

General Terms and Conditions (GTC) of AGILITA AG for AGILITA Software Products (SaaS)

1. General

1.1 Scope of application

These General Terms and Conditions («GTC») apply to contracts for the provision of standard software developed by AGILITA AG («AGILITA») («Software»).

Upon conclusion of a contract for the transfer of software («Software Licence Agreement»), these GTC shall form an integral part thereof, to the exclusion of all other provisions not expressly recorded in writing. Verbal agreements shall not be valid.

For licences or services sold by AGILITA, third-party ePaaS (e.g. SAP), the licence and contract terms of the respective manufacturer shall apply.

1.2 Deviations

Deviations from these GTC must be agreed in writing in the software licence agreement in order to be valid.

In the event of any inconsistency between the Software Licence Agreement and these GTC, the provisions of the Software Licence Agreement shall prevail.

1.3 Delimitation

To other services, such as services, software installation, parameterisation or adaptation of software, instruction or training shall apply AGILITA's other terms and conditions. Such additional services do not form part of the contract and must be agreed separately.

1.4 General Terms and Conditions of the Client

Any general terms and conditions of business of the customer (including terms and conditions of purchase) that deviate from these terms and conditions are expressly rejected and shall not apply.

1.5 Order of the customer

Deviating general terms and conditions of the customer shall not become part of the contract even if AGILITA executes an order of the customer without objecting to the general terms and conditions of the customer referred to in the order. By placing an order, the customer confirms that it accepts these AGILITA General Terms and Conditions as the only valid ones.

If, in addition to signing the Software Licence Agreement, the Customer requires the generation of its own separate purchase order for its internal processing, it shall formulate the text of the purchase order in such a way that it is consistent with these General Terms and Conditions and the provisions in the respective Software Licence Agreement.

If the customer sends AGILITA its own order after conclusion of the software licence agreement, deviating terms and conditions in this order shall only become part of the contract if AGILITA expressly confirms them in writing.

2. Delivery

2.1 Delivery item

If AGILITA and the customer have concluded a software licence agreement, AGILITA shall supply the customer with the software designated in the software licence agreement together with the associated online documentation in German.

2.2 Version

Unless otherwise agreed in the software licence agreement, the software shall be delivered in the version generally released for distribution by AGILITA at the time of delivery. There shall be no entitlement to use new versions of the licensed software that are released for distribution after the time of delivery.

2.3 Documentation

AGILITA shall also deliver the electronic form belonging to the software to the customer with the software, unless this is regulated differently in the software licence agreement.

2.4 Delivery

Unless otherwise agreed in the software transfer contract, AGILITA shall deliver the software in electronic form. Delivery shall be deemed to have taken place when the service is made available on the platform in electronic form.

The object of the delivery is neither an installation nor any additional introductory support nor any training of the customer's employees by AGILITA. Such additional services shall be agreed separately between AGILITA and the customer.

2.5 Delay in delivery

Any time of delivery stipulated by the contracting parties shall only be binding if it has been expressly stipulated in writing in the software licence agreement.

Delivery is subject to correct and timely delivery to the customer. AGILITA shall inform the customer of any delays that become apparent.

3. Rights of use

3.1 Right of use

In return for full payment of the agreed remuneration, AGILITA shall grant the customer a non-exclusive right of use for the term of the software licence agreement for the intended use of the software and documentation specified in the software licence agreement.

3.2 Scope of use

The content and scope of the intended use is based on the agreements in the respective software licence agreement and these GTC. In the event of contradictions, the agreements in the software licence agreement shall take precedence over the provisions in these GTC.

Subject to a deviating provision in the software licence agreement, the names of the customer's employees authorised to use the software must be disclosed in advance («Named Users»). The number of authorised Named Users shall be specified in the software licence agreement. In the absence of an establishment, the right of use for a Named User shall be deemed granted.

Named users are employees of the customer who directly use the functionalities of the software. Any part-time workloads shall be disregarded when determining the number of Named Users, unless otherwise stipulated in the software licence agreement.

