

IBM General Commercial Terms for Programs



These IBM General Commercial Terms for Programs (called the "Commercial Terms") govern transactions by which Customer licenses ICA Programs and obtains Program licenses from IBM **Ceska republika, spol. s r.o.** ("IBM"). These Commercial Terms, including its applicable Attachments and Transaction Documents, including its applicable Attachments and Transaction Documents, create the complete agreement ("Agreement") regarding transactions by which Customer obtains licenses for ICA Programs and Other IBM Programs from IBM.

1. Attachments and Transaction Documents

Additional terms for Programs are in documents called "Attachments" and "Transaction Documents" provided by IBM. In general, Attachments contain terms that may apply to more than one Program transaction, while Transaction Documents (such as a supplement, schedule, exhibit, or addendum) contain specific details and terms related to each individual transaction. Customer may receive one or more Transaction Documents for a single transaction. Attachments and Transaction Documents are part of this Agreement only for those transactions to which they apply. Each transaction is separate and independent from other transactions.

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

2. Definitions

Date of Installation for a Program –

- a. basic license, the second business day after delivery of the Program to Customer's designated location,
- b. copy, the date (specified in a Transaction Document) on which IBM authorizes Customer to make a copy of the Program, and
- c. chargeable component (also called a feature), the date Customer uses the chargeable component or a copy. Customer agrees to notify IBM of the chargeable component's Date of Installation.

Designated Machine – either i) the machine on which Customer will use an ICA Program for processing and which IBM requires Customer to identify to IBM by type/model and serial number, or ii) any machine on which Customer uses the ICA Program if IBM does not require Customer to provide this identification.

Enterprise – 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 Czech Republic.

ICA Program – an IBM Program licensed under this Agreement.

Non-IBM Program – a Program licensed under a separate third party license agreement.

Other IBM Program – an IBM Program licensed under a separate IBM license agreement (e.g., IBM International Program License Agreement).

Program – the following, including the original and all whole or partial copies:

- a. machine-readable instructions and data;
- b. components;
- c. audio-visual content (such as images, text, recordings, or pictures); and
- d. related licensed materials.

The term "Program" includes any ICA Program, Other IBM Program, or Non-IBM Program that IBM may provide to Customer.

Specifications – information specific to an ICA Program. ICA Program Specifications are in a document entitled "Licensed Program Specifications."

Specified Operating Environment – the machines and programs with which an ICA Program is designed to operate, as described in its Licensed Program Specifications.

3. Acceptance of Terms

Customer accepts the terms in Attachments and Transaction Documents by i) signing them (by hand or electronically), ii) using the Program, or allowing others to do so, or iii) making any payment for the Program.

A Program becomes subject to this Agreement when IBM accepts Customer's order by i) sending Customer a Transaction Document, or ii) making the Program available to Customer.

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

4. Delivery

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

5. Charges and Payment

5.1 Charges

A Transaction Document specifies the amount payable for Programs, based on one-time or recurring charges, or both. Additional charges may apply. IBM will inform Customer in advance whenever additional charges apply.

Recurring charges for a Program begin after its Date of Installation. Unless otherwise provided in this Agreement (including any applicable Attachment or Transaction Document) IBM does not give credits or refunds for charges already due or paid.

5.2 Usage Charges

One-time and recurring charges may be based on measurements of actual or authorized use (for example, number of users or processor size for Programs). Customer agrees to provide actual usage data as described in an Attachment or Transaction Document. If Customer makes changes to its environment that impact usage charges (for example, change processor size or configuration), Customer agrees to promptly notify IBM and pay any applicable charges. Recurring charges will be adjusted accordingly. In the event that IBM changes the basis of measurement, its terms for changing charges will apply.

5.3 Changes to Charges

From time to time, IBM may change its charges. Customer receives the benefit of a decrease in charges for amounts that become due on or after the effective date of the decrease.

Unless provided otherwise in an Attachment or Transaction Document, IBM may increase recurring charges for Programs provided under this Agreement, by giving Customer three months' written notice. An increase applies on the first day of the invoice or charging period on or after the effective date IBM specifies in the notice.

