

General Terms and Conditions of Business for Use of the baramundi Managed Software (bMSW) Module



General Terms and Conditions of Business (GTCs) of baramundi software AG, Beim Glaspalast 1, 86153 Augsburg, Germany, hereinafter referred to as "baramundi", for the sale and use of the baramundi Managed Software (bMSW) module.

§ 1 General

(1) The following General Terms and Conditions of Business shall apply to the business relationship between baramundi and the Customer, where the Customer purchases the baramundi Managed Software (bMSW) module from baramundi. The version valid at the time of contract conclusion shall be authoritative in each case.

(2) The baramundi Managed Software (bMSW) module is designed to support customers in maintaining the third-party software applications used by them. The module is thus used to manage and integrate new program updates or patches of software applications which are selected by baramundi, as well as their installation or uninstallation. From a technical perspective, use of the aforementioned module also requires the integration of additional modules of the software application baramundi Management Suite (bMS). The specific system requirements are listed in the performance specification for baramundi Managed Software (bMSW). With regard to the baramundi Management Suite (bMS), baramundi's General Terms of Business for the Sale of Software and/or for the Lease of Software shall additionally apply. Sections 611 et seq. of the German Civil Code (BGB) shall apply to supplementary services (e.g. installation, parameterization, training).

(3) For the purpose of these General Terms and Conditions of Business, "entrepreneur" means any natural or legal persons or partnerships with legal personality which, when concluding the legal transaction, are acting in the exercise of their commercial or independent professional activity. For the purpose of these General Terms and Conditions of Business, customers are exclusively entrepreneurs.

(4) Individual contractual agreements shall take precedence over these General Terms and Conditions of Business. Divergent, opposing or supplementary general terms and conditions of business shall not become part of the contract unless their validity is expressly approved.

§ 2 Contract conclusion

(1) The Customer may commission baramundi to provide the baramundi Managed Software (bMSW) module by e-mail, by fax or in writing. The contract shall be entered into when the Customer places an order with baramundi and baramundi confirms acceptance of the order.

(2) In placing the order, the Customer shall make a binding declaration that it wishes to use the baramundi Managed Software (bMSW) module and to make use of its functions and services.

(3) Unless otherwise separately agreed between the parties, baramundi shall be entitled to accept the contractual offer contained in the order placement within one week of receipt. Acceptance may as a whole be declared by means of a written declaration of acceptance or by another form of declaration through which the willingness to accept the order which has been placed is discernible. If baramundi provides the service which has been ordered, this shall be deemed equivalent to acceptance. As a rule, a legal obligation shall materialize when a contract is signed by both parties or when baramundi issues a written order confirmation.

(4) Separate contracts must be concluded for other types of deliveries and services (e.g. provision of software, consulting in relation to the set-up and installation of the software).

§ 3 Object of the contract

(1) The object of the contract is the delivery of the baramundi Managed Software (bMSW) module to the Customer for use and the granting of corresponding rights of use in accordance with these General Terms and Conditions of Business. This use shall include supporting the Customer in managing and maintaining the third-party software applications defined in §1.

Before concluding the contract, the Customer must check whether and to what extent the module's specification meets its wishes and requirements. To this extent, it must keep informed of the software's key functional characteristics and conditions.

As a rule, the scope of the functions of the baramundi Managed Software (bMSW) module shall be based on the Customer's hardware and software environments, as suggested by baramundi. It is expressly pointed out that as a rule, the module requires third-party software components in order to ensure it offers trouble-free and unrestricted characteristics and functionalities. Any modifications to such software components and/or to the Customer's hardware and software environments may restrict the functionality of the module to be provided by baramundi.

(2) Within the framework of usage of the module which is the object of this contract, baramundi shall offer the following services:
The Customer shall be issued with those new program releases (e.g. updates) of the managed third-party standard software applications which are issued during the contractual term;
The Customer shall be issued with those patches of the managed third-party standard software applications which are issued during the contractual term.

