c. 未遵循「產品」相關授權及限制條款而使用者，或者，當使用現行版本或版次可以避免索賠或降低索賠風險時，卻使用非現行版本或版次的「產品」；
- d. 搭配任何程式、硬體裝置、資料、器材、方法或程序所為之「產品」組合、操作或使用行為，致發生侵權之事由者；
- e. 於「客戶」「企業」外部或為了任何第三人的利益所為之「產品」散布、操作或使用行為；或
- f. 「單獨授權碼」(Separately Licensed Code) (如果有的話)，如「產品」的 LI 中所載明。

「產品」的 LI 或其他文件可能允許「客戶」複製、修改或再散布「產品」的部分或全部，而不需支付額外授權費用給 IBM。「本合約」所規定的侵權賠償義務僅適用於 IBM 提供給「客戶」的「產品」複本，以及 PoE 中明示授權的額外複本。IBM 對於非由 IBM 提供且非 PoE 所特別授權的「產品」複本的相關索賠不負任何義務，即使「產品」的 LI 或其他文件所允許者亦同。

以上「智慧財產保護」為 IBM 就任何第三人之智慧財產請求所負擔之全部義務，及對「客戶」就該等索賠所為之全部補救措施。本條「智慧財產保護」規定，對「產品」所附帶或包含之程式碼（包括「單獨授權碼」）的任何第三人供應商，並未以任何方式課予其義務。

## 1.11 賠償責任

本 1.11 條（賠償責任）中之限制與除外條款，除法律禁止以合約拋棄或限制之情況外，其他情況一律適用。

### 1.11.1 IBM 應負責賠償之項目

因 IBM 違約或其他可歸責事由，「客戶」或得向 IBM 請求損害賠償。無論「客戶」基於何種權利請求賠償（包括重大違約、過失、不實陳述或其他契約請求或侵權行為），就「客戶」因「適用產品」所發生或相關之全部請求或其他基於「本合約」所生之請求，IBM 所負之賠償責任，以實際直接損害為限，且累計賠償金額以美金 \$100,000 元（或當地等值貨幣金額），或「客戶」就造成損害之個別「適用產品」已支付之費用金額（若該「適用產品」為 IBM SaaS，或係依「固定期間」收費者，則以十二個月的費用為限），兩者中之較高者為賠償上限。

此項限制亦適用於任何 IBM 「適用產品」之開發者與供應商。此項限制係 IBM 及 IBM 「適用產品」之開發者與供應商之共同賠償上限。IBM 依法應負責之人身傷害（包括死亡）或物之毀損之賠償，不受前述賠償金額上限之限制。

#### 1.11.2 IBM 毋需負責賠償之項目

在任何情況下，IBM、IBM 「適用產品」之開發者或供應商對下列情事均不負賠償責任，即使被告知該情事有可能發生時，亦同：

- a. 資料損害或滅失；
- b. 特殊損害、附帶損害、懲罰性賠償、間接損害或任何衍生之經濟損害；或
- c. 所失利益、商業機會、營業、收益、商譽損失或可預期節省之成本。

### 1.12 雙方之責任

#### 1.12.1 通知與通訊

在適用法令許可範圍內，雙方同意利用電子方式及傳真傳輸方式傳送及接收「本合約」所生雙方業務關係之相關通訊，且該等通訊視同已簽署之書面文件。電子文件中之識別碼（簡稱「使用者 ID」）即足以驗證送件人之身分及文件之真實性。

#### 1.12.2 轉讓及轉售

未經他方事先書面同意者，任何一方均不得轉讓「本合約」之全部或一部。未經同意所為之任何轉讓均不生效力。於任一方所屬「企業」內所為「本合約」全部或一部之轉讓，或對購併之繼受組織所為「本合約」全部或一部之轉讓，無需他方之同意。此外，IBM 亦得於未取得「客戶」同意之情況下轉讓應收帳款。IBM 出售部分業務因而影響該業務部門之相關合約者，該出售業務之行爲不視為本條所稱之合約轉讓。

「客戶」同意「適用產品」僅限於「客戶」「企業」內部使用，不得轉售、租賃或轉讓予第三人。任何違反之情事均不生效力。

#### 1.12.3 法律之遵循

IBM 應遵循其身爲資訊科技產品及服務供應商一般應遵循之法律。IBM 不負責判斷適用於「客戶」業務之法律要件，包括「客戶」依「本合約」取得「適用產品」之相關法律要求、由 IBM 依「本合約」提供「適用產品」或由「客戶」依「本合約」收受之特定「適用產品」符合該等法律之要件。縱使「本合約」另有相反規定，任一方均無義務因本契約之履行而有違反適用於該方法律之義務。

貴我雙方均同意遵循所有相關之進出口法令規章，包括但不限於美國禁運和制裁法規，以及美國就若干使用行爲或若干使用者所設禁止或限制出口之法令規章。

#### 1.12.4 爭議之解決

任一方於主張他方未依「本合約」履行其義務之前，均應給予他方有合理補正之機會。貴我雙方應基於誠信原則解決雙方有關「本合約」之一切紛爭、爭論或主張。除非法律禁止以合約拋棄或限制之，否則，i) 任一方均不得於訴訟事由發生逾二年後，就「本合約」或依其所爲任何交易所生或相關事由提出任何形式之法律訴訟；且 ii) 於該時限後，任何此等法律訴訟，及一切有關各該訴訟之個別權利，一律喪失其法律效力。

#### 1.12.5 其他雙方責任

- a. 未經事先書面同意，任一方均未授權他方在任何宣傳或出版品中使用其（或其「企業」之）商標、商業名稱，或其他名稱。
- b. 任何機密資訊之交換，均應另依雙方簽署之保密合約爲之。惟依「本合約」所爲有關任何「適用產品」之機密資訊之交換，其適用之保密合約應併入「本合約」並適用「本合約」規定。
- c. 「本合約」及依其所爲之任何交易，不於「客戶」與 IBM 之間建立代理、合資或合夥等關係。任一方均得自由與第三人簽訂類似合約，以開發、取得或提供競爭性產品與服務。
- d. 「客戶」同意授予 International Business Machines Corporation 及其子公司（及其繼受人與受讓人、承包商、「IBM 事業夥伴」和轉銷商），就與 IBM 「適用產品」相關事項或爲促進 IBM 與「客戶」之業務關係而儲存及使用「客戶」業務聯絡資訊之權利。



