



# International Agreement for Early Release of IBM SaaS and Hosted Program Offerings

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**BY ACCESSING, BROWSING, CLICKING ON AN "ACCEPT" BUTTON, OR OTHERWISE USING THE IBM OFFERING, CUSTOMER AGREES TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF CUSTOMER, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS, DO NOT ACCESS, BROWSE, OR CLICK ON AN "ACCEPT" BUTTON.**

## 1. General

### 1.1 Agreement Structure

This Agreement includes Part 1 – General terms, and Part 2 – Country-unique Terms and, for each individual IBM Offering, any applicable Terms of Use. This Agreement and any Terms of Use constitute the complete agreement between Customer and IBM regarding the use of the IBM Offering. It replaces any prior oral or written communications between Customer and IBM concerning Customer's use of the IBM Offering. The terms of Part 2 may replace or modify those of Part 1.

### 1.2 Definitions

**Content** – information, software, and data, including, without limitation, any Personal Data (as defined in Section 1.7), hypertext markup language files, scripts, programs, recordings, sound, music, graphics, images, applets, or servlets that are created, provided, uploaded, or transferred by Customer and any user authorized by Customer.

**Customer** – the customer Enterprise company that is testing the IBM Offering(s).

**Early Release** – a release of an IBM Offering for purposes of testing prior to it being made commercially available that may still be under development and therefore, potentially unreliable.

**Enabling Software** – any Program and associated materials provided to Customer by IBM or a third party as part of an IBM Offering in order to facilitate access to and use of the IBM Offering.

**Enterprise** – any legal entity that, by more than 50%, owns, is owned by, or is under common ownership with Customer.

**Hosted Program** – an offering IBM makes available to Customer remotely through the Internet providing access to (i) functionality of a particular Program or Programs and (ii) infrastructure.

**IBM** – the IBM Enterprise company that is providing the IBM Offering(s).

**IBM Software as a Service ("IBM SaaS")** – an offering IBM makes available to Customer remotely through the Internet providing access to (i) functionality of programs and (ii) infrastructure and includes related offering materials. IBM SaaS is not a program but may require Customer to download Enabling Software in order to use it.

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

**IBM Offering** – the IBM Early Release SaaS offering or the IBM Early Release Hosted Program offering, that has not been made commercially available to customers.

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

**Terms of Use** – any additional terms under which IBM makes an IBM Offering available to Customer.

**Test Period** – the period during which the Customer tests the IBM Offering.

### 1.3 IBM Offering

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

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

## 1.4 Customer's Right to Use

During the Test Period, Customer may use the IBM Offering for the sole purpose of internal evaluation, testing, or demonstration of the IBM Offering. The IBM Offering may not be used for productive purposes. Customer may use the IBM Offering as authorized by IBM on condition that:

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

## 1.5 Content

IBM provides only services for Content. IBM is not the publisher of Content transmitted within IBM Offering.

Customer has sole responsibility for the following:

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

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

## 1.6 Confidentiality

Customer agrees to treat the following as "IBM Confidential Information" regardless of whether they contain restrictive markings indicating the confidential nature thereof or have been identified as IBM Confidential Information prior to disclosure: (a) the IBM Offering, (b) any information provided to Customer by IBM with regard to the IBM Offering including, but not limited to, IBM Offering related materials such as specifications, plans, trends, strategies, benchmarks, performance characteristics, comparisons and other assessments of the IBM Offering, (c) any information related to Customer's access to the IBM Offering including, but not limited to, passwords or other access codes, and (d) all data, feedback, suggestions and/or written materials that Customer provides to IBM related to the IBM Offering. Customer is authorized to use the IBM Confidential Information for the purpose for which it was disclosed or otherwise for the benefit of IBM. Notwithstanding any other terms of this Agreement, Customer agrees not to communicate, publish, disseminate or otherwise discuss with or disclose to any third party the IBM Confidential Information (including but not limited to articles, papers or other written materials pertaining to the IBM Confidential Information) prior to IBM making such IBM Confidential Information publicly available without a non-disclosure obligation.

Customer agrees to use the same care and discretion to avoid disclosure of the IBM Confidential Information as Customer uses with Customer's own similar information that Customer does not wish to disclose, but in no event will such degree of care be less than reasonable care. Customer's obligations with respect to the IBM Confidential Information will continue for a period of two years from Customer's receipt of the IBM Confidential Information. Customer agrees not to disclose to IBM any information that is considered confidential or proprietary to Customer or any third party except under a signed, separate, written confidential agreement. Notwithstanding the existence of any confidentiality or other agreement Customer may have with IBM pertaining to confidential information, the preceding paragraphs will govern the treatment of the IBM Confidential Information.

