

General Terms and Conditions

1. Contractual bases

1.1. Scope

These General Terms and Conditions of schalk&friends GmbH, Lindwurmstrasse 124, D-80337 Munich (schalk&friends) (GTCs) shall apply to all legal transactions and all services and/or products delivered by schalk&friends to counterparties ("Customers") both domestically and abroad. Our GTCs shall apply only *vis-à-vis* entrepreneurs within the meaning of sec. 14 German Civil Code [German acronym: BGB], legal entities under public law or public-law special fund entities under sec. 310 BGB. Under sec. 14 BGB, entrepreneurs are natural persons or legal entities or partnerships with legal personality acting within the scope of their commercial or independent professional activities in concluding legal transactions.

schalk&friends GTCs shall apply exclusively. They shall also apply to all future business relations, even if the parties do not expressly again agree to them. We hereby expressly object to any contrary confirmations or general terms and conditions of Customers. The foregoing shall also apply even where Customers submit offers or accept offers by reference to the priority application of their own general terms and conditions.

1.2. Order of precedence of contract terms

All contractual agreements between the parties shall be subject to the following order of precedence:

- a. Contracts agreed on the basis of individual contracting, in particular: the substance of offers made by schalk&friends to Customers
- b. Special Contract Terms (SCTs) of schalk&friends in respect of the works and services under the contract in question
- c. These General Terms and Conditions (GTCs)
- d. Provisions of applicable law

The agreements first referenced shall in all cases take priority over those referred to subsequently in the event of conflicts. Contractual gaps shall be filled by applying the terms and provisions at the next lower rank of precedence.

2. Substance of works and services

schalk&friends shall furnish services and products in the field of new media. The type and the scope of the services/products provided or supplied are defined by the offer and the technical specifications thereto.

Deadlines for the provision of works and services by schalk&friends shall not be deemed fixed deadlines, except where the parties have expressly so agreed.

Periods for performance shall be deemed extended by the period in which schalk&friends is prevented from providing the products and services due to circumstances for which schalk&friends does not bear fault, as well as by a reasonable start-up period after the impediment to schalk&friends's performance has ceased.

schalk&friends is entitled to furnish partial services and products except where this is unreasonable to the Customer.

schalk&friends is entitled to make use of third parties for the provisions of its products and services.

The legal bases for

- IT and multimedia services (2.1)
- Digital marketing (2.2)
- Web and network services (2.3)

are governed, at the first order of priority, by the SCTs in a detailed fashion, and, at a lower order of priority and in more general respects, by these GTCs. Where schalk&friends undertakes to perform fee-based services for the Customers, the contract shall in this respect be governed by the law governing service contracts (secs. 611 *et seq.* BGB) except where the parties have otherwise agreed. Such services, where they are governed by the law of service contracts, include, for example, providing marketing consulting to Customers and designing and maintaining a website and providing services in connection with search engine marketing (SEM), in particular services in respect of search engine optimisation (SEO). Unless expressly agreed, schalk&friends does not perform any work under the law governing contracts for works and services within the meaning of secs. 631 *et seq.* BGB. The foregoing shall apply even where individual items of work provided are formally accepted by the Customer by counter-signature on work records, hourly sheets or other confirmations, i.e. where the fact that the work has been performed as such is confirmed.

2.1. IT and Multimedia services

schalk&friends is only obliged to surrender source codes and to install multimedia products it has created at the Customer's premises or on servers of the Customer where the parties have explicitly so agreed in the work order or in the specifications. In all other cases, schalk&friends shall have no obligation either to furnish the source codes or to install and/or implement them in the Customer's system environment. schalk&friends is not obliged to perform services personally, but rather may utilise such sub-contractors as appear suitable to it in order to perform the work.

2.1.1. Front end

2.1.1.1. schalk&friends shall perform front-end multimedia services for Customers. These include, in particular, concept and design of websites, banners and advertising campaigns, as well as programming and consultancy services for websites. schalk&friends's performance of such services shall be rendered in line with the written instructions in the specifications.

2.1.1.2. The possibility exists for the Customer to additionally conclude a contract for website maintenance. Such services are charged on the basis of a fixed price to be separately agreed, or on an hourly-rate basis.

2.1.2. Back end (software for websites)

2.1.2.1. schalk&friends also offers back-end services for websites. These include (where so provided in the specifications) delivery of standardised software and/or the creation of software.