- e. 「本合約」或依其所為之任何交易，不為任何第三人創設權利或訴因，此外，任何第三人向「客戶」提出之索賠要求，IBM 概不負責，但於「本合約」第 1.10 條（智慧財產保護）另有規定或於第 1.11 條（賠償責任）所允許者（IBM 依法應對該第三人負責之人身傷害（包括死亡）或物之毀損），不在此限。
- f. 「客戶」應自行負責選擇符合其需求之「適用產品」，並自行負責因使用「適用產品」所致之結果，包括「客戶」決定施行有關「客戶」業務運作之任何建議。
- g. 「適用產品」不得用來提供主機代管 (commercial hosting) 服務或其他資訊科技商業營運服務予第三人。
- h. 依「本合約」之規定，需取得他方之核准、接受、同意或類似行為者，他方不得無理由延遲或拒絕。
- i. 任何一方均毋須就其無法控制之因素致無法履行之非金錢義務而負責。
- j. 「客戶」同意其使用 IBM SaaS 時，會遵守適用的資料保護法令，並遵守載明於 <http://www.ibm.com/services/us/imc/html/aup.html> 的 IBM 接受使用原則。
- k. 當 IBM 提出合理要求以履行「本合約」義務時，「客戶」同意給予 IBM 充分權利及安全方式使用「客戶」之設施、系統、資訊、人員及資源（包括遠端存取），且 IBM 無需支付任何費用。因「客戶」延遲提供前開配合或延遲履行「本合約」規定之其他「客戶」義務，致使 IBM 延遲或不能履行其義務者，IBM 概不負責。
- l. 在簽署「本合約」時，包括每一個「附件」、ToU 及「交易文件」在內，任何一方均未根據「本合約」未載明之任何陳述為基礎，包括但不限於有關下列各項的任何陳述：i) 任何「適用產品」的效能或功能，但於「本合約」中明示保證者，不在此限；ii) 第三人之經驗或推薦；或 iii) 「客戶」可能達成之任何結果或成本節省。

### 1.13 合約終止

於軟體產品更新與技術支援首期期間屆滿後或 IBM SaaS 「訂用期」屆滿後，IBM 得隨時具理由或不具理由立即終止「本合約」且不另行通知。如果「客戶」在收到終止通知之前展延任何「IBM 程式」的「IBM 軟體產品更新與技術支援」或 IBM SaaS，IBM 得自行裁量決定在目前期間的剩餘期間內，繼續提供該等「程式」的「IBM 軟體產品更新與技術支援」或該等 IBM SaaS 供應項目給「客戶」，或是給予「客戶」按比例計算的退款。如果「客戶」在收到終止通知之前展延任何「非 IBM 廠牌程式」的「第三人軟體產品更新與技術支援」，第三人得在目前期間的剩餘期間內，繼續提供該「非 IBM 廠牌程式」的「第三人軟體產品更新與技術支援」給「客戶」。如果第三人未能提供，則「客戶」得取得按比例計算的退款。

若「客戶」無有效的軟體產品更新與技術支援，將視為其已終止「本合約」。若一方不遵守「本合約」中的任何條款，且於收到他方書面通知後，仍未於通知所載之合理期限內補正者，他方得以書面終止「本合約」。

任何「本合約」中依其性質應於合約終止後存續之條款，於該條款完全履行前仍屬有效，亦適用於任一方的繼受人或受讓人。

### 1.14 程式查核

在第 1.14 條（程式查核）條款中，「Passport Advantage 條款」係指 1) 「本合約」及適用的「附件」、「交易文件」和 IBM 提供的「使用條款」，及 2) IBM 軟體規範(此等規範可於 IBM Software Policy 網站 (<http://www.ibm.com/softwarepolicies/>) 找到)，包括但不限於有關備份、子容量計價及移轉之原則。

第 1.14 條中之權利與義務，於任何「適用產品」為「客戶」所持有或控制期間及其後二年內有效。

#### 1.14.1 查核程序

「客戶」同意作成、保留以下各項資料並將其提供予 IBM 及其稽核員：書面記錄、系統工具輸出及其他足以查核「客戶」使用所有「適用產品」時是否遵守「Passport Advantage 條款」(包括 IBM 之授權及計價條款)之系統資訊。「客戶」就下列事項負責：1) 確保未逾其授權使用之範圍，及 2) 遵循「Passport Advantage 條款」。

IBM 為合理之通知後，得查核有關「客戶」於一切實體(Site)、地點或環境基於任何目的安裝或使用受「Passport Advantage 條款」約束的「適用產品」是否遵循「Passport Advantage 條款」。該項查核，將以較不干擾「客戶」業務之方式為之，並得於「客戶」之正常上班時間內，在「客戶」所在處所為之。IBM 得使用獨立稽核員協助進行本項查核，惟 IBM 應與該稽核員訂立適當之書面保密合約。

## 1.14.2 紛爭解決

如該項查核指出「客戶」使用「適用產品」逾越其授權使用範圍或未遵守「Passport Advantage 條款」者，IBM 將以書面通知「客戶」。「客戶」同意立即支付 IBM 於發票載明之下列費用：1) 逾越授權使用範圍之任何行為之應付費用，2) 逾越授權使用範圍之使用期間所應支付之軟體產品更新與技術支援之費用，惟最高以二年之費用為限，及 3) 經該項查核判定之任何額外費用及其他債務。

## 1.15 有效地區及準據法

### 1.15.1 有效地區

「本合約」條款適用之國家/地區為：1) IBM 於當地直接銷售「適用產品」之國家/地區，或 2) 「適用產品」在當地已發表上市之國家/地區。

### 1.15.2 準據法

任一方之權利、責任與義務僅於履行交易的國家/地區內有效，或於 IBM 同意時，在將「適用產品」交由生產使用的國家/地區內有效。但一切授權均依其特別規定其效力範圍。

在不牽涉法律衝突原則之前提下，雙方同意採用履行交易國家/地區之法律，以規範、解釋及執行「本合約」所生或相關之權利、責任與義務。

若「本合約」中有任何條款被認定為不生效力或無法強制執行者，「本合約」之其餘條款仍具完整效力。

「本合約」就任何不得以合約限制或免除之消費者法定權益不生影響。

本合約不適用「聯合國國際商品買賣契約公約(United Nations Convention on Contracts for the International Sale of Goods)」之規定。

