

**Terms & Conditions of HYPE Softwaretechnik GmbH**  
**(„HYPE“) for HYPE GO!**  
**(Version March 2018)**



**HYPE Softwaretechnik GmbH**  
Trierer Straße 70-72, D-53115 Bonn  
Commercial Register of the Magistrate Court of Bonn HRB  
9474  
Phone: +49 228 2276 – 0 Fax: +49 228 2276 - 110

**§ 1 Scope**

- (1) These terms and conditions (the “**T&C HYPE GO!**”) provided by HYPE shall govern the usage of the software by Customer.
- (2) Except with regard to the Software Services, these terms and conditions shall not apply to any supplementary services which may be provided by HYPE such as, for example, adaptation of the software or training & schooling services. Such services shall be subject to a separate agreement and separate terms and conditions.
- (3) The terms and conditions of the Customer are not applicable. This will also apply, if HYPE has not expressly objected to the terms and conditions of the Customer.

**§ 2 Scope of Software Services of HYPE**

- (1) Type and scope of the Software Services are defined in these T&C HYPE GO! (“**Agreement**”).
- (2) If these T&C HYPE GO! contain gaps or inaccuracies, HYPE shall be entitled to supplement the document as reasonably required.

**§ 3 Provision of Software Services**

- (1) HYPE shall provide Customer the Software Services by granting access to the web portal reachable under the address <http://www.hypego.net> (the “**Web Portal**”). HYPE shall provide the Software Services solely on an online platform (the “**Platform**”), which can be accessed via the Web Portal by using the Access Data as stipulated in § 5 (the “**Account**”). Customer shall not receive a physical copy (e.g. on a data storage medium) of the software provided via the Software Services.
- (2) Point of delivery of the Software Services is the router-output of the data center used by HYPE (the “**Point Of Delivery**”). HYPE shall not be responsible for (i) Customer’s connection to the internet, (ii) the continuously network connection between the IT-system of Customer and Point Of Delivery and (iii) the procurement and provision of Customer’s hard- and software, which is necessary to access and use the Software Services.
- (3) For the usage of the Software Services HYPE may provide in its sole discretion a digital, user friendly documentation in English or German (the “**Documentation**”; Software Services and Documentation the “**License Material**”).
- (4) HYPE shall be entitled to replace the used License Material with an updated version of the License Material at any time. Customer shall be obliged to accept and use this new version of the License Material. Unless otherwise agreed, HYPE shall not be obliged to provide new versions, upgrade or updates of the License Material.

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- (5) Without a separate agreement HYPE shall not be obliged to implement changes caused by new or amended legal provisions, regulations or other conditions, which have an effect on the usage of the Software Services and might require changes to the provision of the Software Services.
- (6) Technical details, specifications and performance benchmarks in public statements of HYPE, especially for the purpose of advertisement, shall not be binding for HYPE.

### § 4 Accessibility of the Software Services

- (1) HYPE shall grant the accessibility of the Software Services as stipulated herein. Accessibility shall be considered as granted, if the Software Services are accessible for the Customer at the Point of Delivery (the “**Accessibility**”).
- (2) Customer is aware and accepts that the accessibility might be restricted due to reasons that are not in the sphere of HYPE. Therefore, HYPE cannot give any commitment to the accessibility. Furthermore, the accessibility can be limited or temporarily interrupted at any time due to maintenance purposes. HYPE may inform Customer of scheduled maintenance works.

### § 5 Access Data

- (1) HYPE shall provide access data to Customer, which includes the user name and password chosen by Customer (the “**Access Data**”). Customer’s right to choose a user name shall be limited by HYPE’s user name naming convention and the availability of the chosen user name.
- (2) Customer shall treat the Access Data as confidential. Customer shall be obliged to take all necessary measures to ensure, that the Access Data will not be disclosed to any non-authorized third party. Customer shall inform HYPE without undue delay, if Customer has grounds to believe, that a non-authorized third party has gained access to the Access Data.

### § 6 Hosting

- (1) HYPE shall provide data storage for the Customer to the extent as stated on the HYPE GO! website (the “**Hosting**”) and shall be responsible for the storage of the data transferred by the Customer (the “**Customer Data**”) as set out in this Agreement.
- (2) Unless otherwise agreed in writing or stipulated in subsequence (3), Hosting shall only include providing data storage but no further obligations like custody or care of the Customer Data. Customer is solely responsible for the compliance with applicable commercial and tax laws and ensures in particular, that Customer Data does not contain any unlawful content.
- (3) HYPE shall only be obliged to backup Customer Data when expressly confirmed by HYPE.