2.1.2.2. The Customer's attention is expressly drawn to the fact that schalk&friends does not as a rule tailor standardised software to customer requirements individually where this is not expressly stated as an element of the offer. Unless otherwise agreed between the parties, schalk&friends shall not prepare any separate documentation for software delivered by it.

2.1.3. Open source software

The software developed and/or marketed/sold by schalk&friends may consist in whole or in part of open source software. In respect of their use, such software components are subject both to these GTCs and to the terms of the licence agreements applicable to the respective open source software ("Open Source Licences"). schalk&friends shall identify to the Customer upon request which components are subject to which Open Source Licences. The Customer undertakes that it shall comply with the applicable Open Source Licences in each case. The failure to comply with Open Source Licences may, *inter alia*, cause the Customer to lose its right to use open source components.

2.1.4. Utilisation of services in conformity with the law

The Customer is responsible for ensuring that its use of schalk&friends's services (particularly in the realms of chat communication, e-mail marketing, backoffice & Club, content management systems (CMS), shop systems, gaming modules, moving images (streaming)) is in conformity with the law. Similarly, responsibility for the use of all of the products and services provided by schalk&friends, in particular any software provided and content disseminated (e.g. content of e-mail/chat communications), lies exclusively with the Customer.

Where third parties assert legal claims against schalk&friends based on purportedly illegal use of schalk&friends's products and services for which schalk&friends is not responsible, the Customer shall indemnify and hold schalk&friends harmless against all claims. In particular, the Customer shall bear the reasonable costs of legal defence incurred by schalk&friends.

2.2. Digital marketing

In addition to brokering and selling standard advertising space in online media (as established in the form of banners, buttons, pop-ups, interstitial, superstitials, sticky-ads), schalk&friends also undertakes all special forms of advertising and campaigns such as associate programmes, sponsoring (events and specials), B2B features and similar new forms of advertising and search engine marketing, where the Customer's order requests this. These marketing services are performed as agency services under the services agreement. The details of this are governed by the respective offer furnished by schalk&friends.

2.3. Web and network services

2.3.1. General provisions

In the realm of web and network services, schalk&friends performs *inter alia* the following services:

- Domain hosting
- Server hosting
- Network set-up and maintenance
- Security concepts
- IT & groupware solutions
- Functional extensions (secure socket layers; font hosting; statistics and web analysis tools; backups; support).

2.3.2. Domain hosting

In the event that schalk&friends performs services in the realm of domain hosting, such as procuring and/or maintaining domains, then schalk&friends's Special Contract Terms for domain services and the specifications for the order shall apply in addition to and with priority over these GTCs.

2.3.3. Server hosting

schalk&friends performs services to make content accessible via the Internet. To this end schalk&friends makes system resources available to Customers on a server. The Customer may upload content to that server up to the level agreed in the specifications. schalk&friends's services in the realm of server hosting are limited solely to data communication between the interconnection point offered by schalk&friends on its own data communications network with the Internet and the server space provided to the Customer. schalk&friends has no control over data traffic outside its own communication network. Thus, schalk&friends is not obliged to ensure successful forwarding of information to or from the computer requesting the content.

2.3.4. Availability/Service levels

2.3.4.1. schalk&friends's domain and/or server hosting provider services have an uptime guarantee of 99.5% on a monthly average, unless otherwise provided in the specification of services. This uptime does not include planned and/or pre-notified maintenance work (maintenance windows). schalk&friends shall notify Customers promptly of such maintenance windows and shall exert its best efforts to schedule such outside ordinary business hours, which are weekdays from Monday to Friday (except on public holidays applicable within Bavaria and throughout the country) between 9 am and 5 pm (CET/CEST).

2.3.4.2. The Internet transit services are provided at the service levels shown in the annex "Performance features under Service Level Agreements".

2.3.4.3. schalk&friends shall not be responsible for the following service interruptions: Any fault, non-availability, delay or other quality degradation of the service caused by *force majeure*; interruptions to services for which Customers bear responsibility and any fault, unavailability, delay or other quality degradation of the services caused by third parties (with the exception of sub-contractors of schalk&friends) (in particular traffic interconnection points controlled by network operators or third parties, facilities or power utility services of third parties or caused by third parties' cable cuts).

3. Assurance of services

3.1. Statutory warranty for defects

3.1.1 Customer's rights in the event of substantive defects

In the event of substantive defects, the Customer shall be entitled to assert its statutory warranty rights, except where the parties' agreement otherwise provides.