## 2. 保證

除 IBM 另有規定外，下列保證僅適用於取得「適用產品」之國家/地區。

### 2.1 IBM 程式之保證

「IBM 程式」之保證載明於其授權合約中。

### 2.2 IBM 軟體產品更新與技術支援及選定支援之保證

IBM 保證使用合理的注意與技能提供「IBM 軟體產品更新與技術支援」及「選定支援」。

### 2.3 IBM 內建程式設備中 IBM 機器元件之保證

IBM 保證每一個「IBM 機器元件」均無材料與製造上的瑕疵，並符合其「規格」。

「IBM 機器元件」之保證期間（保固期間）係載明於「交易文件」之固定期間，自「安裝完成日」（亦稱為「保固開始日」）起算。在保固期間內，IBM 就該「IBM 機器元件」，依於「交易文件」中載明、經 IBM 指定之服務方式，免費提供「IBM 機器元件」的修理及更換服務。在保固期間內，如「IBM 機器元件」不符上述保證，且 IBM 無法使其符合保證，亦無法以不低於原功能之「IBM 機器元件」更換時，則「客戶」得將該「IBM 機器元件」退還予「客戶」向其取得該「IBM 機器元件」之人，並獲得退款。

對於 IBM 負責安裝之「IBM 機器元件」，如「客戶」選擇自行安裝該「IBM 機器元件」，或交由第三人安裝該「IBM 機器元件」，則 IBM 得於提供該「IBM 機器元件」之保固服務前，檢驗該「IBM 機器元件」，「客戶」須支付檢驗費用。如經 IBM 自行判斷認定，該「IBM 機器元件」並非處於符合保固服務之可接受狀態者，「客戶」得支付費用要求 IBM 將其回復為符合保固服務之可接受狀態，「客戶」亦可撤回保固服務要求。IBM 將自行裁量決定，判斷前述回復是否可行。前述回復係屬收費服務。

在保固期間內，如「IBM 機器元件」不符上述保證，請參閱隨同「IBM 機器元件」一併出貨之服務文件，以瞭解支援協助與問題判斷程序。

若「客戶」無法依服務文件所提供之資訊解決「客戶」之問題，請洽詢 IBM 或轉銷商，以取得保固服務。IBM 聯絡資訊載明於隨同「IBM 機器元件」一併出貨之「保固資訊」中。若「客戶」之「IBM 機器元件」未向 IBM 登錄，「客戶」可能被要求出示購買證明，亦證實享有保固服務之資格。

### 2.4 IBM SaaS 之保證

IBM SaaS 的保證規定於「使用條款」中。



## 2.5 保證範圍

以上為 **IBM** 對「客戶」的全部擔保責任，取代其他一切明示或默示之擔保，包括但不限於可售性、品質滿意度、符合特定效用，以及未涉侵權之任何保證與擔保。

因不當使用（例如：「客戶」所使用「機器元件」之容量與功能等超出 **IBM** 以書面同意者）、意外、修改、不適當之實體或運作環境、在非特定運作環境下操作、「客戶」或第三人不當維護，或因 **IBM** 不負責之產品所導致之故障或損害，不在 **IBM** 保證範圍內。移除或變更「機器元件」或零件之辨識標籤者，「**IBM** 機器元件」之保證即為無效。

### 不保證之項目

**IBM** 不保證「適用產品」之運作不會中斷或全無錯誤，亦不保證「適用產品」之所有的缺陷均可改正。

**IBM** 將指明其不保證之 **IBM** 「適用產品」。

除非「附件」或「交易文件」另有規定，否則 **IBM** 所提供之非 **IBM** 廠牌「適用產品」，均無任何保證。非 **IBM** 廠牌產品之製造商、開發人員、供應商或出版商可能提供其自有的保證予「客戶」。

## 3. 程式及產品更新與技術支援

### 3.1 IBM 程式

依據「本合約」而取得的「**IBM** 程式」受 **IPLA** 條款約束。

#### 3.1.1 版本和平台：

「客戶」可依「本合約」條款使用「程式」及與其相關之使用者文件於市場上為商業發行的各國家語言版本，並以 **PoE** 中載明的授權使用層級為限。除非「程式」在「客戶」取得時係指定為特定平台或作業系統之專用程式，否則「客戶」得於 **IBM** 目前提供「程式」碼的任何平台或作業系統上，依「本合約」條款使用「客戶」依「本合約」取得的「程式」。

#### 3.1.2 IBM 折價換購 (Trade-ups)：

某些「程式」(用於取代適用的「**IBM** 程式」) 得以減價取得授權。「客戶」同意當「客戶」安裝該取代「程式」時，即終止使用被取代之「**IBM** 程式」。

#### 3.1.3 替代性折價換購：

某些「程式」(用於取代適用的「非 **IBM** 廠牌程式」) 得以減價取得授權。「客戶」同意當「客戶」安裝該取代「程式」時，即終止使用被取代之「非 **IBM** 廠牌程式」。

### 3.2 虛擬化環境中之程式

#### 3.2.1 授權

- 「客戶」必須取得與「適用子容量產品」可用之「虛擬化容量」相對應的 **PVU** 總數的 **PoE**。
- 在增加「適用子容量產品」的「虛擬化容量」之前，「客戶」必須先取得足夠的額外授權，包括「**IBM** 軟體產品更新與技術支援」（如果適用的話），以支持此容量增加。
- 如果「適用產品」之使用低於授權使用層級，**IBM** 就已到期或已支付之費用不予退費。

#### 3.2.2 IBM 責任

**IBM** 會提供及授權「客戶」使用下列項目：

- 於「客戶」或「客戶」的 **IBM** 轉銷商訂購的情況下，提供 **ILMT**，不予收費。為使「客戶」遵守「子容量授權」條款，**IBM** 會提供 **ILMT** 給「客戶」；
- ILMT** 所含的資訊中心，以協助「客戶」遵守「子容量授權」條款。

為遵守「子容量授權」條款，「客戶」得複製 **ILMT** 及資訊中心。

#### 3.2.3 「子容量授權條款」下之客戶責任

「客戶」同意下列事項：

- 在「客戶」第一次部署「適用子容量產品」於一「適用虛擬化環境」的 **90** 天內，應依 **ILMT** 資訊中心，安裝及配置最新版 **ILMT**，使「客戶」得以收集「適用子容量產品」之「虛擬化容量」資料，並依此等「子容量授權」條款產出「審核報告」。惟此一要求於下列之例外情況不適用之：

- (1) 於 ILMT 尚未支援該「適用虛擬化環境」時。
- (2) 若「客戶」「企業」的員工和約聘人員不超過 1,000 位、且「客戶」不是「服務提供者」而且「客戶」未與「服務提供者」有合約關係來管理「客戶」的「適用虛擬化環境」者。
- (3) 若以「全容量 (Full Capacity)」基礎衡量，但使用子容量條款授權方式來計算時，「客戶」「企業」內具有「適用虛擬化環境」的伺服器總實體容量小於 1,000 PVU 者。
- (4) 於「客戶」使用「適用子容量產品」的伺服器，係依伺服器的「全容量」取得授權時。