## **1.7 Customer Data and Databases**

The IBM Offering is not intended for the storage or receipt of any Sensitive Personal Information or Protected Health Information (as defined below), in any form. Customer will not send or provide IBM access to any Sensitive Personal Information or Protected Health Information, whether in data or any other form and Customer will be responsible for reasonable costs and other amounts IBM may incur relating to any such information provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims. "Sensitive Personal Information" is: 1) Personal Data (as defined below), the loss of which would trigger a data breach notification requirement, and includes, but is not limited to financial information, country identification number (e.g. Social Insurance Number (SIN), Social Security Number (SSN)) or other governmentally issued identification number such as driver's license or passport number, bank account number, credit card or debit card number; and 2) Personal Data relating to racial or ethnic origin, sexual orientation, or political opinions or religious, ideological or philosophical beliefs or activities or trade union membership. "Protected Health Information" is "individually identifiable health information" as defined under the Health Information Portability and Accountability Act of 1996 ("HIPAA"), as amended. "Personal Data" is any information that can be used to identify a specific individual, such as name, email address, home address, or phone number that is provided to IBM to store, process, or transfer on Customer's behalf.

## **1.8 Ownership**

IBM and its suppliers own the IBM Offering. Customer agrees that title to, ownership of and all rights in and to patents, copyrights, trademarks, and all other intellectual property rights in the IBM Offering, and any copy or part of IBM Offering will remain with IBM or its suppliers.

## **1.9 No Warranties**

**SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE IBM OFFERING(S), INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.**

**SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF EXPRESS OR IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO LICENSEE. IN THAT EVENT, SUCH WARRANTIES ARE LIMITED IN DURATION TO THE MINIMUM PERIOD REQUIRED BY LAW. NO WARRANTIES APPLY AFTER THAT PERIOD. SOME STATES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO LICENSEE. LICENSEE MAY HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE OR JURISDICTION TO JURISDICTION.**

**THE DISCLAIMERS AND EXCLUSIONS IN THIS SECTION ALSO APPLY TO ANY OF IBM'S PROGRAM DEVELOPERS AND SUPPLIERS.**

**MANUFACTURERS, SUPPLIERS, OR PUBLISHERS OF NON-IBM PROGRAMS MAY PROVIDE THEIR OWN WARRANTIES.**

**IBM DOES NOT PROVIDE SUPPORT OF ANY KIND, UNLESS IBM SPECIFIES OTHERWISE. IN SUCH EVENT, ANY SUPPORT PROVIDED BY IBM IS SUBJECT TO THE DISCLAIMERS AND EXCLUSIONS IN THIS SECTION.**

## **1.10 Emergency Maintenance & Scheduled Maintenance**

IBM may perform regularly scheduled maintenance during maintenance windows defined by IBM. Other scheduled and non-scheduled down times may occur.

IBM Offerings will not be available during these times.

## **1.11 Enabling Software**

This IBM Offering may include Enabling Software provided by IBM or a third party supplier. If Customer downloads or installs any Enabling Software, Customer agrees not to use such Enabling Software for any purpose other than to facilitate or enable Customer's access and use of the IBM Offering. If Enabling Software is presented with a separate license agreement (for example, the IBM International License Agreement for Early Release of Programs("ILAER") or other IBM or third party license agreement) at the time of installation or download, such separate agreement will govern its use. Customer agrees that Customer accepts such terms by accepting this Agreement or downloading, installing, or using the Enabling Software.

## **1.12 Updates; Applicable Terms and Authorization for Auto Updates**

This Agreement applies to all enhancements, modifications, variations, revisions, updates, supplements, add-on components, and replacements for the IBM Offerings (collectively, "Updates") that IBM may provide or make available for the IBM Offering, subject to any additional terms provided by IBM applicable to such Updates. Customer authorizes IBM to, and agrees that IBM may, in accordance with IBM's standard operating procedures, automatically transmit, access, install, and otherwise provide Updates to IBM Offering without further notice or need for consent. IBM has no obligation to, and nothing in this Agreement may be construed to require IBM to, create, provide, or install Updates.

## **1.13 General Principles of Our Relationship**

### **1.13.1 Notices and Communications**

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

### **1.13.2 Rights in Data**

Customer assigns to IBM all right, title, and interest (including ownership of copyright) in any data, excluding Content, suggestions, or written materials that 1) are related to the IBM Offering and 2) Customer provides to IBM. Upon IBM's request, Customer will sign additional documents necessary to assign such rights. In addition to the foregoing, Customer grants to IBM a non-exclusive, irrevocable, unrestricted, worldwide and paid-up right and license to a) include in any product or service any idea, know-how, concept, technique, invention, discovery or improvement, whether or not patentable, that Customer provides to IBM related to the IBM Offering, b) use, manufacture and market any such product or service, and c) allow others to do any of the foregoing.

