

Agreement for Services Acquired from an IBM Business Partner

IBM China/ Hong Kong Limited (“IBM”) has signed agreements with certain organizations (called “IBM Business Partners”) to promote, market, and support certain Services. Some IBM Business Partners also fulfill these functions through other remarketers who are not IBM Business Partners. However, for purposes of brevity in this Agreement, when we use the term IBM Business Partner we mean IBM Business Partners and their remarketers. This IBM Agreement for Services Acquired from an IBM Business Partner (called the “Agreement”) governs transactions by which you acquire Services from an IBM Business Partner that IBM is responsible for providing to you under the warranties and other terms of this Agreement. IBM is not responsible for 1) the actions of IBM Business Partners, 2) any additional obligations they have to you, or 3) any products or services that they supply to you under their agreements. IBM Business Partners establish the price and terms at which they market Services. In the event that your IBM Business Partner is no longer able to offer Services, for any reason, you may continue to receive Services by contacting IBM.

1. Definitions

Enterprise is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. The term “Enterprise” applies only to the portion of the Enterprise located in Hong Kong SAR.

Machine is a machine, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term “Machine” includes an IBM Machine and any non-IBM Machine (including other equipment) for which IBM may provide Services.

Machine Code is microcode, basic input/output system code (called “BIOS”), utility programs, device drivers, and diagnostics delivered with an IBM Machine.

Materials are literary works or other works of authorship (such as programs, program listings, programming tools, documentation, reports, drawings and similar works) that IBM may deliver to you as part of a Service. The term “Materials” does not include licensed program products available under their own license agreements.

Service is performance of a task, provision of advice and counsel, assistance, support, or access to a resource (such as access to an information database) IBM makes available to you.

2. Agreement Structure

IBM provides additional terms for Services in documents called “Attachments” and “Transaction Documents” which become part of the Agreement only for those transactions to which the Attachments and Transaction Documents apply. All transactions have one or more associated Transaction Documents (such as a supplement, schedule, exhibit, statement of work, change authorization, or addendum). IBM makes the applicable Attachments and Transaction Documents available to you directly or through your IBM Business Partner.

If there is a conflict among the terms in the various documents, those of an Attachment prevail over those of this Agreement. The terms of a Transaction Document prevail over those of both of these documents.

You accept, on behalf of its Enterprise, this Agreement and any additional terms in Attachments and Transaction Documents by 1) signing or electronically accepting them, 2) using the Service, or allowing others to do so, or 3) making any payment to your IBM Business Partner for the Service.

The terms and conditions of this Agreement or an Attachment or a Transaction Document shall apply to a particular transaction upon our acceptance of your order or your acceptance of the terms of such Agreement, Attachment or Transaction Document in accordance with the above paragraphs.

A Service becomes subject to this Agreement when IBM accepts your request for Service from your IBM Business Partner by 1) sending you a signed Transaction Document or 2) providing the Service.

3. Charges and Payment

Your IBM Business Partner sets the charges and terms governing charges. You will make payment directly to your IBM Business Partner. However, IBM may charge you directly for some expenses incurred to perform your Service request (for example, actual travel and living expenses and out-of-pocket expenses). IBM will not incur these expenses without your prior approval.

IBM will invoice you for such expenses. Amounts are due upon receipt of invoice and are payable as IBM specifies. You agree to pay accordingly, including any late payment fee.

4. Changes to the Agreement Terms

In order to maintain flexibility in our business relationship, IBM may change the terms of this Agreement by giving you three months’ written notice. However, these changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new orders, renewals, and on-going transactions that do not expire. For on-going transactions with a defined renewable contract period, you may request that IBM defer the change effective date until the end of the current contract period if 1) the change affects your current contract period and 2) you consider the change unfavorable.

Otherwise, for a change to be valid, both of us must sign it. Additional or different terms in any written communication from you (such as an order) are void.

5. Personnel

Each of us is responsible for the supervision, direction, control, and compensation of our respective personnel.