### § 7 Support Services

HYPE shall provide technical support to Customer regarding the use of the Software Services via e-mail (hype-support@hype.de) and an online forum accessible through the Account (the “**Support Services**”). The Support Services shall consist of helping Customer to address specific technical requests or issues regarding the usage of the Software Services, access via the workstation the Account and other related issues. HYPE shall use its

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reasonable efforts to answer the technical requests or resolve the technical issue. However, HYPE shall not owe response and resolution times. Support Services may not be used as a means of obtaining general training with regard to the usage of the Service.

### § 8 Diagnosis and correction of defects notified by Customer

- (1) HYPE shall diagnose and correct defects of the Software Services which are notified by Customer. The corrections may consist, at HYPE's option, of software patches or fixes or of instructions to Customer how to correct or circumvent a defect. If a defect cannot be corrected in the short term, HYPE shall be entitled to provide an intermediate solution to by-pass the defect.
- (2) Customer shall notify defects of the Software Services without undue delay, through the channels set out in § 7 above. Customer shall provide a detailed description of the situation and the symptoms of the defect that occurred.
- (3) HYPE shall have the right to analyze and diagnose reported defects directly by accessing Customer Data, the Platform and the Account information.
- (4) HYPE may provide in its sole discretion a modified or additional Documentation for corrections and work-arounds to Customer which will include an explanation of the changes resulting from the correction.
- (5) The right of the reduction of the Services Fee in accordance to section 536 of the German Civil Code shall be excluded.

### § 9 Subcontractors

HYPE shall be free to use third parties as subcontractors to provide any or all portions of the Software Services. This shall not affect the obligations and responsibility of HYPE under the Agreement.

### § 10 Obligations of Customer

- (1) Customer shall use the Software Services in accordance with this T&C HYPE GO! Customer shall comply with all laws applicable to its use of the Software Services.
- (2) Customer shall provide the infrastructure for the usage of the Software Services, e.g. by fulfilling the minimum hard- and software requirements. Especially Customer (i) shall be obliged to provide a data connection between its workstation and the Point Of Delivery and (ii) shall be responsible that its workstation is connected to the internet and configured correctly.
- (3) Customer shall apply reasonable state-of-the-art security precautions in order to prevent intrusion of viruses and other adverse effects from Customer's systems into systems of HYPE.
- (4) On request of HYPE Customer shall provide to HYPE in writing or via e-mail all information available to Customer and required by HYPE to provide the Software Services, in particular, but not limited to, information regarding symptoms of defects and information about occurrences within Customer's sphere which may affect HYPE's provision of the Software Services. All information provide by Customer must be accurate and complete. HYPE shall not be under an obligation to verify the accuracy or completeness of the information provided by Customer.

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- (5) Customer shall provide to HYPE other assistance as reasonably requested by HYPE in order to enable HYPE to provide the Software Services agreed herein.
- (6) Customer shall keep Account information, Access Data and other means of identification or authentication confidential.
- (7) Customer shall fulfill any of its obligations set out in this Agreement timely and free of charge for HYPE. If Customer fails to properly fulfill its obligations HYPE may, without prejudice to other statutory or contractual rights demand an extension of affected timelines and service levels like Accessibility as well as a reimbursement of additional costs incurred by HYPE as a result of Customer's failure; time spent by HYPE personnel will be charged at the then applicable hourly or daily rate.

### § 11 Breach of Customer's obligations

- (1) HYPE shall be entitled to suspend the access to the License Material and Customer Data in the event that Customer breaches any of its obligations under the Agreement (the "**Suspension**").
- (2) Before such a Suspension shall be applied, HYPE shall inform Customer about its breach of obligations under the Agreement and shall give him the opportunity (i) to end this breach of obligations within a reasonable period of time and (ii) to declare, that such breach of obligations will not occur again.
- (3) In the event of a Suspension, access to the License Material shall only be granted again after Customer has (i) ended the breach of obligations under the Agreement and (ii) declared that such breach of obligations will not occur again within the term of the Agreement.
- (4) A Suspension shall not limit any further rights of HYPE in respect to the Agreement and shall not limit any further claims against Customer.