IBM may increase one-time charges without notice. However, an increase to one-time charges does not apply to Customer if i) IBM receives the order before the announcement date of the increase and ii) one of the following occurs within three months after IBM's receipt of the order:

- a. IBM makes the Program available to Customer;
- b. Customer makes an authorized copy of a Program or distributes a chargeable component of a Program to another machine; or
- c. a Program's increased use charge becomes due.

Upon reasonable notice, IBM may verify the usage data and other information affecting the calculation of charges under this Agreement. Such verification will be conducted in a manner that minimizes disruption to Customer's business and may be conducted on Customer's premises, during Customer's normal business hours. Customer agrees to i) provide records, system tools outputs, and other electronic or hard copy system information reasonably necessary for such verification, and ii) promptly pay any additional, valid charges and other liabilities determined as a result of such verification.

5.4 Payment

Amounts are due and payable upon receipt of invoice. Customer agrees to pay accordingly, including any late payment charges. Payment may be made electronically to an account specified by IBM or by other means agreed to by the parties.

If payment is not received within 30 days from the date of invoice, Customer may be subject to late payment charges. The late payment charges will be calculated in accordance with local law.

5.5 Taxes

If any authority imposes upon any transaction under this Agreement a duty, tax, levy, or fee, excluding those based on IBM's net income, then Customer agrees to pay that amount as specified in an invoice, unless Customer supplies exemption documentation.

6. Changes to the Agreement Terms

In order to maintain flexibility in our business relationship, IBM may change the terms of this Agreement by providing Customer at least 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, on-going transactions that do not expire, and transactions with a defined renewable contract period. For transactions with a defined renewable contract period, Customer may request that IBM defer the change effective date until the end of the current contract period.

Customer acknowledges its agreement to have these changes apply for such transactions by i) placing new orders for Programs after the change effective date, ii) failing to request that the change effective date be deferred until the start of the next renewal period, iii) allowing transactions to renew after receipt of the change notice, or iv) failing to terminate non-expiring transactions prior to the change effective date. Changes to charges are implemented as described in the Charges and Payment section above.

Otherwise, for a change to be valid, both parties must sign it.

7. IBM Business Partners

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain Programs. Customer may order IBM Programs that are promoted or marketed to Customer by IBM Business Partners or other suppliers, however, i) this Agreement applies only if a Transaction Document subject to this Agreement is provided for the specific transaction, and ii) such Business Partners and suppliers remain independent and separate from IBM.

IBM is not responsible for the actions or statements of IBM Business Partners or other suppliers, any obligations either has to Customer, or any products or services that they supply to Customer under their agreements.

8. License

When IBM accepts Customer's order, IBM grants Customer a nonexclusive license to use the ICA Program only within Customer's Enterprise in the Czech Republic. ICA Programs are owned by International Business Machines Corporation, one of its subsidiaries, or a third party and are copyrighted and licensed (not sold).

8.1 Authorized Use

Under each license, IBM authorizes Customer to:

- a. use the ICA Program's machine-readable portion on only the Designated Machine. If the Designated Machine is inoperable, Customer may use another machine temporarily. If the Designated Machine cannot assemble or compile the ICA Program, Customer may assemble or compile the ICA Program on another machine.
If Customer changes a Designated Machine previously identified to IBM, Customer agrees to notify IBM of the change and its effective date;
- b. use the ICA Program to the extent of authorizations Customer has obtained;
- c. make and install copies of the ICA Program, to support the level of use authorized, provided Customer reproduces the copyright notices and any other legends of ownership on each copy or partial copy; and
- d. use any portion of the ICA Program IBM i) provides in source form, or ii) marks restricted (for example, "Restricted Materials of IBM") only to --
 - (1) resolve problems related to the use of the ICA Program, and
 - (2) modify the ICA Program so that it will work together with other products.