### **1.13.3 Assignment and Sale**

Customer may not assign this Agreement, in whole or in part, without IBM's prior written consent. Any attempt to do so is void.

### **1.13.4 Compliance with Applicable Export Law**

Customer agrees to comply with all applicable import and export laws and regulations, including those of the United States regarding embargo and sanctions regulations and prohibitions on export by certain end users or for any prohibited end uses (including nuclear, space or missile, and chemical and biological weapons). Customer represents that Content will not, in whole or part, be controlled under the U.S. International Traffic in Arms Regulations (ITAR). Customer acknowledges that IBM may use global resources (non-permanent residents used locally and personnel in locations worldwide) to remotely support the delivery of the IBM Offering. Customer represents that no Content accessible to IBM for the IBM Offering will require an export license or is restricted from export to any IBM global resource or personnel under applicable export control laws.

### **1.13.5 Dispute Resolution**

Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and ii) after such time limit, any such claim and all respective rights related to the claim lapse.

### 1.13.6 Other Principles of Our Relationship

- a. 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.
- b. Customer authorizes International Business Machines Corporation and its subsidiaries (and their successors and assigns, contractors, IBM Business Partners, and resellers) to store and use Customer's business contact information wherever they do business, in connection with the IBM Offering or in furtherance of IBM's business relationship with Customer.
- c. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Customer except as permitted in Section 1.15 (Limitation of Liability) above for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- d. Where approval, acceptance, consent, or similar action by either party is required under this Agreement, such action will not be unreasonably delayed or withheld.
- e. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- f. IBM does not warrant that any version of the IBM Offering that is formally released or made commercially available (if any) will be similar to, or compatible with, Early Release versions.
- g. Customer agrees that their use of IBM Offering will comply with the IBM acceptable use policy at <http://www.ibm.com/services/us/imc/html/aup.html> and applicable data protection laws.
- h. In entering into this Agreement, neither party is relying on any representation that is not specified in this Agreement, including without limitation any representations concerning: i) performance or function of any IBM Offering; ii) the experiences or recommendations of other parties; or iii) any results or savings that Customer may achieve.
- i. There is no charge for the use of the IBM Offering for the duration of the Test Period.

### 1.14 Indemnity

Customer agrees to indemnify, defend and hold IBM harmless against any third party claim arising out of or relating to: 1) violation of the Acceptable Use policy by Customer or any IBM Offering User; or 2) Content created within IBM Offering or provided, uploaded, or transferred to IBM Offering by Customer or any IBM Offering User.

### 1.15 Limitation of Liability

The limitations and exclusions in this Section 1.15 (Limitation of Liability) apply to the full extent they are not prohibited by applicable law without the possibility of contractual waiver.

#### 1.15.1 Items for Which IBM May Be Liable

Circumstances may arise where, because of a default on IBM's part or other liability, Customer is entitled to recover damages from IBM. Regardless of the basis on which Customer is entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM's entire liability for all claims in the aggregate arising from or related to each IBM Offering or otherwise arising under this Agreement will not exceed the amount of any 1) damages for bodily injury (including death) and damage to real property and tangible personal property and 2) other actual direct damages up to U.S. \$10,000 (or equivalent in local currency).

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

#### 1.15.2 Items for Which IBM Is Not Liable

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

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

## **1.16 Copyright Infringement**

It is IBM's policy to respect the intellectual property rights of others. To report the infringement of copyrighted material, please visit the Digital Millennium Copyright Act Notices page at: <http://www.ibm.com/legal/us/en/dmca.html>.

## **1.17 Termination**

### **1.17.1 Termination**

IBM may terminate Customer's access to IBM Offering at any time for any reason. IBM will notify Customer of any termination. Customer's access and other rights to the IBM Offering will be cancelled and cease. In such event, Customer and its IBM Offering Users must cease any further use of the IBM Offering and destroy any copies of the associated Enabling Software within Customer's possession or control.

## **1.18 Term**

### **1.18.1 Term of Test Period**

The Test Period begins on the date Customer agrees to the terms of this Agreement and ends upon the earliest of 1) the end of the duration or the date specified by IBM or 2) thirty (30) days following the date on which IBM makes the IBM Offering commercially available, unless earlier terminated as specified in Section 1.17.1 (Termination). Customer's ability to use the IBM Offering terminates at the end of the Test Period, along with any access to materials Customer may have used within the IBM Offering and Customer agrees to promptly discontinue use of the IBM Offering and destroy any copies of the associated Enabling Software within Customer's possession or control.