### § 12 Services Fee

- (1) The services fee payable by Customer for the provision of Software Services shall be specified on the HYPE GO! website at <https://www.hypego.net> (the "**Services Fee**").
- (2) The Services Fee is exclusive of any expenses. Expenses, including postage and travel expenses (if any), incurred by HYPE in connection with the provision of the Software Services shall be payable as actually incurred by HYPE.
- (3) Unless otherwise agreed, HYPE shall be entitled to increase the Services Fee at the beginning of any calendar month. Such increase shall be communicated to Customer at least 2 months before the increase becomes effective.
- (4) All amounts payable by Customer shall be subject to statutory VAT at the then applicable rate. In addition Customer shall pay all taxes that HYPE is required by law to pay or collect in connection with the provision of the Software Services, including, but not limited to, sales, use, excise, value-added, business, service, consumption, withholding and other similar taxes, but excluding income taxes on HYPE's and its subcontractors income. If Customer is exempt from any tax, Customer shall provide to HYPE satisfactory evidence of such exemption. Each party will provide to the other party any factual information reasonably re-

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requested by the other party in order to help the other party to determine if any tax is due with respect to the provision of the Software Services.

- (5) Unless otherwise stated, the Services Fee shall be payable retroactively. Expenses shall be charged as incurred.
- (6) Amounts payable by Customer shall be due upon receipt of the electronic invoice and payable within 21 days of the invoice date. Payments shall be (i) made to the account specified by HYPE on the invoice or (ii) drawn directly from Customer's pre-authorized credit card or registered bank account.
- (7) Interest on overdue amounts shall accrue at 8 percentage points above the prime interest rate of the European Central Bank.

### § 13 Liability for Defects of Title

- (1) If a third party raises a claim against Customer that the License Material infringes its proprietary rights, Customer shall notify HYPE without undue delay in writing. Upon HYPE's sole discretion, Customer shall, to the extent legally possible, leave the defense of such claims to HYPE or shall defend the claim itself according to HYPE's instructions. Customer shall grant HYPE all necessary authorizations for the legal defense or settlement negotiations. Customer shall reasonably support HYPE in the defense of the asserted claims. In particular, Customer shall provide HYPE with all necessary information. Customer shall not admit any third party claim without the prior written consent of HYPE or otherwise interfere with HYPE's defense of the claim by taking action without consulting HYPE.
- (2) If (i) an infringement of third party rights has finally been asserted, (ii) HYPE is responsible for the infringement, and (iii) Customer has fulfilled its obligations under the preceding of § 10(1), HYPE shall, at its option, cure the infringement by (i) procuring the right for Customer to use the affected License Material or (ii) altering the infringing License Material so as to avoid the infringement, or (iii) provide a new License Material that is non-infringing; and (iv) compensate all reasonable costs incurred by Customer in connection with the legal defense or settlement of the claims.
- (3) HYPE shall be entitled to terminate the Agreement for cause in accordance with the provisions of § 17 below in the event that the measures in § 13(2) will cause unreasonable costs or efforts. The right of Customer in § 13(2) (iv) or to claim further damages shall remain unaffected.
- (4) Should HYPE fail to remove the infringement within reasonable time and such failure materially impacts Customer's use of the Software Services Customer shall be entitled to terminate the Agreement for cause in accordance with the provisions of § 17 below. A right to rescind the Agreement shall be excluded.
- (5) If Customer modifies or causes third parties to modify the License Material, it shall have no claims under this section § 13 unless Customer proves that the infringement was not caused by such modifications.
- (6) Customer shall not have any further claim against HYPE for damages caused by the infringement of a third party's rights other than those provided in this § 13; the regulation in § 14(2) shall remain unaffected.