A link or other means shall be used to provide the Customer with new program releases or patches for retrieval. The Customer alone shall be responsible for installing new program releases or patches. baramundi itself shall not as a rule provide such services for the Customer. baramundi shall not have any more extensive obligation to check the new program releases or patches for any defects, for improper use or modification of the relevant third-party standard software applications, for any contamination of software components with computer viruses or other malware, or for other security gaps.

baramundi shall not be obliged to protect against faults originating from the sphere of risk of the Customer, of the third-party suppliers of the relevant software application or of other third-party suppliers, and in particular shall not be obliged to protect against faults which were caused by improper use or modification of third-party software, by contamination of relevant software components with computer viruses, the use of unsuitable data media, defective hardware, a power failure or failure of data-carrying cables, or to protect against faults which were caused by a lack of information security, unsuitable environmental conditions at the place where the software is operated, or force majeure.

(3) The agreements made in each individual case between the parties pursuant to the contractual offer contained in the order and the associated order confirmation by baramundi shall be authoritative as regards the specific scope of performance and the type and quality of the services offered via the baramundi Managed Software (bMSW) module. In all other respects, the qualities and functionalities shall derive from the corresponding product specifications, which shall not be construed as constituting warranties. A warranty shall be granted only if it is expressly designated as such.

(4) baramundi's services shall be provided in accordance with the respective state of the art and in such a way that they are geared to the interests of all users of the software.

(5) In the event of a change in the state of the art, baramundi reserves the right to modify the services within reasonable bounds.

(6) baramundi expressly reserves the right to suspend or entirely cease the provision of new program releases or patches of certain software applications on technical grounds or on grounds which are otherwise outside baramundi's sphere of influence. This shall apply only in cases where provision would be unreasonable or impossible for baramundi. baramundi shall make all reasonable efforts in order to enable it to provide new program releases or patches of specific software applications. If baramundi's services are nevertheless restricted in this way, any remuneration paid to baramundi in advance shall be reimbursed accordingly on a pro-rata basis. The Customer shall be informed immediately if services are unavailable or are only partially available.

§ 4 Rights of use

(1) The Customer shall receive the non-exclusive, non-sublicensable right, limited to the agreed contractual term, to access the baramundi Managed Software (bMSW) module to the agreed extent and to use its software functions in accordance with the hardware and software environment proposed by baramundi. Unless otherwise agreed between the parties, the services owed shall be provided via the Internet.

(2) Usage in excess of the contractual agreements taking into account § 4 No. 1 of these General Terms and Conditions of Business shall not be permitted. As a rule, the Customer shall not be permitted to make the software available to third parties for use beyond the contractual agreements.

The Customer shall refrain from any usage in a scope which exceeds the acquired rights of use in qualitative terms (with regard to the type of permitted use) or in quantitative terms (with regard to the number of acquired licenses). If it does not refrain from doing this, baramundi may assert the rights to which it is entitled in this regard.

(3) This granting of rights of use shall not involve any more extensive acquisition of rights. The Customer may not circumvent or remove any digital rights management (DRM) used or any other technical safeguards and/or information for managing rights.

§ 5 Remuneration

(1) The prices quoted by baramundi shall be binding. In principle, prices are exclusive of the statutory rate of value added tax and any other duties.

(2) Customers may pay the remuneration owed on account. The costs of utilizing the baramundi Managed Software (bMSW) module shall be based on the agreements made in each individual case between the parties pursuant to the contractual offer contained in the order and the associated order confirmation by baramundi.

The remuneration shall in each case be paid following conclusion of the contract and shall be paid annually in advance.

(3) Unless where applicable or separately agreed between the parties, the Customer must pay the remuneration within 14 days of receiving the order confirmation/the invoice. After expiry of this period, the Customer shall be deemed to be in default. During the period of default, the Customer shall pay interest of 9 percentage points above the base interest rate on the monetary debt. baramundi reserves the right to claim higher damages for default.

