



IBM Agreement

for Services Acquired from an IBM Business Partner

This IBM Agreement for Services Acquired from an IBM Business Partner (“Agreement”) governs IBM’s delivery of certain IBM Services and Product Offerings which Customer acquires through an IBM Business Partner. Such Services are delivered by IBM under terms which are in addition to the terms of this Agreement (for example, a statement of work) and such Product Offerings are delivered by IBM under terms which are in addition to the terms of this Agreement (for example, an attachment to this Agreement). IBM Products are not acquired from IBM Business Partners under this Agreement.

1. Definitions

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

Date of Installation –

- a. for an IBM Machine that IBM is responsible for installing, the business day after the day IBM installs it or, if Customer defers installation, makes it available to Customer for subsequent installation by IBM;
- b. for a Customer-set-up Machine and a non-IBM Machine, the second business day after the Machine’s standard transit allowance period; and
- c. for a Program --
 - (1) basic license, the second business day after the Program’s standard transit allowance period,
 - (2) copy, the date (specified in a Transaction Document) on which IBM authorizes Customer to make a copy of the Program, and
 - (3) 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.

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 Romania.

IBM Machine – a Machine bearing an IBM logo.

IBM Product – an IBM Machine or IBM Program.

IBM Program – a Program licensed under a separate IBM license agreement (for example, the IBM International Program License Agreement).

ICA Program -- an IBM Program licensed under the terms of the IBM Customer Agreement (“ICA”) or equivalent.

Licensed Internal Code (called “LIC”) – Machine Code used by certain IBM Machines IBM specifies (called “Specific Machines”).

Machine – a hardware device, 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) that IBM may provide to Customer.

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

Materials – literary works or other works of authorship (such as software programs and code, documentation, reports, and similar works) that IBM may deliver to Customer as part of a Service. The term “Materials” does not include Programs, Machine Code, or other items available under their own license terms or agreements.

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

Product – a Machine or a Program.

Product Offering – a certain capability or right(s) associated with, and delivered by IBM for Customer’s use on, an IBM Product (for example, capacity on demand capability enabled for a Machine).

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 IBM Program or Non-IBM Program that IBM may provide to Customer. The term does not include Machine Code or Materials.

Service – performance of a task, assistance, support, or access to resources (such as an information database) that IBM makes available to Customer.

2. IBM Business Partners

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote, market, and support certain Products and Services. Customer may order IBM Products (including Product Offerings) or Services that are promoted or marketed to Customer by IBM Business Partners or other suppliers, however, i) this Agreement applies only if an Attachment or Transaction Document (as defined in Section 3 below) 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.

3. Agreement Structure

Additional terms for Services and Product Offerings are in documents called "Attachments" and "Transaction Documents" provided by IBM. In general, Attachments contain terms that may generally govern Customer’s use of a Product Offering, or may apply to more than one Product or Services transaction, while Transaction Documents (such as a statement of work, supplement, schedule, exhibit, change authorization, 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.

4. Changes to the Agreement

In order to maintain flexibility in our business relationship, IBM may propose changes to the terms of this Agreement, Services or Product Offerings by giving you three months' written notice. However, these changes are not retroactive. You acknowledge your agreement to have these changes apply, as of the effective date IBM specifies in the notice, only to new orders, renewals, and ongoing transactions that do not expire by 1) placing new orders for Services or Product Offerings after the change effective date, 2) allowing transactions to renew after receipt of the change notice, or 3) failing to terminate ongoing transactions that do not expire prior to the change effective date.

For ongoing transactions with a defined renewable contract period, you may request that IBM defer the effective date of a notified change until the end of the current contract period if (i) the change affects your current contract period, and (ii) you consider the change unfavorable.

5. Charges and Payment

When Customer orders a Service or Product Offering through an IBM Business Partner, the IBM Business Partner establishes the charges and terms governing payment of the charges. Customer will make payment directly to Customer’s IBM Business Partner.