在這些例外情況下，雖然建議使用 ILMT，但使用 ILMT 並非「子容量授權」的必要條件。若不使用 ILMT，則「客戶」必須手動管理及追蹤「客戶」的「適用虛擬化環境」，並準備「審核報告」，在每一個日曆或會計季度期間，針對「客戶」的「適用虛擬化環境」，記錄各項「適用子容量產品」的「虛擬化容量」。這些「審核報告」必須包含如

<http://www.ibm.com/software/lotus/passportadvantage/subcaplicensing.html> 網址中提供的「審核報告」範例所列出的資訊。這些「審核報告」必須根據維持「虛擬化容量」的增加歷程所需要的頻率和次數來準備，但每一季不得少於一次，且「審核報告」必須至少保存兩年，以展現對這些「子容量授權」條款的持續遵守；

- b. 立即安裝 IBM 提供的 ILMT 的新版本、版次、修改或更正程式碼(修正程式)。「客戶」必須在 <http://www.ibm.com/support/mynotifications> 網址訂閱「Tivoli 支援服務中心(Tivoli Support)」通知，以便能在有此等資訊時收到通知；
- c. 不以任何方式，直接或間接變更、修改、省略、刪除或不實陳述、不正確傳達下列各項：
  - (1) ILMT 審核記錄；
  - (2) ILMT (除非是 IBM 提供的變更)；或
  - (3) 「客戶」提交給 IBM 的「審核報告」。
- d. 至少每一個日曆或會計季度使用 ILMT 或手動產生「審核報告」，並保存「審核報告」至少兩年，且依 **第 1.14 條**之規定，在收到通知時提供這些報告給 IBM。若未能產生「審核報告」或提供「審核報告」給 IBM，將導致「適用子容量產品」必須依「全容量」條款付費；
- e. 指定一位「客戶」組織中擁有權限之人員，來管理及立即解決關於「審核報告」的任何問題，或「審核報告」內容、所取得之授權之間的不一致的問題，或 ILMT 配置的相關問題；
- f. 如果「審核報告」反映「適用子容量產品」的使用超出「客戶」的授權層級，立即向 IBM 或「客戶」的 IBM 轉銷商下單。「IBM 軟體產品更新與技術支援」的涵蓋期間應自「客戶」超出「客戶」授權層級時開始起算。

### 3.2.4 附加條款

無法符合或不符本合約「子容量授權」條款和要求的產品使用，應依「全容量」條款取得授權。

## 3.3 固定期間授權

「固定期間授權」之期間開始於 IBM 接受「客戶」訂單的日期，或前一「固定期間」到期後的第一個日曆日。

### 3.3.1 固定期間授權自動展延

「客戶」可在到期日之前，依「本合約」條款規定，以書面展延授權方式（例如，訂單表格、訂貨信、採購單等）展延「客戶」即將到期的「固定期間授權」。

若 IBM 未在到期日之前收到上述展延之書面，則將到期的「固定期間授權」即依「本合約」之條款並以該「程式」授權到期日當時有效的續約費用自動展延，展延期間與將到期之「固定期間」長度相同。惟 IBM 在到期日之前直接從「客戶」或從其轉銷商（依適用情形而定）收到「客戶」表明不願續約的書面通知者，則不自動展延。「客戶」同意支付前述續約費用。

如果「客戶」選擇不展延「固定期間授權」，「客戶」同意自到期日起即停止使用「程式」。

如果在到期日之後，「客戶」選擇回復使用「程式」，則「客戶」必須支付初始「固定期間授權」之所有相關費用，而非「固定期間授權」續約之費用。

### 3.3.2 特定程式固定期間授權之終止

如果 IBM 終止特定「IBM 程式」的「固定期間」授權，「客戶」同意：

- a. 「客戶」不得展延該「IBM 程式」的「固定期間授權」；而且
- b. 如果「客戶」在終止通知之前展延該「IBM 程式」的「固定期間授權」，「客戶」可 (a) 依據「固定期間授權」條款繼續使用該「程式」，直到目前「固定期間」結束為止，或 (b) 取得按比例計算的退款。

### 3.4 CEO 產品種類

「CEO 產品種類」（「適用產品」的分類）係依每一使用者為基礎(on a per-user basis)而取得。「客戶」必須為「客戶」「企業」內的所有「CEO 使用者」取得「客戶」的第一個「CEO 產品種類」（「主要產品種類」），且不得少於網址 <http://www.ibm.com/software/passportadvantage> 中「CEO 產品種類表」所載明的「CEO 使用者」數目。

如果「客戶」符合網址 <http://www.ibm.com/software/passportadvantage> 中「CEO 產品種類表」的「CEO 產品種類」所載明的「CEO 使用者」數目下限要求，則「客戶」可取得額外的「CEO 產品種類」。惟「客戶」無需為「客戶」「企業」內所有「CEO 使用者」取得額外的「CEO 產品種類」。

「CEO 使用者」可使用所選擇的「CEO 產品種類」中的任何或全部「程式」。但是，用於用戶端存取的所有「IBM 程式」，必須從其存取的伺服器端「程式」的相同「CEO 產品種類」中取得。

#### CEO 產品種類：新增及刪除

IBM 可以隨時在「CEO 產品種類」中新增「適用產品」或刪除「適用產品」。如果 IBM 從「CEO 產品種類」中刪除「適用產品」，則「客戶」雖可繼續使用已刪除的「適用產品」，但「客戶」不得超出刪除之前登記的「CEO 使用者」數目。

#### 增加 CEO 使用者數目

如果「客戶」增加「CEO 使用者」數目，「客戶」必須為每一個新「CEO 使用者」取得「CEO 產品種類」之使用授權。

#### 減少 CEO 使用者數目

如果「客戶」的「CEO 使用者」總數目減少，「客戶」應在「客戶」的下一個「周年日」之前，以書面通知 IBM。減少可能是由於一或多個「客戶」「實體 (Site)」重組、重構或出售所造成。暫時性或季節性的「CEO 使用者」數目降低不應視為減少。如果「CEO 產品種類」的授權使用層級低於該「CEO 種類」適用的「CEO 使用者」數目下限，則「客戶」不得按「CEO 產品種類」展延「IBM 軟體產品更新與技術支援」。