The customer shall be obliged to notify AGILITA in writing without delay of any exceeding of the assessment amount on which the remuneration for the use of the software is based. In the event that the rights of use are exceeded, the licensee shall arrange for a sufficiently remunerated subsequent licensing for the period in which the rights of use are exceeded. AGILITA shall be entitled to check the number of licensed and actual users at any time.

3.3 Copies

The customer may make backup copies of the software in the number required for proper data backup. Copyright notices of AGILITA may not be changed or removed in the process. In addition, copies of the software or the associated documentation shall only be permitted insofar as they are necessary for use in accordance with the intended purpose.

3.4 New version

If the customer receives (e.g. within the scope of subsequent performance) a new version of the licensed software which replaces a previously provided version of the software, its rights of use shall expire with respect to the previously provided and now replaced software as soon as he uses the new software productively. Until such time as the new version of the software is put into productive use, it may be used as a test system in addition to the previously provided software that is still in operational use.

3.5 Limits of use

The customer may only install, load, run and use the software within the limits of use set out in the software licence agreement and these GTC.

3.6 Intended use

In the absence of any express provision to the contrary in the software licence agreement, the customer may only use the software for the purpose of processing its internal business transactions. Use in affiliated companies (group companies) is explicitly excluded.

3.7 Operation by third parties

If the customer does not wish to operate the software itself but has it operated by a third company (e.g. hosting provider or outsourcing company), including affiliated companies of the customer, for its own purposes, this shall only be possible on the basis of a written agreement with AGILITA. AGILITA shall not unreasonably refuse to conclude such an agreement while safeguarding its justified operational interests in particular respect for the contractual provisions on the use and transfer of the software by the third company.

3.8 Transmission

The rights of use granted under the software licence agreement may not be transferred without the prior written consent of AGILITA.

3.9 Transfer

The customer is not entitled to rent, lease or otherwise make the software or parts of the software available to third parties on a permanent or temporary basis. In particular, the customer is not entitled to grant sub-licences.

4 Remuneration

4.1 Remuneration

For the delivery of the software designated in the software licence agreement and the granting of the rights of use for the intended use, the customer shall pay AGILITA the remuneration specified in the software licence agreement. Insofar as no remuneration for the software is agreed in the software licence agreement, the customer shall pay to AGILITA as remuneration the AGILITA list price of the software valid at the time of conclusion of the agreement.

4.2 Increase in remuneration

In the event that the remuneration pursuant to the software licence agreement also covers a service provided by AGILITA which AGILITA arranges to be performed by a third party and/or which is dependent on a service provided by a third party, AGILITA shall be entitled to increase the remuneration unilaterally by written notice before the beginning of a contractual year.

4.3 Terms of payment

Unless otherwise stipulated in the software licence agreement, AGILITA's invoices shall be due for payment within 10 days of the invoice date without deduction (i.e. without deduction of discounts, expenses, taxes, duties, etc.) and excluding offsetting.

4.4 Invoicing

The contractually agreed remuneration shall be invoiced quarterly in advance subject to a deviating provision in the software licence agreement.

4.5 Transfer of the rights of use

The transfer of the rights to use the software granted under the software licence agreement shall only take place at the time of full payment of the remuneration by the customer.

If the software is delivered before the agreed remuneration has been paid in full, the customer shall acquire a non-exclusive, non-transferable right to use the software together with the associated documentation to the otherwise agreed extent («**provisional right of use**») for the period between delivery and acquisition of the right of use («**pending period**»). During this pending period, the customer's provisional right of use may only be revoked by AGILITA withdrawing from the contract due to default in payment on the part of the customer following an unsuccessful reminder. The customer's provisional right of use shall automatically expire upon acquisition of the right of use, unless it has previously expired as a result of AGILITA's lawful withdrawal.

4.6 Compensation for overuse

If the software is used beyond the agreed scope and/or beyond the intended use without corresponding prior granting of rights by AGILITA, the customer shall pay compensation to AGILITA for this overuse in accordance with AGILITA's then valid price list.