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### § 14 General Limitation of Liability

- (1) In all cases of contractual or non-contractual liability, HYPE shall only be liable for damages subject to the following provisions.
- (2) HYPE's liability for damages caused by intent, for damages from injury to life, body, or health or for damages caused by a breach of a written guarantee shall be unlimited.
- (3) In case of damages caused by gross negligence HYPE's aggregate liability for occurrences giving rise to a claim in a contract year shall be limited to 100% of the net Services Fee (as set out in § 11 above) payable under the Agreement for the respective contract year. In the event that the term of the Agreement is shorter than a contract year, HYPE's aggregate liability for shall be limited to 100% of the net Services Fee (as set out in § 11 above) payable under the Agreement for the respective term.
- (4) In all other cases HYPE shall only be liable for breach of a material contractual duty whose fulfillment is a prerequisite for the proper performance of the Software Services under the Agreement and on whose fulfillment Customer was entitled to rely, but in any case only up to the amount of the typically foreseeable damages.
- (5) The Parties assume that the typically foreseeable damages will not exceed per damage case 20% of the net Services Fees payable in the respective contract year and will amount in aggregate to less than 50% of the total net Services Fees to be paid in the respective contract year. In the event that the term of the Agreement is shorter than a contract year, § 15 subsection (3) sentence 2 shall apply accordingly.
- (6) Except in cases for willful misconduct, liability for indirect and consequential damages, including loss of profits, shall be excluded.
- (7) HYPE's liability according to the Product Liability Act shall remain unaffected.
- (8) The limitations of liability shall apply to the benefit of HYPE's subcontractors, agents, legal representatives and employees.
- (9) All claims under this § 14 shall become statute-barred after one year. The time bar shall begin in accordance with section 199 par. 1 German Civil Code. This subsection shall not apply in case of willful misconduct, gross negligence, personal injuries or liability under the Product Liability Act.

### § 15 Confidentiality

- (1) During the term of the Agreement and thereafter, each party shall keep secret and confidential all Confidential Information of the other party that comes to its knowledge unless otherwise provided for by law or ordered by a governmental body. Confidential Information shall include all information and documents of the respective party which are marked as confidential or whose confidential nature is obvious including, without limitation, information relating to operational processes, business relations, and know-how (the "**Confidential Information**").
- (2) Each party shall take appropriate measures to protect Confidential Information of the other party from unauthorized access, disclosure or use. Each party agrees to use the other party's Confidential Information only for the execution of the Agreement.

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- (3) Without the prior written consent of the disclosing party the receiving party shall not disclose the Confidential Information to third parties, except as necessary to its service providers, subcontractors, agents and representatives, provided that these are subject to confidentiality obligations no less stringent than as those set out in these terms and conditions.
- (4) The obligations of confidentiality under this § 15 shall not apply to Confidential Information that (i) can be demonstrated to have been known to the recipient prior to the conclusion of the Agreement or that is subsequently disclosed by a third party without violating any non-disclosure agreement or any laws or regulations; (ii) was in the public domain at the time of conclusion of the Agreement or subsequently becomes public knowledge without any violation of this non-disclosure agreement; (iii) must be disclosed by law or by order of a court or governmental authority; (iv) was independently developed by the other party.
- (5) If a party is required by law or enforceable order by a court of law or government agency to disclose Confidential Information of the other party in accordance with subsection (4) (iii) above, the party may comply with such law or order, but shall provide prompt written notice to the other party before disclosing any Confidential Information, unless the law forbids such notice.
- (6) The receiving party shall return all Confidential Information of the disclosing party (i) upon request by that party or (ii) at the End of the Term as set out in § 18(1). Statutory obligations regarding the retention of data and documents shall not be affected.
- (7) Neither party shall use the name of the respective other party without prior written consent. Notwithstanding the foregoing, HYPE shall be entitled to (i) use the name of Customer in customer reference lists, (ii) compile an analysis on the basis of the contractual contents and (iii) - provided that the parties have mutually agreed on that - use this analysis in marketing activities of HYPE.

### § 16 Data Protection

- (1) The parties shall comply with statutory data privacy provisions. Therefore, it is agreed that if HYPE gets access to personal data of Customer, HYPE shall be a processor ("**Processor**") in accordance with Art. 2 lit. (e) of Directive 95/46/EC respectively Art. 4 (7) of Regulation (EU) 2016/679 as of 25th May 2018 ("**GDPR**") who will process any personal data on behalf of Customer and that Customer shall be the ("**Controller**") in the meaning of Art. 2 lit. (d) of Directive 95/46/EC resp. Art. 4 (7) GDPR.
- (2) To the extent required by law, the parties shall enter in a data processing agreement.
- (3) Insofar Customer or HYPE on the behalf of Customer collect, process or make use of personal data, Customer shall be solely responsible that such a behavior is lawful in respect to the applicable laws, especially in respect to data statutory data privacy provisions.
- (4) Customer shall ensure that any required consents of data subjects regarding the provision and use of the Software Services are obtained and that HYPE does not get access to personal data where no consent of the data subject has been obtained or access to personal data is not covered by a legal permission.
- (5) Customer further agrees that it shall not make available or transmit to HYPE personal data unless necessary for the performance of the Software Services. Customer shall take adequate precautions to prevent unnecessary access to or transmission of personal data to HYPE, in particular by encrypting personal data.