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General Terms and Conditions of Business for Use of the baramundi Managed Software (bMSW) Module



(4) baramundi reserves the right to adjust the remuneration to be paid at its reasonable discretion in line with the development of the costs that are relevant for the price calculation. A price increase can be considered and a price reduction should be applied if, for example, the costs for the procurement of hardware and software as well as energy, the use of communication networks or labor costs rise or fall, or if other changes in the economic or legal framework conditions result in a changed cost situation. Increases in a cost category, e.g. labor costs, may only be used for a price increase to the extent that they are not offset by possible declining costs in other areas, such as hardware and software costs. In the case of cost reductions, e.g. hardware costs, baramundi shall reduce prices insofar as these cost reductions are not fully or partially offset by increases in other areas. When exercising its reasonable discretion, baramundi shall choose the respective dates of a price change in such a way that cost reductions are not taken into account in accordance with criteria less favorable for the customer than cost increases, i.e. cost reductions affect prices to at least the same extent as cost increases. baramundi shall inform the customer in writing of changes to fees no later than six weeks before the changes take effect.

(5) The Customer shall have a right of set-off only if its counterclaims have been established by a court of law, have been acknowledged or have not been contested by baramundi. This shall not affect the Customer's right of set-off against contractual and other claims resulting from the initiation or implementation of this contractual relationship. The Customer may only exercise a right of retention if its counterclaim is based on the same contractual relationship.

§ 6 Place of performance

The place of performance for services shall be the place at which the service is to be provided. In all other cases, baramundi's registered office shall be the place of performance for all services under and in connection with the present contract.

§ 7 Customer obligations

(1) The Customer shall be obliged to professionally examine or to arrange for the professional examination of the software supplied by baramundi immediately after delivery or immediately after it has been made accessible and to notify any defects identified together with a precise description of the defect. Before commencing productive use, the Customer must thoroughly test use of the software in accordance with the intended use.

(2) The Customer must in each case cooperate in an active and appropriate way in order to promote proper use of the baramundi Managed Software (bMSW) module. It must provide baramundi with the necessary information and data to enable proper provision of performance. The Customer shall be responsible for ensuring that it creates the technical requirements for using the object of the contract, including in particular with regard to the hardware and software used, the Internet connection and current browser software. The Customer shall in particular perform regular data back-ups and use a current virus protection software. baramundi shall not be liable for virus damage which could have been prevented if corresponding software had been used. In this connection, the limitations of liability pursuant to § 12 of these General Terms and Conditions of Business shall also apply.

(3) The Customer must in principle comply with the applicable law of the Federal Republic of Germany, notably provisions on data protection and the protection of young people, penal provisions and the present General Terms and Conditions of Business. In particular, the Customer shall be obliged: to protect access data which have been supplied and also corresponding identification and authentication mechanisms from access by unauthorized third parties and not to forward these to such third parties; not to infringe third-party rights, including in particular copyrights and neighboring rights, trademark, patent and other property and individual rights; not to execute any applications, such as viruses, which can lead to a change in the physical or logical structure of the networks.

(4) Where the Customer arranges for personal data to be collected, processed and used during usage of baramundi's contractual services, without this already being permitted pursuant to applicable data protection provisions or other legal provisions, the Customer must obtain the required consent of the respective party concerned. Personal data are data which contain information about the personal and material circumstances of a certain or identifiable person.

(5) baramundi shall be exempted from the obligation to provide maintenance and management services for the Customer, without this affecting the obligation to pay the agreed remuneration, if the Customer fails to install the respective current version or the previous version and also disregards the supplied solutions for the managed standard software applications, unless the versions or solutions are defective. The Customer shall itself be responsible for installing software updates.

(6) The Customer shall inform baramundi without delay if the baramundi Managed Software (bMSW) module does not work properly. In doing so, the Customer must provide a specific written description of the circumstances in which the defect occurred and the resulting consequences.

(7) The Customer shall take adequate data back-up precautions to ensure that the data from the datasets, which are kept in machine-readable form, can be reproduced at reasonable effort and expense.