8.2 Customer's Additional Obligations

For each ICA Program, Customer agrees to:

- a. comply with any additional or different terms in its Licensed Program Specifications or an Attachment or Transaction Document;
- b. ensure that anyone who uses it (accessed either locally or remotely) does so only for Customer's authorized use and complies with IBM's terms regarding ICA Programs; and
- c. maintain a record of all copies and provide it to IBM at its request.

8.3 Actions Customer May Not Take

Customer agrees not to:

- a. reverse assemble, reverse compile, otherwise translate, or reverse engineer the ICA Program unless expressly permitted by applicable law without the possibility of contractual waiver; or
- b. sublicense, assign, rent, or lease the ICA Program or transfer it outside Customer's Enterprise.

8.4 Distributed System License Option

For some ICA Programs, Customer may make a copy under a Distributed System License Option (called a "DSLO" copy). IBM charges less for a DSLO copy than for the original license (called the "Basic" license). In return for the lesser charge, Customer agrees to do the following while licensed under a DSLO:

- a. have a Basic license for the ICA Program;
- b. provide problem documentation and receive Program Services (if any) only through the location of the Basic license; and

- c. distribute to, and install on, the DSLO's Designated Machine, any release, correction, or bypass that IBM provides for the Basic license.

8.5 Program Services

IBM provides Program Services for warranted ICA Programs. If IBM can reproduce Customer's reported problem in the Specified Operating Environment, IBM will issue defect correction information, a restriction, or a bypass. IBM provides Program Services for only the unmodified portion of a current release of an ICA Program.

IBM provides Program Services i) on an on-going basis (with at least six months' written notice before IBM terminates Program Services), ii) until the date IBM specifies, or iii) for a period IBM specifies.

9. Warranty for ICA Programs

IBM warrants that each warranted ICA Program, when used in the Specified Operating Environment, will conform to its Specifications.

During the warranty period, IBM provides defect-related Program Services without charge. Program Services are available for a warranted ICA Program for at least one year following its general availability. The warranty period for an ICA Program expires when its Program Services are no longer available.

If an ICA Program does not function as warranted during the first year after Customer obtains its license and IBM is unable to make it do so, Customer may return the ICA Program and the charges Customer paid for the license will be refunded. To be eligible, Customer must have obtained its license while Program Services (regardless of the remaining duration) were available for the ICA Program.

The warranty stated above will not apply to the extent that there has been misuse, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by Customer or a third party, or failure or damage caused by a product for which IBM is not responsible.

This 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 and any warranty of non-infringement.

IBM does not warrant uninterrupted or error-free operation of a Program or that IBM will correct all defects.

IBM will identify ICA Programs that it does not warrant.

Unless otherwise specified in an Attachment or Transaction Document, IBM provides non-IBM Programs without warranties of any kind. However, non-IBM developers, suppliers, or publishers may provide their own warranties to Customer. Warranties, if any, for Other IBM Programs and Non-IBM Programs may be found in their license agreements.

10. Compliance Verification

IBM's right to verify Customer's usage data and other information affecting the calculation of charges also includes the right to verify Customer's compliance with other terms of this Agreement (including applicable Attachments and Transaction Documents) relating to Customer's use of ICA Programs at all sites and for all environments in which Customer installs or uses ICA Programs for any purpose. IBM may use an independent auditor to assist with such verification, provided IBM has a written confidentiality agreement in place with such auditor.

Customer agrees to create, retain, and provide to IBM and its auditors written records, system tools outputs, and other system information sufficient to provide auditable verification that Customer's installation and use of ICA Programs complies with the Agreement terms, including IBM's applicable licensing and pricing terms. IBM will notify Customer in writing if any such verification indicates that Customer is not in compliance with Agreement terms. The rights and obligations in this section remain in effect during the period any ICA Programs are licensed to Customer and for two years thereafter.

11. License Termination

Customer may terminate the license for an ICA Program at any time on one month's written notice to IBM.

For ICA Program licenses that Customer acquired for a one-time charge, replacement licenses may be acquired for an upgrade charge, if available. When Customer obtains licenses for these replacement ICA Programs, Customer agrees to terminate the license of the replaced ICA Programs when charges become due, unless IBM specifies otherwise.