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- (6) Customer shall indemnify HYPE against any third party claims arising from the breach of Customer's obligations in this § 16, unless Customer can prove that Customer is not responsible for this breach obligations.

### § 17 Term

- (1) The Agreement shall become effective with the acceptance of this T&C HYPE GO! by Customer (the "**Begin Of Term**") and shall be effective for an infinite term.
- (2) The Agreement may be terminated by each party the end of a calendar month with one month notice.
- (3) The right for termination for cause shall remain unaffected. In particular such a cause shall be deemed to exist in the case of a material breach of the obligations under the Agreement by the other party, provided that if the breach is capable of remedy the party in breach does not remedy the breach upon the other party's notice describing the breach and specifying a reasonable cure period (normally not exceeding 7 days).
- (4) The right of HYPE to terminate for cause exists, in particular, (i) if Customer becomes insolvent or is threatened with insolvency, in the case of over-indebtedness of Customer or the opening of the insolvency proceedings over the assets of Customer has been requested; (ii) if Customer is in delay with at least two payments for more than 60 days; or (iii) in the case of a change of control of Customer.
- (5) The right of Customer to terminate the Agreement for cause based on section 543 par. 1 no 1 of the German Civil Code shall be excluded in the event that the License Material (i) has not been provided by HYPE as stipulated in the T&C HYPE GO! or (ii) has been withdrawn from Customer.
- (6) Notice of termination must be given in writing or by completing the termination procedure in the Account settings.

### § 18 Obligations at the End of Term

- (1) When the Agreement ends, for any reasons whatsoever (the "**End of Term**"), Customer shall be able to download Customer Data via data transmission in a reasonable data format. All reasonable expenses by doing so shall be covered by Customer.
- (2) HYPE shall be entitled to delete Customer Data 2 weeks after the End of Term, unless Customer has given notice to HYPE, that the downloaded Customer Data cannot be read or is not complete (the "**Notice Of Corrupt Data**"). The non-receipt of such a Notice Of Corrupt Data shall be interpreted as Customer's confirmation to delete Customer Data by HYPE. HYPE may notify Customer of the consequences of a missing Notice Of Corrupt Data at the End Of Term.
- (3) Customer shall bear all and any costs caused by the Notice Of Corrupt Data, e.g. additional data storage costs or efforts of HYPE personnel, unless Customer can prove that such a delay was caused by HYPE itself. Efforts of HYPE personnel in this respect shall be payable at HYPE's then current hourly rates.



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### § 19 Changes to Contract Terms

HYPE may change the terms and conditions upon 30 days' written notification with effect from the next calendar months. The right of Customer to terminate the Agreement in accordance to § 17 in the event that such change materially impairs legitimate interests of Customer shall remain unaffected. The termination shall become effective as of the effective date of the change to the contract terms.

### § 20 Publicity

Customer agrees that HYPE may publicly disclose that Customer is receiving the Software Services and may use Customer's name and logo as a reference in promotional materials or press releases.

### § 21 Final Provisions

- (1) Neither party may assign its rights or obligations under the Agreement to any third party without the prior written consent of the other party. Section 354a of the German Commercial Code shall remain unaffected.
- (2) Customer may only set off claims of its own against the claims of HYPE, if such counterclaims are undisputed or recognized by declaratory judgment.
- (3) Customer shall have no right of retention unless its counterclaim is based on the same contractual relationship and is undisputed or has been acknowledged in writing or recognized by declaratory judgment.
- (4) The Agreement shall be governed by German law. The application of the UN Convention on Contracts for the International Sale of Goods (CISG) and the German International Private Law shall be excluded.
- (5) The exclusive venue for all legal disputes arising in connection with the Agreement shall be the seat of HYPE.
- (6) In the event that one or more provisions of the Agreement shall be found to be invalid, the remaining provisions shall not be affected. In such event, the parties shall replace the invalid provision by a valid provision that comes as close as possible to the economic purpose of the invalid provision. The same shall apply in case of an omission.

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