However, IBM may charge Customer directly for some expenses incurred to perform Customer’s Service request (for example, actual travel and living expenses and out-of-pocket expenses). IBM will not incur

these expenses without Customer's prior approval. IBM will invoice Customer for such expenses. Amounts are due upon receipt of invoice and are payable as IBM specifies. Customer agrees to pay accordingly, including any late payment fee.

6. Warranty

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

6.2 No Warranty for Product Offerings

Subject to any statutory warranties which cannot be excluded, IBM makes no warranties or conditions for product offerings either express or implied, including but not limited to, the implied warranties or conditions of merchantability, fitness for a particular purpose, and any warranty or condition of non-infringement.

6.3 Extent of Warranty

These warranties are customer's exclusive warranties and replace all other warranties or conditions, express or implied, including, but not limited to, the implied warranties or conditions of merchantability and fitness for a particular purpose and any warranty or condition of non-infringement.

Items Not Covered By Warranty.

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.

7. Service Terms

7.1 Personnel

Each party will assign personnel that are qualified to perform the tasks required of such party under this Agreement and is responsible for the supervision, direction, control, and compensation of its personnel. Subject to the foregoing, each party may determine the assignment of its personnel and its contractors.

An Attachment or Transaction Document will specify Materials to be delivered to Customer and identify them as "Type I Materials," "Type II Materials," or otherwise as both parties agree. If not specified, Materials will be considered Type II Materials.

Customer will own the copyright in Materials created as part of a Service that are identified as "Type I Materials." Customer grants IBM an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, sublicense, distribute, and prepare derivative works based on, Type I Materials.

7.2 Customer Resources

If Customer is making available to IBM any facilities, software, hardware or other resources in connection with our performance of Services, Customer agrees to obtain any licenses or approvals related to these resources that may be necessary for IBM to perform the Services and develop Materials. IBM will be relieved of its obligations that are adversely affected by Customer's failure to promptly obtain such licenses or approvals. Customer agrees to reimburse IBM for any reasonable costs and other amounts that IBM may incur from Customer's failure to obtain these licenses or approvals.

Unless otherwise agreed in an Attachment or Transaction Document, Customer is responsible for i) any data and the content of any database Customer makes available to IBM in connection with a Service under this Agreement, ii) the selection and implementation of procedures and controls regarding access, security, encryption, use, and transmission of data, and iii) backup and recovery of the database and any stored data.

7.3 Service for Machines

IBM provides certain types of Service to keep Machines in, or restore them to, conformance with their Specifications. IBM will inform Customer of the available types of Service for a Machine. At its discretion, IBM will i) either repair or exchange the failing Machine and ii) provide the Service either at Customer's

location or a service center. IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive maintenance.

Any feature, conversion, or upgrade IBM services must be installed on a Machine which is i) the designated, serial-numbered Machine, if applicable, and ii) at an engineering-change level compatible with the feature, conversion, or upgrade.

When the type of Service requires that Customer deliver the failing Machine to IBM, Customer agrees 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 deliver it to Customer at IBM's expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, Customer's Machine while it is i) in IBM's possession or ii) in transit in those cases where IBM is responsible for the transportation charges.

Customer agrees:

- a. to obtain authorization from the owner to have IBM service a Machine that Customer does not own;
- b. where applicable, before IBM provides Service, to --
 - (1) follow the problem determination and service request procedures that IBM provides,
 - (2) secure all programs, data, and funds contained in a Machine, and
 - (3) inform IBM of changes in a Machine's location.
- c. to 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); and
- d. when Customer returns a Machine to IBM for any reason --
 - (1) to securely erase from any Machine all programs not provided by IBM with the Machine 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;
 - (2) to remove all funds from Machines returned to IBM. IBM is not responsible for any funds, programs not provided by IBM with the Machine, or data contained in a Machine that Customer returns to IBM; and
 - (3) IBM may ship all or part of the Machine 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.