IBM reserves the right to determine the assignment of its personnel.

IBM may subcontract a Service, or any part of it, to subcontractors selected by IBM.

6. Materials Ownership and License

IBM will specify Materials to be delivered to you. IBM will identify them as being "Type I Materials," "Type II Materials," or otherwise as we both agree. If not specified, Materials will be considered Type II Materials.

Type I Materials are those, created during the Service performance period, in which you will have all right, title, and interest (including ownership of copyright). IBM will retain one copy of the Materials. You grant IBM 1) an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, distribute (internally and externally) copies of, and prepare derivative works based on, Type I Materials and 2) the right to authorize others to do any of the former.

Type II Materials are those, created during the Service performance period or otherwise (such as those that preexist the Service), in which IBM or third parties have all right, title, and interest (including ownership of copyright). IBM will deliver one copy of the specified Materials to you. IBM grants you an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute, within your Enterprise only, copies of Type II Materials.

Each of us agrees to reproduce the copyright notice and any other legend of ownership on any copies made under the licenses granted in this section.

7. Service for Machines

IBM provides certain types of Service to keep Machines in, or restore them to, conformance with their specifications. IBM will inform you of the available types of Service for a Machine. At its discretion, IBM will 1) either repair or exchange the failing Machine and 2) provide the Service either at your location or a service center.

When the type of Service requires that you deliver the failing Machine to IBM, you agree to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will return it to you at its expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, your Machine while it is 1) in IBM's possession or 2) in transit in those cases where IBM is responsible for the transportation charges.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is 1) for certain Machines, the designated, serial-numbered Machine and 2) at an engineering-change level compatible with the feature, conversion, or upgrade.

IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive maintenance.

You agree to:

1. obtain authorization from the owner to have IBM service a Machine that you do not own;
2. where applicable, before IBM provides Service:
 - a. follow the problem determination, problem analysis, and service request procedures that IBM provides,
 - b. secure all programs, data, and funds contained in a Machine, and
 - c. inform IBM and your IBM Business Partner of changes in a Machine's location; and
3. follow the Service instructions that IBM provides which may include installing Machine Code and other software updates either downloaded from an IBM Internet web site or copied from other electronic media.

Replacements

When Service involves the exchange of a Machine or part, the item IBM replaces becomes its property and the replacement becomes yours. You represent that all removed items are genuine and unaltered. The replacement may not be new, but it will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty or maintenance Service status of the replaced item. Before IBM exchanges a Machine or part, you agree to remove all features, parts, options, alterations, and attachments not under IBM's service. You also agree to ensure that the item is free of any legal obligations or restrictions that prevent its exchange.

IBM Machines may contain parts designated as Customer Replaceable Units (called "CRUs"), e.g., mouse, keyboard, speaker, memory, and hard disk drive. IBM provides replacement CRUs to you for installation by you. You may request IBM to install a CRU, however you may be charged for the installation. Check with your IBM Business Partner to determine if installation charges apply. IBM provides CRU information and replacement instructions with your Machine and at any time on your request. IBM specifies in the materials shipped with a replacement CRU whether a defective CRU must be returned to IBM. When return is required, 1) return instructions and a container are shipped with the replacement CRU, and 2) you may be charged for the replacement CRU if IBM does not receive the defective CRU within 15 days of your receipt of the replacement. Check with your IBM Business Partner to determine if any charges apply.

Items Not Covered

Repair and exchange Services do not cover:

1. accessories, supply items, and certain parts, such as batteries, frames, and covers;

2. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by you;
3. Machines with removed or altered Machine or parts identification labels;
4. failures caused by a product for which IBM is not responsible;
5. service of Machine alterations; or
6. service of a Machine on which you are using any capacity or capability, other than that authorized by IBM in writing.

Warranty Service Upgrade

For certain Machines, you may select a Service upgrade from the standard type of warranty Service for the Machine. Check with your IBM Business Partner to determine if any charges apply.

You may not terminate the Service upgrade or transfer it to another Machine during the warranty period.