IBM may terminate Customer's license if Customer fails to comply with the license terms. If IBM does so, Customer's authorization to use the ICA Program is also terminated.

12. Intellectual Property Protection

12.1 Third Party Claims

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

- a. promptly notifies IBM in writing of the claim; and
- b. allows IBM to control, and cooperates with IBM in, the defense and any related settlement negotiations.

12.2 Remedies

If such a claim is made or appears likely to be made, Customer agrees to permit IBM to enable Customer to continue to use the ICA Program, or to modify it, or replace it with one that is at least functionally equivalent. If IBM determines that none of these alternatives is reasonably available, Customer agrees to return the ICA Program to IBM on IBM's written request. IBM will then give Customer a credit equal to the amount paid by Customer or 12 months' charges (whichever is less).

12.3 Claims for Which IBM is Not Responsible

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

- a. anything provided by Customer or a third party on Customer's behalf that is incorporated into an ICA Program or IBM's compliance with any designs, specifications, or instructions provided by Customer or a third party on Customer's behalf;
- b. modification of an ICA Program by Customer or a third party on Customer's behalf, or an ICA Program's use other than in accordance with its applicable licenses and restrictions;
- c. the combination, operation, or use of an ICA Program with any product, hardware device, program, data, apparatus, method, or process that IBM did not provide as a system, if the infringement would not have occurred were it not for such combination, operation or use;
- d. the distribution, operation or use of an ICA Program outside Customer's Enterprise; or
- e. infringement by a non-IBM Program or an Other IBM Program alone.

This Intellectual Property Protection section states IBM's entire obligation and Customer's exclusive remedy regarding any third party intellectual property claims.

13. Limitation of Liability

13.1 Items for which IBM May Be Liable

Circumstances may arise where, because of a default by IBM in the performance of its obligations under this Agreement, Customer is entitled to recover damages from IBM. In such event, IBM is liable only for damage caused by IBM under this Agreement, which in the aggregate will not exceed the amount of any direct damage, to the extent actually suffered by Customer as an immediate and direct consequence of the default, up to the greater of the equivalent of € 500,000 (five hundred thousand euro) in local currency converted according to the exchange rate published by Czech National Bank on the business day preceding the date of payment of the relevant invoice by the customer or, if none, the date of IBM's breach, or the charges (if recurring, 12 months' charges apply) for the Product or Service in relation to which the relevant claim for damages has been made. For purposes of this item, the term "Product" also includes Materials and Machine Code. This limit also applies to any of IBM's subcontractors and Program developers. It is the maximum for which IBM and its subcontractors and Program developers are collectively responsible.

Referring to § 379 of the Commercial Code and concerning all conditions related to the conclusion of this Agreement, both contractual parties state that the total foreseeable damage, which may accrue, shall not exceed the sum set forth in paragraph above. It is the maximum for which IBM and its subcontractors and Program developers are collectively responsible. The following amounts are not subject to a cap on the amount of damages:

- a. payments referred to in the Intellectual Property Protection section above; and
- b. damages for bodily injury (including death) and damage to real property and tangible personal property for which IBM is legally liable.

13.2 Items for Which IBM is Not Liable

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is IBM, its subcontractors, or Program developers liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data;
- b. special, incidental, exemplary, or indirect damages or for any economic consequential damages; or
- c. lost profits, business, revenue, goodwill, or anticipated savings.

These limitations of liability under this Limitation of Liability article of this Agreement shall apply to the maximum possible extent permitted by mandatory provisions of applicable laws.

14. General Principles of Our Relationship

14.1 Notices and Communications

To the extent permissible under applicable law, written communications, including notices to the receiving party's designated representative, are to be sent to the address (physical, e-mail or facsimile) specified in an applicable Attachment or Transaction Document. The parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.

14.2 Assignment

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

14.3 Compliance with Laws

IBM will comply with laws applicable to IBM generally as a provider of information technology Programs. IBM is not responsible for determining the requirements of laws applicable to Customer's business, including those relating to Programs that Customer acquires under this Agreement, or that IBM's provision of or Customer's receipt of particular Programs under this Agreement meets the requirements of such laws. Notwithstanding anything in this Agreement to the contrary, neither party is obligated to take any action that would violate law applicable to that party.