7.3.1 Replacements

When Service involves the exchange of a part or Machine, the item IBM replaces becomes its property and the replacement becomes Customer's. Customer represents that all removed items are genuine and unaltered. The replacement may not be new, but 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 part or Machine, Customer agrees to remove all features, parts, options, alterations, and attachments not under IBM's service. Customer also agrees to i) ensure that the part or Machine is free of any legal obligations or restrictions that prevent its exchange and ii) transfer ownership and possession of removed parts to IBM.

Service for some IBM Machines involves IBM providing Customer with an exchange replacement for installation by Customer. Such exchange replacements may be i) a part of a Machine (called a Customer Replaceable Unit, or "CRU," e.g., keyboard, memory, or hard disk drive), or ii) an entire Machine. Customer may request IBM to install the replacement CRU or Machine, however, Customer may be charged for the installation. IBM provides information and replacement instructions with Customer's Machine and at any time on Customer's request. IBM specifies in the materials shipped with a replacement whether the failing CRU or Machine must be returned to IBM. When return is required, return instructions and a container are shipped with the replacement, and Customer may be charged for the replacement if IBM does not receive the failing CRU or Machine within 15 days of Customer's receipt of the replacement.

7.3.2 Items Not Covered

Repair and exchange Services do not cover:

- a. accessories, supply items, consumables (such as batteries and printer cartridges), and structural parts (such as frames and covers);
- b. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by Customer or a third party;
- c. Machines with removed or altered Machine or parts identification labels;
- d. failures caused by a product for which IBM is not responsible;
- e. service of Machine alterations; or
- f. service of a Machine on which Customer is using capacity or capability, other than that authorized by IBM in writing.

7.4 Warranty Service Upgrade

For certain Machines, Customer may select a Service upgrade from the standard type of warranty Service for the Machine. Customer may be charged for the Service upgrade during the warranty period.

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

7.5 Maintenance Coverage

When Customer orders maintenance Service for Machines, IBM, or Customer's IBM Business Partner, will inform Customer 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, Customer may have IBM restore it for a charge or Customer may withdraw its request for maintenance Service. However, Customer will be charged for any maintenance Service which IBM has performed at Customer's request.

7.6 Automatic Service Renewal

Renewable Services renew automatically for a same length contract period unless either of us provides written notification (at least one month prior to the end of the current contract period) to the other of its decision not to renew.

7.7 Termination and Withdrawal of a Service

Either party may terminate a Service transaction if the other materially fails to meet its obligations concerning the Service.

Customer may terminate a Service, on notice to IBM provided Customer has met all minimum requirements and paid any adjustment charges specified in the applicable Attachments and Transaction Documents.

For a maintenance Service, Customer may terminate provided any of the following circumstances occur:

- a. Customer permanently removes the eligible Product, for which the Service is provided, from productive use within Customer's Enterprise;
- b. the eligible location, for which the Service is provided, is no longer controlled by Customer (for example, because of sale or closing of the facility); or
- c. the Machine has been under maintenance Service for at least one year and Customer gives IBM one month's written notice prior to terminating the maintenance Service.

IBM may withdraw a Service or support for an eligible Product on three months' written notice to Customer. If IBM withdraws a Service for which Customer has prepaid and IBM has not yet fully provided it to Customer, Customer will receive 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.

8. Product Offering Terms

8.1 Machine Upgrades

As used in this section, the term "upgrade" includes, without limitation, features and conversions. IBM provides upgrades for installation on Machines, and, in certain instances, only for installation on a designated, serial-numbered Machine. Within 30 days of the shipment of an upgrade, Customer agrees to

install the upgrade or, if IBM is responsible for the installation, to allow IBM to install the upgrade. Otherwise, IBM may terminate the transaction and Customer must return the upgrade at Customer's expense.

8.2 Machine Code License

Machine Code is licensed under the terms and restrictions of the Machine Code license agreement (e.g., IBM License Agreement for Machine Code, IBM Agreement for Licensed Internal Code, or an equivalent) provided with the Machine Code. Customer acceptance of this Agreement includes acceptance of IBM's Machine Code license agreements, current versions of which are available at the following URL: http://www.ibm.com/servers/support/machine_warranties/support_by_product.html or by contacting an IBM representative. Machine Code license agreements may be amended by IBM from time to time. Such amended license terms will apply only to Machine Code that is supplied after such amended terms become effective.