### 3.5 軟體產品更新與技術支援和選定支援

#### 3.5.1 軟體產品更新與技術支援

- a. 在「本合約」中，「軟體產品更新與技術支援」係指「IBM 軟體產品更新與技術支援」和「第三人軟體產品更新與技術支援」兩者。IBM 對每一個依 IPLA 授權的「IBM 程式」提供「IBM 軟體產品更新與技術支援」。「IBM 軟體產品更新與技術支援」為單一供應項目，不以個別元件的形式提供。IBM 不對下列項目提供「IBM 軟體產品更新與技術支援」：(i) 「非 IBM 廠牌程式」，或 (ii) 依「IBM 國際授權合約 - 無保證程式」(IBM License Agreement for Non-Warranted Programs) 合約條款所授權的「IBM 程式」（統稱為「選定程式」）。
- b. 「IBM 軟體產品更新與技術支援」開始於取得日，結束於隔年對應月份的最後一天，但若取得日為當月第一天，則結束於隔年對應月份前一月的最後一天。
- c. 當一「IBM 程式」授權之「IBM 軟體產品更新與技術支援」生效時：
  - (1) IBM 會提供其所開發的「IBM 程式」之瑕疵更正(defect corrections)、限制(restrictions)及迴避(bypasses)程式（如果有的話）給「客戶」。
  - (2) IBM 會提供該「IBM 程式」最新的市場上商業發行版本(version)、版次(release)或更新(update)（如果有的話）給「客戶」，並授權「客戶」使用。
  - (3) IBM 就下列「客戶」之事項為「客戶」提供協助服務：i) 一般性、短期安裝及使用（如何進行）之問題；及 ii) 程式碼相關之問題（統稱為「支援」）。此種對於「IBM 程式」特定版本或版次的

「支援」將持續提供，惟僅至 IBM 或第三人（依適用情形而定）終止該「IBM 程式」版本或版次的「支援」。當「支援」被終止時，「客戶」必須升級該「IBM 程式」至有支援之版本或版次，才能繼續接受「支援」。IBM「軟體支援生命週期」政策位於 <http://www.ibm.com/software/info/supportlifecycle/> 網址中。

- (4) IBM 僅於「客戶」之 IBM 支援中心的正常上班時間內（已公佈的正常上班時間）透過電子存取方式或透過電話（如果可行的話），對「客戶」的資訊系統 (IS) 技術支援人員提供「支援」。（此協助不提供予「客戶」之終端使用者）。就問題嚴重程度為「Severity 1」者，IBM 提供一年 365 天、每天 24 小時之協助。詳情請參閱「IBM 軟體支援手冊」(Software Support Handbook)，網址如下：<http://www.ibm.com/software/support>。
  - (5) IBM 得要求「客戶」允許 IBM 從遠端存取「客戶」的系統，以協助「客戶」找出軟體問題原因。每當 IBM 在「客戶」的許可之下，從遠端存取「客戶」的系統時，「客戶」仍應負責充分保護「客戶」系統及其中包含的所有資料。
- d. 「IBM 軟體產品更新與技術支援」不包括下列協助服務：1) 應用程式之設計及開發，2) 「客戶」於「IBM 程式」特定運作環境外之使用行為，或 3) 因依「本合約」非 IBM 需負責之產品所造成的故障。

對於每一個已安裝於「客戶」「實體 (Site)」且為可使用狀態的「IBM 程式」的授權使用 (authorized use)，「客戶」就取得和維持「IBM 軟體產品更新與技術支援」之選項為：(a) 為所有的授權使用 (all of the authorized use) 均取得「IBM 軟體產品更新與技術支援」，或 (b) 所有的授權使用均不取得「IBM 軟體產品更新與技術支援」。

對於已安裝於「客戶」「實體 (Site)」且為可使用狀態的「IBM 程式」，不得僅對其授權使用的一部分，選擇取得和維持「IBM 軟體產品更新與技術支援」。

對於「客戶」尚未全部付清「IBM 軟體產品更新與技術支援」費用的「IBM 程式」，「客戶」不得使用或享有第 3.5.1 條的 C 款中所定的任何「IBM 軟體產品更新與技術支援」利益，包括應用或使用任何修正程式、更新或升級。如果「客戶」使用其尚未全部付清費用的任何此等利益，則「客戶」同意以當時適用的 IBM 價格，取得足夠的「IBM 軟體產品更新與技術支援」回復 (Reinstatement)，該回復須足以涵蓋和支持該等利益的所有未授權使用。

### 3.5.2 選定支援

符合「選定支援」資格的「選定程式」列於 <http://www.ibm.com/lotus/PASelectedSupportPrograms> 網址中。

「選定支援」開始於 IBM 接受「客戶」對此等支援之訂購的日期，結束於隔年對應月份的最後一天，但若 IBM 接受「客戶」對此等支援之訂購的日期為當月第一天，則結束於隔年對應月份前一月的最後一天。

當一「選定程式」之「選定支援」生效時：

- a. IBM 會提供其所開發的「選定程式」之瑕疵更正（如果有的話）給「客戶」。
- b. IBM 就下列「客戶」之事項為「客戶」提供協助服務：1) 一般性、短期安裝及使用（如何進行）之問題；及 2) 程式碼相關之問題。此等對於「程式」特定版本或版次的「選定支援」將持續提供，惟僅至 IBM 終止該「程式」版本、版次或修改的「選定支援」。當此等「選定支援」被終止時，「客戶」必須升級該「程式」至有支援之版本或版次，才能繼續接受此種支援。IBM「軟體支援生命週期」政策不適用於「選定支援」。
- c. IBM 可依「客戶」的訂閱層級來協助「客戶」設計及開發應用程式。
- d. IBM 可視「客戶」的位置和「客戶」取得的訂閱層級，透過電子存取方式或透過電話（如果可行的話）提供協助。此種協助僅於「客戶」之 IBM 支援中心的正常上班時間內（已公佈的正常上班時間），對「客戶」的資訊系統 (IS) 技術支援人員提供。如需適用於「選定支援」的詳細資料，請參閱「IBM 軟體支援手冊」，網址如下：<http://www.ibm.com/software/support>。
- e. IBM 得要求「客戶」允許 IBM 從遠端存取「客戶」的系統，以協助「客戶」找出軟體問題原因。每當 IBM 在「客戶」的許可之下，從遠端存取「客戶」的系統時，「客戶」仍應負責充分保護「客戶」系統及其中包含的所有資料。

IBM 不依據「本合約」提供「選定程式」的授權。

### 3.5.3 客戶資料及資料庫

在「IBM 軟體產品更新與技術支援」或「選定支援」之下，為協助「客戶」找出「程式」問題的原因，IBM 得要求「客戶」1) 允許 IBM 從遠端存取「客戶」的系統，或 2) 傳送「客戶」之資訊或系統資料給 IBM。IBM 將利用此等錯誤及問題相關之資訊以改進其產品與服務，並協助其提供相關的支援供應項目。基於該等目的，IBM 得使用 IBM 實體及下包商（包括在「客戶」所在國家/地區以外的一個或多個國家/地區內使用），且「客戶」授權 IBM 得以為之。