5 End of the authorisation to use

In all cases of termination of the customer's right to use the software (e.g. through justified withdrawal or termination), the customer shall return all deliveries and copies on data carriers of the software to AGILITA and delete all other copies of the software, unless it is legally obliged to retain them for a longer period. In this case, the claim to return and deletion shall be extended by the duration of the legal retention obligation. The customer shall confirm the completion of the return and deletion to AGILITA in writing.

6 Cooperation obligations of the customer

6.1 Information

Within the scope of the existing contractual designation, the customer shall provide AGILITA with all necessary information, such as details of the system environment (SAP PaaS platform) or a detailed error description, promptly and free of charge.

6.2 Central contact persons

The customer shall appoint an employee as the central contact person for AGILITA. The customer shall also appoint sufficient deputies of the central contact person who, like the central contact person, have in-depth knowledge of the software and the existing system environment so as to ensure that a competent contact person is always available at the customer's premises.

6.3 Patches, workarounds and new releases

The customer shall inspect patches, workarounds and new releases for completeness of delivery and obvious errors immediately upon receipt and notify AGILITA of any complaints immediately.

Error message

The customer shall report errors in the software to AGILITA without delay via the support service, stating the information that can be recognised by the customer with reasonable effort and that is useful for the error analysis.

6.4 Access

In order to grant AGILITA access to the software to be installed as well as its system environment, the customer shall provide the measures required on its side at its own expense and maintain them for the duration of the contract.

7 Term and termination

7.1 Entry into force

Unless otherwise agreed individually, the software licence agreement shall enter into force upon legally valid signature by all parties and shall be concluded for an indefinite period.

7.2 Cancellation

The software licence agreement may be terminated by either party with a notice period of three months to the end of a calendar year, but for the first time at the end of the calendar year in which two full contract years, calculated from the beginning of the software licence agreement, end. Partial termination of the software licence agreement is not permitted.

7.3 Termination for cause

Termination for an important reason shall remain unaffected by the above provision.

8. Claims for defects of the customer

8.1 Material defects

8.1.1 Warranty

AGILITA warrants that at the time of delivery the software does not contain any defects which nullify or significantly reduce the value or suitability for the use stipulated in the software contract. Otherwise there shall be a defect in the software subject to warranty («**material defect**»). AGILITA shall not provide any warranty beyond this. The customer acknowledges that malfunctions of the software cannot be completely ruled out even with the greatest care and that the uninterrupted functioning of the software cannot be guaranteed.

8.1.2 Duty to inspect and reprimand

The customer is obliged to inspect the software for completeness and any material defects immediately after delivery.

If material defects are discovered during the examination of the software, the customer shall immediately notify AGILITA of the material defects in writing and in a substantiated manner. In the written notice of defects, the material defects shall be described in particular in detail and in a manner that is comprehensible for AGILITA.

Material defects that are not recognisable upon proper inspection («**hidden material defects**») must be notified by the customer to AGILITA in writing and in a substantiated manner immediately after their discovery.

If the software is not inspected, or not inspected in due time and/or is not inspected properly by the customer, material defects which would have been recognisable upon proper inspection shall be deemed to have been approved by the customer. Defects detected during the examination of the software shall be reported immediately and hidden defects shall be reported immediately after their discovery in writing and substantiated, otherwise the corresponding material defects shall be deemed to have been approved by the customer. In the aforementioned cases, the customer shall not be entitled to any defect rights.

8.1.3 Defect rights

In the event of a material defect, the customer shall initially only have the right to subsequent performance within a reasonable period. Within the scope of subsequent performance, AGILITA shall be entitled to remedy the material defect, at its discretion, either by supplying new software or by eliminating the material defect («**rectification**»). The circumvention or suppression of a defect shall also be deemed to be a permissible subsequent improvement. The rectification of a material defect may, at AGILITA's discretion, also consist of AGILITA giving the customer reasonable instructions by telephone, in writing or electronically on how to rectify the material defect.

If AGILITA is unable to remedy a material defect within a reasonable period of time or if the rectification or new delivery is deemed to have failed for other reasons, the customer may, at its discretion, either withdraw from the contract or reduce the remuneration. In the case of a continuing obligation, the right of withdrawal shall be replaced by the right to terminate the contract extraordinarily. AGILITA shall be free to choose the number of attempts at subsequent performance during the reasonable period of time allowed for subsequent improvement or new delivery. Failure of the rectification or the new delivery can only be assumed if AGILITA seriously and finally refuses these actions, unreasonably delays them or if there are other special circumstances as a result of which it is unreasonable for the customer to wait any longer.