(8) baramundi may, where applicable, demand that where defects are notified, the symptoms arising, the program and also the system and hardware environment be observed in detail and reported (using forms provided by baramundi), stating information relevant for rectification of the defect, such as the number of users affected, a description of the system and hardware environment, as well as, where applicable, any third-party software that was loaded simultaneously, and documents. Similarly, baramundi may demand that identified malfunctions be made available in reproducible form.

(9) If the Customer learns that its access data or the identification and authentication mechanisms have been misused, it must inform baramundi of this immediately. In the event of misuse, baramundi shall be entitled to block access to its services. The block may only be lifted by means of a written request from the Customer. The Customer shall be liable for any misuse for which it is responsible.

§ 8 Blocking of access

(1) baramundi reserves the right to delete information from servers and to block user accounts if the present General Terms and Conditions of Business are infringed. If applicable laws are infringed, baramundi shall be entitled to forward the corresponding information to the competent government agencies.

(2) baramundi reserves the right to temporarily block access to all or part of the agreed services if and to the extent that the Customer uses such services illegally and/or breaches the obligations anchored in § 7 of these General Terms and Conditions of Business. The Customer shall be informed of this by e-mail without delay.

§ 9 Indemnification

In principle, baramundi shall not be responsible for the Customer's own content. In particular, baramundi shall not be obliged to check the content for possible illegalities. The Customer shall indemnify baramundi in respect of all justified claims asserted by third parties against baramundi on account of a breach of their rights and for which the Customer is responsible. In this respect, the Customer shall also assume the costs of baramundi's legal defense including all court and attorney expenses, in the amount of the statutory fees. The Customer must provide baramundi with a reasonable advance for such costs.

§ 10 Termination

The contract for use of the baramundi Managed Software (bMSW) module may be concluded for a term of 1, 3 or 5 years from the date of contract conclusion. Unless either party terminates the contract with a notice period of 3 months to the end of the respective agreed term, the contract shall in each case be extended by a further year. Extraordinary termination shall not be affected by this provision. In order to be effective, each termination shall require written form pursuant to Section 126 of the German Civil Code (BGB).

§ 11 Maintenance and warranty

(1) The Customer shall be obliged to professionally examine or to arrange for the professional examination of the baramundi Managed Software (bMSW) module supplied by baramundi immediately after delivery or immediately after it has been made accessible and to notify any defects identified together with a precise description of the defect. Before commencing productive use, the Customer must thoroughly test use of the aforementioned module in accordance with the intended use.

(2) baramundi warrants that the contractually agreed quality characteristics of the baramundi Managed Software (bMSW) module shall be maintained throughout the contractual term and that no third-party rights conflict with using the module in accordance with the Contract. baramundi shall eliminate any material defects and defects of title occurring in the baramundi Managed Software (bMSW) module within an appropriate period of time.

(3) The Customer shall be obliged to notify baramundi in writing of any defects in the baramundi Managed Software (bMSW) module immediately after they are discovered. In the event of material defects this shall include a description of the time the defect occurred and the detailed circumstances. Any defects in the services owed by baramundi shall be rectified immediately following a description of the defect by the Customer. If baramundi is unable to rectify the defect within a reasonable time, the Customer may demand a pro-rata reduction. This shall not apply if the defect is due to circumstances for which the Customer is responsible, in particular, if it has not fulfilled its duty of cooperation. In the event of repeated significant defects the Customer may, moreover, terminate the contract without notice. This shall not affect more far-reaching rights of the Customer.

(4) Unless otherwise expressly agreed, baramundi shall not give the Customer any warranties in the legal sense.

(5) The content which is integrated into any baramundi infrastructure that is provided shall be deemed external content for baramundi. The legal responsibility therefor shall lie with the Customer.

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(6) Based on the current state of the art, no guarantee can be given that data communication via the Internet will be free of errors and/or available at all times. Consequently, baramundi shall not assume any warranty for technical defects for which it is not responsible, in particular for the constant, uninterrupted availability of the databases and their contents or for the full and error-free reproduction of any content input by the Customer.