就下列事項，「客戶」仍應自行負責：1) 「客戶」提供予 IBM 之任何資料及任何資料庫之任何內容，2) 選擇及實施有關資料（包括任何可辨識個人身分之資料）之存取、安全、加密、使用及傳輸之程序與控管，以及 3) 備份及回復任何資料庫及儲存資料。「客戶」不得以資料或任何其他形式，傳送任何可辨識個人身分之資料，或提供該等資料之存取權限予 IBM。而對於因錯誤提供該等資料予 IBM，或因 IBM 遺失或揭露該等資料之情事，致使 IBM 發生合理成本、費用及其他款項者，包括因任何第三人之索賠肇生費用及款項，均應由「客戶」負責。

### 3.5.4 軟體產品更新與技術支援和選定支援之年度自動展延

「客戶」可在到期日之前，依「本合約」條款規定，以書面展延授權方式（例如，訂單表格、訂貨信、採購單等）展延「客戶」即將到期的「軟體產品更新與技術支援」或「選定支援」。

若 IBM 未在到期日之前收到上述展延之書面，則將到期的「軟體產品更新與技術支援」和「選定支援」即依「本合約」之條款並以當時有效的續約費用自動展延，展延期間係至下一個「周年日」止。惟 IBM 在到期日之前直接從「客戶」或從其轉銷商（依適用情形而定）收到「客戶」表明不願續約的書面通知者，則不自動展延。「客戶」同意支付前述續約費用。

若要回復任何已到期的「軟體產品更新與技術支援」涵蓋期間，「客戶」必須取得「IBM 軟體產品更新與技術支援回復(Reinstatement)」或「第三人軟體產品更新與技術支援回復」（依適用情形而定）。

### 3.5.5 特定程式之軟體產品更新與技術支援或選定支援之終止

如果 IBM 或第三人（依適用情形而定）終止特定「程式」的「軟體產品更新與技術支援」或「選定支援」，「客戶」同意：

- a. IBM 不再提供「軟體產品更新與技術支援」或「選定支援」之展延續約供該「程式」使用；以及
- b. 如果「客戶」在終止通知之前展延該「IBM 程式」授權的「IBM 軟體產品更新與技術支援」或「選定程式」授權的「選定支援」，IBM 得繼續提供該「程式」授權的「IBM 軟體產品更新與技術支援」或「選定支援」給「客戶」直到目前期間結束為止，或是「客戶」可取得按比例計算的退款。如果「客戶」在終止通知之前展延「非 IBM 廠牌程式」的「第三人軟體產品更新與技術支援」，第三人得繼續提供該「非 IBM 廠牌程式」授權的「第三人軟體產品更新與技術支援」給「客戶」直到目前期間結束為止。如果第三人未能提供，則「客戶」得取得按比例計算的退款。

## 4. 內建程式設備

### 4.1 虛擬內建程式設備

「客戶」係依據「本合約」的條款而獲授權使用「程式」。

### 4.2 由程式元件和機器元件組成之內建程式設備

IBM 提供之由「程式元件」和「機器元件」組成之「內建程式設備」係以單一產品提供。「客戶」不得基於任何用途獨立於其所屬「內建程式設備」外單獨使用任一元件。

### 4.3 程式元件

客戶係依據「本合約」的條款而獲授權使用「程式元件」，但只能使用於 IBM 或授權轉銷商提供的「機器元件」上，或使用於 IBM 或授權轉銷商提供給「客戶」的「機器元件」的任何更換品上。「客戶」不得將其使用「程式元件」的授權轉讓給另一個「企業」。



## 4.4 機器元件

### 4.4.1 產品狀態

每一個「IBM 機器元件」都是以全新，或部分以使用過的零件製造。「IBM 機器元件」有時可能不是全新，或是曾經安裝過，但無論「IBM 機器元件」的產品狀態為何，IBM 仍依第 2.3 條載明之保證條款負責。

### 4.4.2 所有權及危險負擔

當「客戶」直接從 IBM 取得「機器元件」時，IBM 將於「客戶」支付一切應付款項時，移轉「機器元件」之所有權予「客戶」或「客戶」之出租人（依適用情形而定）。就「機器元件」而取得之裝置、轉換或其他類型之升級，IBM 保留所有權之移轉，至 IBM 收到一切應付款項及取回一切移除零件為止（依適用情形而定），移除零件之所有權將移轉為 IBM 所有。

「機器元件」滅失及損壞之危險，於 IBM 將其交付予 IBM 指定之貨運業者前由 IBM 負擔。其後，即轉由「客戶」負擔。「機器元件」由貨運業者運送至「客戶」之過程中，由 IBM 為「客戶」安排「機器元件」保險事宜，保險費由 IBM 給付。倘有任何滅失或損壞發生時，「客戶」應於交運日起十個工作天內以書面通知 IBM，且依當時有效之索賠程序辦理。

### 4.4.3 安裝

#### a. 機器元件安裝

- (1) 「客戶」同意提供符合規格文件載明之「機器元件」需求的環境。
- (2) 「客戶」應負責遵照 IBM 或「機器元件」製造商提供之指示，安裝「客戶安裝機器元件」及「非 IBM 廠牌機器元件」。
- (3) 對於 IBM 負責安裝的「機器元件」，IBM 訂有標準安裝程序，以安裝「機器元件」，於該等程序完成後，即為安裝完成。惟因「客戶」延遲安裝的「機器元件」或「客戶安裝機器元件」不在此限。對於由 IBM 負責安裝之「IBM 機器元件」，如果該「IBM 機器元件」於 IBM 出貨後六個月內未由 IBM 安裝者，則此安裝將收取安裝費用。

#### b. 升級與工程變更

- (1) IBM 銷售用以安裝於「機器元件」上之「升級」，在某些情況下，僅得用以安裝於指定序號之「機器元件」上。「客戶」同意於「升級」交付後 30 日內安裝「升級」或允許 IBM 安裝「升級」（如由 IBM 負責安裝者）。如果無法讓 IBM 在交付後 30 天內安裝，則 IBM 得自行裁量決定任意終止特定「升級」之訂單，在此情況下，「客戶」應自費將該「升級」退還予 IBM。無論如何，若該「升級」於 IBM 運送「升級」之日起六個月內未由 IBM 安裝者，則此安裝將收取安裝費用。
- (2) 除非雙方另有協議，否則「客戶」同意在 IBM 通知「客戶」的 30 天內，允許 IBM 於「機器元件」上安裝 IBM 認為必要之「工程變更」（例如：安全性所需之變更）。