8.1.4 No material defect

If, in the course of troubleshooting, it transpires that the software did not have a material defect, AGILITA shall be entitled to charge the customer for the time and effort involved in analysing and processing the defect in accordance with AGILITA's then valid price list for services. This shall apply in particular if the reported error is due to unsuitable or improper operation, faulty installation by the customer or by a third party commissioned by the customer, the use of software in a system environment that has not been agreed or improper intervention by the customer or a third party commissioned by the customer in the delivery or service of AGILITA (e.g. for the purpose of eliminating errors).

8.1.5 Limitation and forfeiture

Claims of the customer arising from breach of warranty pursuant to para. 8.1 of these GTC shall become statute-barred and forfeited after the expiry of 12 months from the date of delivery of the software.

8.1.6 Exclusion of warranty

Further warranty claims of the customer (including the customer's right to claim damages) are excluded to the extent permitted by law.

AGILITA shall be released from its warranty obligation to the extent that a material defect in the software is attributable to circumstances for which it is not responsible. This includes in particular material defects that are attributable to the fact that the software is delivered on an environment that is operated or offered by a third party (e.g. SAP Cloud Services).

8.1.7 No assurances

Statements made by AGILITA in connection with the software orally or in writing (e.g. in the documentation or in other documents) do not constitute warranties.

8.1.8 Duty to cooperate

The customer shall support AGILITA in the search for defects and their processing to the necessary extent free of charge, in particular provide the data, information and files necessary for the processing of material defects and, in the event of a material defect in the software supplied, take the measures necessary on its part to enable AGILITA to access the software and its respective system environment by way of remote access if required.

In the event of material defects in the software, the customer shall take over a new version of the software supplied by AGILITA and install it at its own expense, provided that the intended scope of functions is retained and the installation does not lead to unreasonable adjustment and conversion problems for the customer.

8.2 Legal defects

8.2.1 Violation of protection by AGILITA

If the intended use of the software leads to the infringement of copyrights or other industrial property rights of third parties, AGILITA shall, at its own expense and at its own choice, either procure for the customer the right to continue to use the software as intended or modify or replace the delivery or service in a manner that is reasonable for the customer so that the infringement no longer exists. If none of these measures are possible for AGILITA, AGILITA shall be entitled to withdraw from this contract. In the case of a continuing obligation, the right to terminate the contract extraordinarily shall take the place of the right of withdrawal. The customer's right to use the software and the documentation shall end with the declaration of withdrawal from the contract or termination by AGILITA. The remuneration paid for the duration of the right to use the software shall be refunded to the customer.

Furthermore, AGILITA shall exempt the customer against undisputed or legally established claims of the holders of the property rights concerned.

8.2.2 AGILITA commitments

The provisions set out in para. 8.2.1 of these GTCs shall only exist if:

- the customer immediately informs AGILITA in writing of any infringements of property rights asserted against it;
- the customer supports AGILITA to a reasonable extent in defending the claims asserted;
- the customer enables AGILITA to modify or replace the delivery or service;
- the customer authorises AGILITA to conduct the defence (including the conclusion of settlements) and AGILITA reserves the right to all defence measures, including out-of-court settlements;
- the infringement of the property right is not based on an instruction of the on-customer.
- the infringement of property rights has not been caused by the fact that the customer has modified the delivery or service of AGILITA on its own authority or has used it in a manner not in accordance with the contract.

8.2.3 Exclusion of warranty

Any further warranty of title by AGILITA towards the customer in the event of actual or alleged claims by third parties shall be excluded.

8.2.4 Infringement of property rights by customers

Insofar as the customer itself is responsible for the infringement of property rights, claims against AGILITA shall be excluded.

9. Liability for damages

AGILITA shall only be liable for direct or immediate damage, but limited in amount to the remuneration agreed in accordance with the software licence agreement for one contractual year.