Each party will comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users.

14.4 Dispute Resolution

Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. The Parties agree that any legal or other action related to a breach of this agreement must be commenced no later as defined by the local law (4 years) from the date on which the cause of action arose.

15. Other Principles of Our Relationship

- a. Neither party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b. The exchange of any confidential information will be made under a separate, signed confidentiality agreement. However, to the extent confidential information is exchanged in connection with any Program under this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.
- c. This Agreement and any transaction under it do not create an agency, joint venture, or partnership between Customer and IBM. Each party is free to enter into similar agreements with others to develop, acquire, or provide competitive products and services.
- d. Each party grants only the licenses and rights specified in this Agreement. No other licenses or rights (including licenses or rights under patents) are granted either directly, by implication, or otherwise. The rights and licenses granted to Customer under this Agreement may be terminated if Customer fails to fulfill its applicable payment obligations.
- e. For the purposes of this sub-Clause 1.11.5.e, the following additional definitions shall apply:

"Business Contact Information" means 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.

"Business Contact Personnel" means the Customer employees and contractors to whom the Business Contact Information relates.

"Data Protection Authority" means the Office for Personal Data Protection established by the Act No. 101/2000 of Coll. on the Protection of Personal Data and on Amendment to Some Acts.

"Data Protection & Electronic Communications Legislation" means the Act No. 101/2000 of Coll. on the Protection of Personal Data and on Amendment to Some Acts or any statutory replacement or modification thereof.

“IBM Group” means International Business Machines Corporation of Armonk, New York, USA, its subsidiaries, and their respective ‘Business Partners’ and subcontractors. IBM Group entities are principally providers of information technology, including hardware and software products, services, consultancy, financing services and other related activities.

Customer authorizes IBM to process and use Business Contact Information for the purpose of furthering the business relationship between Customer and IBM Group, including the marketing of products and services (the **“Specified Purpose”**).

Customer agrees that Business Contact Information may be disclosed to, and processed and used by, IBM Group in pursuit of the Specified Purpose.

IBM agrees that all Business Contact Information will be processed in accordance with the applicable Data Protection & Electronic Communications Legislation and will be used only in accordance with the Specified Purpose.

To the extent that the Data Protection & Electronic Communications Legislation requires them, Customer represents that it has obtained (or will obtain) such consents from and has issued (or will issue) such notices to, the Business Contact Personnel in order to enable the IBM Group to process and use the Business Contact Information to contact them, including by email, in accordance with the Specified Purpose.

Customer consents to IBM transferring Business Contact Information outside the European Economic Area, provided that any such transfer is made on contractual terms approved by the Data Protection Authority as ensuring adequate safeguards for the rights and freedoms of data subjects.

- f. 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 1) as described in the Intellectual Property Protection section above, ii) 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, or iii) as provided by mandatory provisions of applicable laws.
- g. Customer is responsible for selecting the Programs that meet its needs and for the results obtained from the use of the Programs, including Customer’s decision to implement any recommendation concerning Customer’s business practices and operations.
- h. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- i. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- j. As reasonably required by IBM to fulfill its obligations under this Agreement, Customer agrees to provide IBM with sufficient and safe access (including remote access) to Customer’s facilities, systems, information, personnel, and resources, all at no charge to IBM. IBM is not responsible for any delay in performing or failure to perform caused by Customer’s delay in providing such access or performing other Customer responsibilities under this Agreement.
- k. All provisions of this Agreement apply to extent that they are not prohibited under applicable law.

16. Agreement Termination

Either party may terminate this Agreement on written notice to the other following the expiration or termination of the terminating party’s obligations under this Agreement, including any applicable Attachment or Transaction Document.

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

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

17. Geographic Scope and Governing Law

The rights, duties, and obligations of each party are valid only in Czech Republic, except that all licenses are valid as specifically granted.

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

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

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