Start of Maintenance Service

When you order Machine maintenance Service which is provided under this Agreement, your IBM Business Partner will inform you of the date on which maintenance Service will begin. IBM may inspect the Machine within one month following that date. If the Machine is not in an acceptable condition for service, you may have IBM restore it. Check with your IBM Business Partner to determine if any charges apply. Alternatively, you may withdraw your request for maintenance Service. Check with your IBM Business Partner to determine if any charges apply.

8. Warranty for IBM Services

IBM warrants that it performs each IBM Service using reasonable care and skill and according to its current description (including any completion criteria) contained in this Agreement, an Attachment, or a Transaction Document.

THIS WARRANTY IS YOUR EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

IBM does not warrant uninterrupted or error-free operation of any deliverable or Service or that IBM will correct all defects. Unless IBM specifies otherwise, it provides Materials and non-IBM Services **WITHOUT WARRANTIES OF ANY KIND**. However, non-IBM suppliers may provide their own warranties to you.

9. Automatic Service Renewal

Services identified as subject to automatic renewal will renew for a same length contract period unless you, your IBM Business Partner, or IBM provide written notification (at least one month prior to the end of the current contract period) to the others; of its decision not to renew. Nonrenewal notification sent to you and your IBM Business Partner by IBM or received by IBM from either you or your IBM Business Partner will result in IBM ceasing to provide you the applicable Services at the end of the current contract period.

10. Termination and Withdrawal of a Service

Either of us may terminate a Service if the other does not meet its obligations concerning the Service, provided the one who is not meeting its obligations is given reasonable time to comply. You may terminate a Service on notice to IBM and your IBM Business Partner provided you have met all minimum requirements. Check with your IBM Business Partner to determine if any charges apply.

IBM may withdraw a Service or support for an eligible product on three months' written notice to you and your IBM Business Partner. If IBM withdraws a Service for which you have prepaid and IBM has not yet fully provided it to you, your IBM Business Partner will give you a prorated refund.

Any terms which by their nature extend beyond termination or withdrawal remain in effect until fulfilled and apply to respective successors and assignees.

11. Patents and Copyrights

If a third party claims that Materials IBM provides to you infringe that party's patent or copyright, IBM will defend you against that claim at its expense and pay all costs, damages, and attorney's fees that a court finally awards or that are included in a settlement approved by IBM, provided that you:

1. promptly notify IBM and your IBM Business Partner in writing of the claim; and
2. allow IBM to control, and cooperate with IBM in, the defense and any related settlement negotiations.

Remedies

If such a claim is made or appears likely to be made, you agree to permit IBM to enable you to continue to use the Materials, or to modify them, or replace them with Materials that are at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, you agree to return the Materials to IBM on its written request. Your IBM Business Partner will then give you a credit for the Materials returned. This is IBM's and your IBM Business Partner's entire obligation to you regarding any claim of infringement.

Claims for Which IBM is Not Responsible

IBM has no obligation regarding any claim based on any of the following:

1. anything you or your IBM Business Partner provide which is incorporated into the Materials or IBM's compliance with any designs, specifications, or instructions provided by you, your IBM Business Partner, or by a third party on your behalf;
2. your modification of the Materials; or
3. the combination, operation, or use of the Materials with any product, data, apparatus, or business method that IBM did not provide, or the distribution, operation or use of the Materials for the benefit of a third party outside your Enterprise.

12. Limitation of Liability

Circumstances may arise where, because of a default on IBM's part or other liability, you are entitled to recover damages from IBM. In each such instance, regardless of the basis on which you are entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable for no more than:

1. payments referred to in the Patents and Copyrights section above;
2. damages for bodily injury (including death) and damage to real property and tangible personal property; and
3. the amount of any other actual direct damages, up to the greater of HK\$ 780,000 or the charges (if recurring, 12 months' charges apply) you paid to your IBM Business Partner for the Service that is the subject of the claim.

This limit also applies to any of IBM's subcontractors. It is the maximum for which IBM and its subcontractors are collectively responsible.