若干「升級」及「工程變更」需移除零件並移轉移除零件之所有權及占有予 IBM。「客戶」應自行負責於安裝「升級」或「工程變更」時歸還所有移除零件予 IBM。在此情形下，「客戶」應取得所有權人與質權人之同意以：(1) 安裝「升級」及「工程變更」，及 (2) 移轉移除零件之所有權及占有予 IBM。「客戶」應確保所有移除之零件均屬真品、未經更動，且處於良好的工作狀態。更換部份將承接被更換部份之原有保固或維護服務條件。

### 4.4.4 機器碼元件

「機器碼元件」授權之提供，係依隨同「機器碼元件」一併提供之「機器碼」授權合約（例如：「IBM 機器碼授權合約」、「IBM 授權內碼合約」或同等合約）之條款與限制為之。「客戶」接受「本合約」之條款時，亦連同接受 IBM 「機器碼」授權合約，該合約之最新版本可於下列網址取得：[http://www.ibm.com/servers/support/machine\\_warranties/support\\_by\\_product.html](http://www.ibm.com/servers/support/machine_warranties/support_by_product.html) >，或聯絡 IBM 業務人員後取得。「機器碼」授權合約得由 IBM 隨時修訂之。該等修訂授權條款，僅適用於該等修訂條款生效後所提供之「機器碼元件」。

「機器碼元件」之授權，限用於使「機器元件」依其規格運作，且僅適用於「客戶」已就其取得 IBM 書面授權之容量與功能。「客戶」同意僅限於依「本合約」之規定或依其適用之授權合約所授權或限制之範圍



使用「機器碼元件」。以下規定並不限縮相關授權條款中對「客戶」使用「機器碼元件」之額外限制。「客戶」不得：

- a. 複製、展示、轉讓、改編、修改或散布（採電子方式或其他方式）「機器碼元件」，但 IBM 於「機器碼元件」之使用者文件或交付予「客戶」之書面文件中另有授權者不在此限；
- b. 逆向組合、逆向編譯、以其他方式解譯「機器碼元件」或對其進行還原工程，但適用法律明文許可，且不得以合約免除者，不在此限；
- c. 為「機器碼元件」之再授權或轉讓；或
- d. 出租「機器碼元件」或其任何複本。

International Business Machines Corporation、其子公司，或第三人擁有「機器碼元件」之著作權，及其全部複本（含原版「機器碼元件」、其複本及複本之複本）之所有權。IBM 僅就「機器碼元件」授權使用，而非讓售。

IBM 提供僅由「機器碼元件」組成之裝置、轉換或升級時，不移轉所有權。

某些「機器碼元件」之容量受限於「機器碼元件」中之技術措施。「客戶」同意 IBM 採取該等技術措施，以限制「機器碼元件」容量。

#### 4.4.5 交付

含有「機器碼元件」的「內建程式設備」交付日期為預估日期，但於「交易文件」特別載明交付日期者不在此限。如有運輸費用，將在「交易文件」中載明。

## 5. IBM SaaS

「客戶」同意 IBM 並不提供「客戶」網際網路存取權以使用 IBM SaaS，且仍由「客戶」負責網際網路存取。

「客戶」確認並同意 International Business Machines Corporation 及其子公司 (1) 並不控制在電信設備（包括網際網路在內）間資料的傳送，以及 (2) 在公用網際網路環境中，無法承諾特定的保密義務。

依「本合約」的 **第 1.12.5.b 條** 之規定，在另行簽署的保密合約下進行任何機密資料的交換，並不適用於「內容」。縱使「客戶」與 IBM 之間有任何另行簽署的保密合約，IBM 對於「內容」不負任何保密義務。

### 5.1 所有權

IBM 及其供應商擁有 IBM SaaS。「客戶」同意 IBM SaaS 中的權利，其所有權，以及專利權、著作權、商標權和所有其他智慧財產權中的所有權益，以及 IBM SaaS 的任何複本或部分，均屬於 IBM 及其供應商所有。IBM 得將 IBM SaaS 或其任何部分（包括技術支援在內）下包予 IBM 選取的下包商。

### 5.2 客戶之使用權

「客戶」可依 IBM SaaS 之「使用條款」來使用 IBM SaaS 供應項目，惟以「權利證明書」中載明的授權使用層級為限，並應符合下列條件：

- a. 「客戶」接受 IBM SaaS 供應項目的「使用條款」；
- b. 「客戶」確保任何使用 IBM SaaS 供應項目之人僅代表「客戶」使用，並確保該等人員遵守「本合約」的條款及適用的「使用條款」；以及
- c. 「客戶」不得：
  - (1) 使用、複製、修改或提供全部或部分的 IBM SaaS 供應項目予第三人，惟「本合約」及適用的「使用條款」明示允許者不在此限；
  - (2) 對 IBM SaaS 供應項目進行逆向組合、逆向編譯、以其他方式解譯或對其進行還原工程，但適用法律明文許可且不得以契約免除者，不在此限；
  - (3) 獨立於 IBM SaaS 供應項目外單獨分開使用任何 IBM SaaS 供應項目元件、檔案、模組、影音內容或相關授權資料；
  - (4) 轉讓、再授權或出租 IBM SaaS 供應項目；
  - (5) 建立與 IBM SaaS 供應項目之間的網際網路「鏈結」；或

- (6) 「截取」(frame) 或「鏡映」(mirror) IBM SaaS 供應項目的任何內容形成部份，惟「客戶」得在與「客戶」授權使用 IBM SaaS 供應項目關連的「客戶」本身企業內部網路上為之。

## 5.3 IBM SaaS 訂用

### 5.3.1 各 IBM SaaS 供應項目的專有條款

各 IBM SaaS 供應項目的專有條款於其「使用條款」中提供，包括但不限於定義、訂用及服務的說明、收費標準及限制。

### 5.3.2 IBM SaaS 訂用期

「IBM SaaS 訂用期」是從 IBM 通知「客戶」其可存取訂用的供應項目當日開始。「訂用期」的結束日期載明於「交易文件」中，為當月的最後一天。

在「IBM SaaS 訂用期」內，「客戶」可增加「客戶」對 IBM SaaS 供應項目的訂用層級。

在「訂用期」內，「客戶」不得減少「客戶」對 IBM SaaS 供應項目的訂用層級，但可在後續的「訂用期」中減少訂用層級。

### 5.3.3 IBM SaaS 訂用期展延

除非該供應項目的「使用條款」另有約定，「客戶」可在「訂用期」結束時展延 IBM SaaS 供應項目。部分 IBM SaaS 供應項目，依 IBM SaaS 供應項目的「使用條款」或「交易文件」之規定，將在「訂用期」結束時自動展延。惟 IBM 在「訂用期」結束之前直接從「客戶」或從其轉銷商（依適用情形而定）收到「客戶」不續約的書面通知者，則不自動展延。