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

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

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

The capacity of certain Machines is limited by technological measures in Machine Code. Customer agrees to IBM's implementation of such technological measures to limit Machine capacity.

8.3 Compliance Verification

Upon reasonable notice, IBM may verify the usage data and other information affecting the calculation of Product Offering charges under this Agreement. IBM may use a third party as an independent auditor ("IBM Auditor") to assist with such verification, provided IBM has a written confidentiality agreement in place with such IBM Auditor.

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.

IBM's right to verify Customer's usage data and other information affecting the calculation of Product Offering 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 Product Offerings at all sites and for all environments in which Customer installs or uses Product Offerings for any purpose.

Customer agrees to create, retain, and provide to IBM and IBM's Auditors, as applicable, written records, system tools outputs, and other system information sufficient to provide auditable verification that Customer's installation and use of each Product Offering complies with the terms under which the Product Offering is provided, 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 the Product Offering's terms. The rights and obligations in this section remain in effect during the period any Product Offering is provided to Customer and for two years thereafter.

9. Intellectual Property Protection

9.1 Third Party Claims

If a third party claims that a Material 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;
- b. allows IBM to control, and cooperates with IBM in, the defense and any related settlement negotiations; and
- c. is and remains in compliance with Customer's obligations under section 9.1.2 (Remedies) below.

9.2 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 Material, 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 terminate use of the Material and, if applicable, return the Material to IBM, on IBM's written request. Customer's IBM Business Partner will then give Customer a credit for the amount Customer paid for the creation of the returned Material.

9.3 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 a Material, or IBM's compliance with any designs, specifications, or instructions provided by Customer or a third party on Customer's behalf;
- b. modification of a Material by Customer or a third party on Customer's behalf;
- c. the combination, operation, or use of a Product 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 a Material outside Customer's Enterprise; or
- e. infringement by a non-IBM Product or an IBM Program alone.

9.4 Items for which IBM May be Liable

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each Service or Product Offering or otherwise arising under this Agreement will not exceed the amount of any actual direct damages 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 Romanian 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 Service or Product Offering that is the subject of the claim. For purposes of this Limitation of Liability section, 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. 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.

9.5 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.

10. General 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 Product Offering or Service 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. Customer authorizes IBM to process Customer's employee and contractor business contact information, in connection with IBM Products and Services or in furtherance of IBM's business relationship with Customer, including for marketing purposes. Customer also agrees that such contact details can be disclosed and processed by International Business Machines Corporation and its subsidiaries as well as IBM Business Partners and subcontractors, for the purpose described above. Customer acknowledges that such companies may be located in countries outside the European Union where data protection laws may not be as comprehensive as in the Customer's country. International Business Machines Corporation and its subsidiaries, IBM Business Partners and subcontractors are mainly in the information technology business, including the supply and resale of hardware and software products and services, as well as outsourcing, consulting and financing services and related activities.

Customer represents that, prior to disclosing such contact information to IBM, Customer has obtained, where required by applicable law, the informed consent of the individuals whose contact information is disclosed and has delivered any notices to such individuals and taken any other required action as deemed necessary to comply with the applicable data privacy laws to entitle International Business Machines Corporation and its subsidiaries, IBM Business Partners and subcontractors to process (including by e-mail) such contact information for the purpose described in this item. Such notice shall also state that such individual's business contact information will be or has been incorporated into IBM's marketing and customer databases and that any request of such individuals to exercise their rights to access, rectify, cancel or oppose can be exercised by writing a letter, including a copy of the data subject's identification card, to IBM Romania S.R.L.

- f. Where approval, acceptance, consent or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- g. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.

11. 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.

12. Geographic Scope and Governing Law

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

Except where required by law, IBM has no obligation to provide any services for Machines located outside Romania.

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.