Items for Which IBM is Not Liable

Under no circumstances is IBM or its subcontractors liable for any of the following even if informed of their possibility:

1. loss of, or damage to, data;
2. special, incidental, or indirect damages or for any economic consequential damages; or
3. lost profits, business, revenue, goodwill, or anticipated savings.

13. General Principles of Our Relationship

Resources Provided by

You agree to perform your obligations set forth in the Services transaction. As reasonably required by IBM to fulfill its obligations, you agree to provide sufficient, free, and safe access to your facilities, systems, information, personnel and resources.

If you make facilities, software, hardware, networks or other resources available to IBM, you agree to obtain any licenses or approvals related to such resources that may be necessary for IBM or its subcontractors to perform the Services. IBM will be relieved of its obligations to the extent your failure to promptly obtain such licenses or approvals adversely affects IBM's ability to perform its obligations. If a third party asserts a claim against IBM as a result of your failure to obtain these licenses or approvals, you agree to reimburse IBM for any costs and damages that IBM may reasonably incur in connection with such claim.

Prior to you making facilities, software, hardware, networks or other similar resources available to IBM, you agree to obtain any licenses or approvals for IBM or its subcontractors to use, access, and modify such resources to the extent necessary for IBM to perform the Services, including the development of any Materials. IBM will be relieved of its obligations to the extent your failure to promptly obtain such licenses or approvals adversely affects IBM's ability to perform its obligations. If a third party asserts a claim against IBM as a result of your failure to obtain these licenses or approvals, you agree to reimburse IBM for any costs and damages that IBM may reasonably incur in connection with such claim.

Other

1. Neither of us grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
2. All information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement.
3. Each of us is free to enter into similar agreements with others.
4. Each of us grants the other only the licenses and rights specified. No other licenses or rights (including licenses or rights under patents) are granted.
5. 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.
6. Each of us will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations.
7. Neither of us will bring a legal action arising out of or related to this Agreement more than two years after the cause of action arose, unless otherwise provided by applicable law without the possibility of contractual waiver or limitation.
8. Neither of us is responsible for failure to fulfill any obligations due to causes beyond its control.
9. Neither of us may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to do so is void. Neither of us will unreasonably withhold such consent. The assignment of this Agreement, in whole or in part, within the Enterprise of which either of us is a part or to a successor organization by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payment under this Agreement without obtaining your consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that similarly affects all of its customers.

10. You agree not to resell any Service without IBM's prior written consent. Any attempt to do so is void.
11. You agree that this Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for any third party claims against you except as described in the Patents and Copyrights section above or as permitted by the Limitation of Liability section above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
12. You agree that you are responsible for the results obtained from the use of the Services.
13. You agree to provide IBM with sufficient, free, and safe access to your facilities and systems for IBM to fulfill its obligations.
14. You agree to allow International Business Machines Corporation and its subsidiaries to store and use your business contact information, including names, business phone numbers, and e-mail addresses, anywhere they do business. Such information will be processed and used in connection with our business relationship, and may be provided to contractors acting on IBM's behalf, Business Partners who promote, market and support certain IBM products and Services, and assignees of International Business Machines Corporation and its subsidiaries for uses consistent with our business relationship.
15. You agree to comply with all applicable export and import laws and regulations.

14. Agreement Termination

Either of us may terminate this Agreement on written notice to the other and your IBM Business Partner following the expiration or termination of the terminating party's obligations.

Either of us may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

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

15. Geographic Scope and Governing Law

The rights, duties, and obligations of each of us are valid only in Hong Kong SAR except that all licenses are valid as specifically granted.

Both you and IBM consent to the application of the laws of Hong Kong SAR to govern, interpret, and enforce all of your and IBM's rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

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

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

This Agreement and its applicable Attachments and Transaction Documents are the complete agreement between us, and replace any prior oral or written communications, regarding the acquisition of Services from an IBM Business Partner. No machines or licensed program products are acquired under this Agreement.