## **1.19 Compliance Verification**

Upon reasonable notice, IBM may verify Customer's compliance with this Agreement at all locations and for all environments in which Customer uses (for any purpose) IBM Offerings. Such verification will be conducted in a manner that minimizes disruption to Customer's business. IBM will notify Customer in writing if any such verification indicates that Customer has used any IBM Offering in excess of its authorized use or is otherwise not in compliance with this Agreement. Customer agrees to promptly pay directly to IBM the charges that IBM specifies in an invoice for 1) any such excess use and 2) any additional charges and other liabilities determined as a result of such verification. The rights and obligations set forth in this Section 1.19 remain in effect during the period Customer is accessing the IBM Offering and for two years thereafter.

## **1.20 Updates to the Agreement**

IBM reserves the right to modify this Agreement, only with respect to prospective use of the IBM Offering, at any time, by providing notice of such modified terms to Customer. Customer's continued use of IBM Offering constitutes Customer's acceptance to be bound by any such modified Agreement.

## **1.21 Geographic Scope and Governing Law**

### **1.21.1 Geographic Scope**

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

### **1.21.2 Governing Law**

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

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

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

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

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

## 2. Country-unique Terms

For transactions performed in the countries specified below, the following terms replace or modify the referenced terms in Parts 1. All terms in Parts 1 that are not changed by these amendments remain unchanged and in effect. This part 2 is organized as follows:

- Section 2.1 contains multiple country amendments to Section 1.21 (Geographic Scope and Governing Law);
- Section 2.2 contains the Americas country amendments to other Agreement terms;
- Section 2.3 contains the Asia Pacific country amendments to other Agreement terms; and
- Section 2.4 contains the Europe, Middle East, and Africa country amendments to other Agreement terms.

### 2.1 Multiple country amendments to Section 1.21 (Geographic Scope and Governing Law)

#### 2.1.1 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 1.21.2 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.

#### 2.1.2 Governing Law

*In the second paragraph of Section 1.21.2 Governing Law, the phrase, “the laws of the country in which the transaction is performed” is replaced with the following:*

##### AMERICAS

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

##### ASIA PACIFIC

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

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

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

- Emirates, the United Kingdom, West Bank/Gaza, Yemen, Zambia, and Zimbabwe:** the laws of England; and
- m. in **South Africa, Namibia, Lesotho and Swaziland:** the laws of the Republic of South Africa.

### 2.1.3 Jurisdiction

*The following paragraph pertains to jurisdiction and is added to Section 1.21.2 **Governing Law** 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.

### 2.1.4 Arbitration

*The following terms pertain to arbitration and are added to Section 2.1 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.

## **2.2 AMERICAS COUNTRY AMENDMENTS**

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

**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.*

**LATIN AMERICA**

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

**Preamble- Acceptance of Terms**

*The following replaces the first sentence:*

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

**BRAZIL AND COLOMBIA**

**1.17 Termination**

*The following is added aft as the third paragraph:*

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

**ARGENTINA**

**Preamble- Acceptance of Terms**

*The following replaces the first sentence:*

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

**BRAZIL**

**1.13.1 Notices and Communications**

*The following replaces 1.13.1:*

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;

**PERU**

**1.15 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**

#### **1.15 Limitation of Liability**

##### **1.15.1 Items for Which IBM May Be Liable**

*The following replaces the last sentence in this Section 1.15.1:*

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.

#### **1.13 General Principles of Our Relationship**

##### **1.13.4 Compliance with Applicable Export Law**

*The following replaces the first sentence in this Section 1.13.4:*

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.

##### **1.13.6 Other Principles of Our Relationship**

*The following replaces item 1.13.6c:*

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

## **UNITED STATES OF AMERICA**

### **1.13 General Principles of Our Relationship**

#### **1.13.5 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.

#### **1.13.6 Other Principles of Our Relationship**

*The following is added as 1.13.6j:*

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

## **2.3 ASIA PACIFIC COUNTRY AMENDMENTS**

### **AUSTRALIA**

#### **1.7 Customer Data and Databases**

*The definition of "Personal Data" in the last sentence is 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)."

#### **1.15 Limitation of Liability**

##### **1.15.1 Items for Which IBM May Be Liable**

*The following paragraph is included at the end of 1.15.1:*

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:

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

Where services are of a kind ordinarily acquired for personal, domestic, or household use or consumption, then none of the limitations in this section apply.