§ 12 Limitations of liability

(1) baramundi shall not assume any liability for the uninterrupted availability of systems or for system-related failures, interruptions and malfunctions of the technical systems and services for which baramundi is not responsible. In particular, baramundi shall not be liable for disruptions to the quality of the access to its services due to force majeure or due to events for which it is not responsible. This shall include in particular strikes, lock-outs, lawful internal company industrial dispute measures and official orders. It shall also include the full or partial failure of the communications and network structures and gateways of other suppliers and operators which are required for baramundi to provide its own performance. baramundi shall be entitled to postpone the performance it owes for the duration of the hindering event plus an appropriate lead time. baramundi shall not assume any liability for insignificant interruptions. Furthermore, baramundi shall not assume any liability for faults originating from the sphere of risk of the Customer, of the third-party suppliers of the software application affected or of other third-party suppliers, and in particular shall not assume any liability for faults which were caused by improper use or modification of third-party software, by contamination of relevant software components with computer viruses, the use of unsuitable data media, faulty hardware, a power failure or failure of data-carrying cables, or for faults which were caused by a lack of information security or unsuitable environmental conditions at the place where the software is operated.

(2) In the event of slightly negligent breaches of duty, liability shall be limited to the average foreseeable, direct damage typical for the contract, based on the type of goods. This shall also apply in the event of slightly negligent breaches of duty on the part of baramundi's statutory representatives or vicarious agents or persons employed by baramundi in the performance of its obligations. baramundi shall not be liable for slightly negligent breaches of minor contractual obligations. In contrast, baramundi shall be liable for a breach of legal positions of the Customer which are material to the contract. Legal positions which are material to the contract are legal positions which the contract must guarantee to the Customer according to the content and purpose of the contract. baramundi shall also be liable for a breach of obligations the fulfillment of which makes due performance of the contract possible in the first place and on the fulfillment of which the customer may rely.

(3) The above limitations of liability shall not affect claims of the Customer involving warranties and/or product liability. Furthermore, the limitations of liability shall not apply in the event of malicious intent, in the event of a breach of essential contractual obligations or in the event of physical injury to, damage to the health of or death of the Customer which is attributable to baramundi.

(4) baramundi shall not be liable for the loss of data and/or programs where the damage is due to the fact that the Customer has failed to perform a data back-up and thus ensure that lost data can be restored with justifiable effort and at reasonable expense.

§ 13 Data privacy

(1) The contracting parties shall observe the applicable data protection regulations, in particular those valid in Germany, and shall bind separately their employees employed in connection with the contractual relationship and its performance to data secrecy – unless they are already generally obliged in this regard.

(2) If the Customer collects, processes or uses personal data, it shall be responsible for ensuring that it is entitled to do so in accordance with the applicable provisions, in particular those of data protection law, and shall indemnify baramundi from claims by third parties in the event of an infringement.

(3) Personal data which baramundi collects in the course of performing its contractual obligations shall be dealt with in confidence and shall be collected, processed and used only to the extent that this is permitted by reason of provisions of data protection law or that the Customer consents thereto.

§ 14 Amendment of these General Terms and Conditions of Business

(1) baramundi reserves the right to amend these General Terms and Conditions of Business at any time while observing an appropriate period of notice of at least six weeks. baramundi shall inform the Customer of a corresponding amendment in text form.

(2) If the Customer does not object, the amended Terms and Conditions of Business shall be deemed to have been accepted. If an objection is made, the contract shall continue to apply unchanged, with the existing terms and conditions of business; baramundi shall, however, be entitled to pronounce ordinary termination in accordance with the contract.

§ 15 Final provisions

(1) The law of the Federal Republic of Germany shall apply. The provisions of the United Nations Convention on the International Sale of Goods shall not apply.

(2) Where the Customer is a merchant, a legal entity under public law or a special fund under public law, the legal venue for all disputes arising under the present contract shall be the court with jurisdiction for baramundi's registered office, unless an exclusive legal venue applies. baramundi shall, however, also be entitled to bring an action against the merchant at his place of residence or place of business. This shall not affect jurisdiction based on an exclusive legal venue.

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