## 5.4 IBM SaaS 技術支援

在 IBM SaaS 「訂用期」內：

- IBM 會提供如 ToU 所載明之協助，協助處理關於使用 IBM SaaS 時「客戶」就特定供應項目之工作導向問題；以及
- IBM SaaS 技術支援僅適用於目前支援的 IBM SaaS 版本、用戶端作業系統、網際網路瀏覽器及軟體。IBM 技術支援僅可在 IBM SaaS 支援中心的正常上班時間內（已公佈的正常上班時間）取得。如需特定 IBM SaaS 供應項目適用的詳細資料，請參閱「使用條款」。

## 5.5 內容

IBM 只為「內容」提供服務。IBM 並非在 IBM SaaS 內傳輸「內容」的發佈者。

「客戶」對下列各項負完全責任：

- 確保取得任何適當與充分的 IBM SaaS 元件，以滿足任何「客戶」需求；
- 所有「內容」，包括但不限於其選取、建立、設計、授權、安裝、正確、維護、測試、備份及支援；
- 具有所有必要的授權，以允許 IBM 及其下包商管理、快取(cache)、記錄、複製及顯示「內容」，且「客戶」聲明在其使用 IBM SaaS 的期間，已擁有且將持續維持所有此等權利以及授與 IBM 及其下包商此等權利時所需的核准的有效性，且此等權利係免費提供給 IBM。「客戶」保留其「內容」的所有權利、所有權和利益；以及
- 選擇及實施有關「內容」之存取、安全、加密、使用及傳輸和備份及回復之程序與控管。

為使 IBM SaaS 可供使用之目的，「客戶」授與 IBM 及其下包商非專屬、不可撤銷、全球性、無授權金、全部付訖、可轉讓的授權，得以管理、快取、記錄、複製及顯示「內容」。

## 5.6 IBM SaaS 之終止

IBM 得透過信件或電子郵件方式，以 12 個月前之書面通知目前所有「客戶」終止全部的 IBM SaaS。

縱使「本合約」另有相反規定，如果 IBM 因為「客戶」違反「本合約」的任何適用條款而終止「客戶」對 IBM SaaS 的存取權利，IBM 無義務為 IBM SaaS 的任何未使用部分給予退款。

## 6. 各國專有條款

針對在下列載明國家執行之交易，下列條款取代或修改第 1 部分至第 5 部分所參照之條款。第 1 部分至第 5 部分中未由此等修訂條款變更之一切條款均維持不變且持續有效。本第 6 部分之結構如下：

- 第 6.1 條內含各國就第 1.15 條（「有效地區與準據法」）之修訂條款；
- 第 6.2 條內含其他合約條款之美洲國家修訂條款；
- 第 6.3 條內含其他合約條款之亞太國家之修訂條款；以及
- 第 6.4 條內含其他合約之歐洲、中東及非洲國家修訂條款。

### 6.1 第 1 部分第 1.15 條 (有效地區與準據法)之各國修訂條款

#### 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 1.15.2 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 準據法

第 1.15.2 條「準據法」第二段中之「履行交易國家之法律」，將由下列內容代替：

##### AMERICAS

- in **Canada**: the laws in the Province of 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;
- 香港特別行政區與澳門特別行政區：香港特別行政區 ("SAR") 法律；
- 台灣：台灣法律；

##### EUROPE, MIDDLE EAST, AND AFRICA

- 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;
- 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;
- in **Estonia, Latvia, and Lithuania**: the laws of Finland;
- 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
- 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

#### 3.5.4 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.

#### 3.3.1 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 1.6b:*

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



### **3.3.1 Automatic Renewal of Fixed Term Licenses and Error! Reference source not found. 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**

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

## **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 1.6b:*

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.

### **1.12.1 Notices and Communications**

*The following replaces 1.12.1:*

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.

### **3.3.1 Automatic Renewal of Fixed Term Licenses and Error! Reference source not found. 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.

Error! Reference source not found. **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 1.6b:*

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 Federación 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**

##### **1.11.1 Items for which IBM May be Liable**

*The following replaces the last sentence in this section 1.11.1:*

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**

##### **1.12.3 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.

### 1.12.5 Other Principles of Our Relationship

*The following replaces item 1.12.5e:*

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 described in section 1.10 (Intellectual Property Protection) above 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

#### 1.12.4 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.

#### 1.12.5 Other Principles of Our Relationship

*The following is added as 1.12.5.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 3.5.4 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 3.3.1 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

### 4.4.2 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 1.6c 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

##### 1.10.3 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.

##### 1.11 Limitation of Liability

*The following paragraph is included at the end of 1.11.1:*

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 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.

## **5.5 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 1.6c 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 NEPAL3.5 Programs and Subscription and Support**

*The following replaces the paragraph that begins “IF IBM DOES NOT RECEIVE SUCH AUTHORIZATION BY THE EXPIRATION DATE” in 3.5.4 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 3.3.1 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.

#### 香港特別行政區、澳門特別行政區與台灣

適用於在台灣與在下列的「特別行政區 (SAR)」所起始與履行的交易時，本「合約」中包含「國家」二字的用詞（例如「取得國家」及「安裝國家」）將以下列文字取代：

- 1) 香港特別行政區：「香港特別行政區」；
- 2) 澳門特別行政區：「澳門特別行政區」，但不包含上述屬於 1.15.2條（準據法）的項目；及
- 3) 台灣：「台灣」。

#### INDIA

##### 1.12.4 Dispute Resolution

*The following replaces the final sentence in 1.12.4:*

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.

##### 1.12.4 Dispute Resolution

*The following is inserted at the end of 1.12.4:*

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**

### **1.12.5 Other Principles of Our Relationship**

*The following replaces the terms of 1.12.5e:*

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.*

#### **1.11.1 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.*

### **1.12.5 Other Principles of Our Relationship**

*The following replaces 1.12.5d:*

- a. Definitions – For the purposes of 1.12.5d, 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 1.6b 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 3.5.4 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 3.3.1 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 1.6b 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.

**1.11.1 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)."*

### **1.11.2 Items for which IBM Is Not Liable**

*The following replaces 1.11.2b:*

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 1.12.1.*

## **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.

#### **1.12.4. Dispute Resolution**

*The following replaces the third sentence of 1.12.4:*

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.

#### **1.12.5 Other Principles of Relationship**

*The following replaces 1.12.5e:*

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 1.6b:*

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 1.12.1.*

## **TURKEY**

### **1.6 Payment**

*The following replaces 1.6b*

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**

#### **1.11.1 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 1.10.1 shall not be subject to any limitation or exclusion set forth in this section 1.11.

#### **1.11.2 Items for Which IBM is Not Liable**

*The following replaces Items 1.11.2b and 1.11.2c:*

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