Liability for indirect or consequential damages (including, but not limited to, lost profits, unrealised savings, additional expenses incurred by the customer, loss of use, loss of production, loss of data and costs of data restoration or data recovery, costs associated with business interruption or claims by third parties) is hereby excluded to the extent permitted by law.

Liability for auxiliary persons within the meaning of Art. 101 CO is excluded in full for all damages.

The limitation of liability and the exclusion of liability apply to contractual as well as to non-contractual and quasi-contractual claims.

10. Prevention of fulfilment due to force majeure

AGILITA shall not be liable for damage caused by a delay in performance or prevention of performance, the cause of which is reasonably beyond its control. Such causes for delays in performance or hindrances to performance may, for example, be: significant operational disruptions, accidents, labour disputes, official measures or omissions, natural events, late deliveries or late performance by third parties.

In such cases AGILITA shall be entitled to postpone the provision of the affected services for the duration of the impediment plus a reasonable start-up period.

11. Industrial property rights

AGILITA or its licensors shall be entitled to all rights (including all industrial property rights) to the software, modifications, updates and the associated documentation. The customer shall only receive the non-exclusive rights of use to the software agreed in the software licence agreement.

In particular, the customer is not entitled to further develop, decompile or disassemble the software or parts thereof or to process it (including error corrections).

12. Use of know-how

AGILITA shall be entitled to use ideas, concepts, processes and know-how acquired by AGILITA alone or in cooperation with third parties or with the customer in the execution of individual contracts free of charge in the execution of other work for itself or for third parties, irrespective of whether the rights thereto have passed to the customer pursuant to the individual contract.

13. Secrecy

AGILITA and the customer undertake to treat as confidential all information of the contractual partner which is not generally accessible and which they learn in the course of performing work, and not to make it available to third parties, either in whole or in part, nor to publish it or use it themselves in any form whatsoever. The employees of AGILITA and of the customer shall only be entitled to use such information within the framework of the performance of the contract between AGILITA and the customer. Section 12 of this AG shall remain valid.

The customer undertakes in particular to keep the software and the associated documentation secret and not to disclose or pass them on to third parties, either in whole or in part, unless it is expressly permitted to do so by written agreement with AGILITA.

14. Data protection

Insofar as AGILITA obtains access to the customer's EDP systems, this shall not be for the purpose of any business-related processing or use of personal data by AGILITA. The customer shall therefore secure the personal data stored on its systems in such a way that AGILITA does not have access to this data or shall agree with AGILITA in advance on a procedure for accessing and handling this data in order to comply with the provisions of data protection law. If this leads to additional expense for AGILITA, this additional expense shall be borne by the customer.

In the event that AGILITA obtains access to personal data of the customer, AGILITA shall collect, process and use this data in compliance with the provisions of data protection law and only for contractually agreed purposes. AGILITA shall in particular secure this data against unauthorised access and shall only pass it on to third parties with the consent of the customer. In addition, the data protection declaration of AGILITA shall apply in the respective current version (available at: www.agilita.ch).

15. Final provision

15.1 Written form

All agreements and legally relevant declarations, including amendments to these GTC (including this clause 15.1) and all contracts must be in writing to be valid.

15.2 Severability clause

Should a provision of the software contract or these GTC be or become invalid or should a loophole occur, this shall not affect the validity of the remaining provisions of the software contract and these GTC. However, the contracting parties undertake in this case to replace the invalid provision in question with a valid provision or to close the loophole with such a provision that comes as close as possible to the intended economic purpose.

15.3 Transmission

The contractual relationship or individual parts thereof may only be transferred with the consent of AGILITA. A change in the ownership structure of the customer or AGILITA (including mergers, sale of companies) shall not constitute grounds for termination and shall therefore not release the customer from the obligation to perform the contract.

15.4 Applicable law and place of jurisdiction

The legal relationship shall be governed in all respects by Swiss substantive law, excluding the applicability of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention, CISG) and excluding conflict of law provisions.

The contracting parties agree that Zurich, Switzerland, shall be the exclusive place of jurisdiction.