### **1.9 No Warranties**

*The following paragraph is added to the end of this section 1.9:*

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

## **NEW ZEALAND**

### **1.7 Customer Data and Databases**

*The definition of "Personal Data" in the last sentence is 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."

### **1.9 No Warranties**

*The following paragraph is added to the end of this section 1.9:*

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.

## **HONG KONG SAR, MACAU SAR, AND TAIWAN**

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

- 1) In **Hong Kong SAR**: "Hong Kong SAR"
- 2) In **Macau SAR**: "Macau SAR," except under Section 1.21.2 (Governing Law) above; and
- 3) In **Taiwan**: "Taiwan."

## **INDIA**

### **1.13.5 Dispute Resolution**

*The following replaces the final sentence in 1.13.5:*

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**

### **1.17 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**

### **1.13.5 Dispute Resolution**

*The following is inserted at the end of 1.13.5:*

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

## **SINGAPORE**

### **1.13.6 Other Principles of Our Relationship**

*The following replaces the terms of 1.13.6c:*

Subject to the rights provided to IBM's IBM SaaS offering developers and suppliers as provided in 1.15 below (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.

## **2.4 EUROPE, MIDDLE EAST, AFRICA COUNTRY AMENDMENTS**

### **Amendments Applicable to Many Countries**

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

#### **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.*

### **1.13.6 Other Principles of Our Relationship**

*The following replaces 1.13.6b:*

- a. Definitions – For the purposes of 1.13.6b, 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.

## **WESTERN EUROPEAN COUNTRIES**

### **EMEA-WIDE**

#### **AUSTRIA**

##### **1.15 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.

##### **1.15.1 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)."*

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

*The following replaces 1.15.2b:*

indirect damages or consequential damages; or

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

#### **EGYPT**

##### **1.13 General Principles of Our Relationship**

*Delete 1.13.1.*

#### **GERMANY**

##### **1.15 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 12 months' charges Customer paid for the IBM SaaS offering 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.

##### **1.13.5 Dispute Resolution**

*The following replaces the third sentence of 1.13.5:*

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

### **1.13.6 Other Principles of Relationship**

*The following replaces 1.13.6c:*

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 1.15 (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.

## **IRELAND AND UNITED KINGDOM**

### **1.15.1 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 in relation to, the subject matter of an 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 Program is subject to fixed term charges, up to 12 months' charges) for the Program 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.

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

*The following replaces Items 1.15.2b and 1.15.2c:*

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

## **SWITZERLAND**

### **1.13 General Principles of Our Relationship**

*Delete 1.13.1.*

### **IBM High Performance Services for HPC: Remote Visualization – Early Customer Program**

The terms of this IBM Terms of Use are in addition to those of the IBM International Agreement for Early Release of IBM SaaS and Hosted Program Offerings (“Agreement”). Carefully read these IBM Terms of Use (“Terms of Use” or “ToU”) before using the IBM Offering and any associated Enabling Software. Customer may use the IBM Offering and Enabling Software only if Customer first accepts these Terms of Use. By accessing or using the IBM Offering or Enabling Software or clicking on an “Accept” button, Customer agrees to these Terms of Use.

**IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF CUSTOMER, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE. IF YOU DO NOT AGREE WITH THESE TERMS OF USE OR DO NOT HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE THEN DO NOT IN ANY MANNER USE OR PARTICIPATE IN ANY OF THE FUNCTIONALITY OFFERED AS PART OF THE IBM OFFERING OR USE ANY ENABLING SOFTWARE.**

#### **1. Offering Unique Terms**

Prior to using the IBM SaaS, Customer must (i) separately acquire from Microsoft (A) a Microsoft Virtual Desktop Access subscription license for each applicable device that will access the IBM SaaS and (B) a license for Windows 7 Professional SP1 64-bit (“Windows 7”) and (ii) provide to IBM the Windows 7 program images and license key(s) (“Microsoft Prerequisites”). IBM will use the Microsoft Prerequisites to install and configure Windows 7 within, and make it available to Customer as part of, the IBM SaaS. Prior to making the Microsoft Prerequisites available to IBM, Customer will obtain from Microsoft any licenses or approvals necessary for IBM or its subcontractors to access and use the Microsoft Prerequisites for such purposes. If Customer does not have any of the foregoing licenses or approvals, then Customer cannot use the IBM SaaS. Customer hereby represents and warrants that Customer has and will maintain any necessary licenses or approvals from Microsoft. If a third party asserts a claim against IBM as a result of Customer’s failure to promptly obtain these licenses or approvals, Customer agrees to reimburse IBM for any costs and damages that IBM may reasonably incur in connection with such claim.