In the event of a statutory defect, schalk&friends shall be obliged and entitled, at its option (which schalk&friends shall exercise within a reasonable time), initially to remediate the defect or to supply a replacement. Remediation of defects may also consist of schalk&friends's provision of reasonable options to the Customer within a reasonable time, enabling it to avoid the impacts of the defect.

Customer claims for compensation of damages or of frustrated expenditures are limited in line with secs. 3.2 (Liability) and 3.6 (Prescription).

In respect of the contract types set forth below, the provisions in secs. 3.1.1.1 to 3.1.1.4 shall supplementally apply.

3.1.1.1. Law governing service contracts

The contract obligations of schalk&friends for provision of services (in particular in the case of front-end services, digital marketing, website hosting and maintenance/updating of software and/or websites) shall be governed by the law of non-gratuitous agency pursuant to secs. 675, 611 ff. BGB (service contract law) and the

provisions set out below. schalk&friends shall endeavour to achieve the results intended in each case. However, schalk&friends is unable to assume any obligations beyond this, or any warranty that it will achieve the results envisaged by the Customer. The Customer shall reimburse schalk&friends for expenditures in line with sec. 670 BGB, where such expenditures are not already fully covered by the compensation payable and where this Agreement does not otherwise provide. The Customer shall itself bear all of the costs (i) incurred by it for utilising telecommunications services or other third-party services, (ii) incurred by it for procuring and keeping available the IT structure needed in order to utilise schalk&friends's services, (iii) incurred by schalk&friends in connection with any audits by the data protection authorities or (where data relevant under tax law are the subject of data storage) by the tax authorities and (iv) caused by unauthorised access to schalk&friends's system, through the use of the access data provided by schalk&friends, if and to the extent the Customer is responsible for such unauthorised use of the access data.

3.1.1.2. Commercial law

To the extent that commercial law applies (in particular in respect of sales of software, or web design contracts (contracts for the delivery of works and services) etc.), the Customer shall examine the products for obvious defects that an average user would notice without unusual efforts. Obvious defects, particularly readily visible functional defects of products, must be raised by a written complaint to schalk&friends promptly upon delivery. The Customer must concretely specify the defect alleged. The Customer must notify schalk&friends of defects which are not obvious within two weeks of its discovery of the defect, concretely specifying the alleged defect in writing. Where the Customer breaches its duty to examine and to give notice of complaints, the product shall be deemed approved by the Customer in respect of the defect in question.

In all further and other respects, schalk&friends merely warrants that multimedia productions are not subject to defects at the time of their delivery to such an extent that they would nullify the value or the fitness of the product for its usual or intended purpose or reduce the value or fitness to a degree which is more than insubstantial. These warranty rights shall, in addition, cease wherever the Customer or third parties engaged by the Customer interferes with or otherwise manipulates the product. However, the Customer is entitled to plead and prove that the modifications bear no relationship to the fault which has occurred and do not materially render the analysis and elimination of the fault more difficult.

3.1.1.3. Lease law

Where products and services (or portions thereof) are classifiable as covered by the law governing leases, in particular licences to use software for a limited time, secs. 535 ff. BGB shall apply, but subject to the following provisos:

schalk&friends shall have no liability in the absence of fault under sec. 536a (1) (1) BGB for defects which were already present at the time the contract was formed.

In derogation from sec. 536 (1) sentence 2 BGB, the Customer may not enforce any abatement of the compensation payable in respect of schalk&friends's duty to provide the products/services by making

deductions from the agreed remuneration; claims for unjust enrichment and contract damages remain unaffected hereby.

In the case of defects of title in respect of the products or services, schalk&friends warrants supplemental performance by providing to the Customer an option for using the product or service provided in a manner which is legally unobjectionable, at the option of schalk&friends, by providing replacement products or services of equal value or modified products or services of equal value. The Customer shall accept the new product status/service status, provided that the scope of functionality in line with the parties' contract is retained.

Where, upon a request of the Customer, schalk&friends performs services to identify faults or troubleshoot them without being obliged to do so, schalk&friends may demand such reimbursement of expenses as schalk&friends deems necessary, based on the price list in force at the time the services are rendered.

3.1.1.4 Law governing works and services contracts

In the event that, in an individual case, the law governing works and services contracts applies, the Customer shall be obliged to formally accept the works and services undertaken in line with the contract, and may not refuse formal acceptance based on non-material defects.

schalk&friends warrants that the works and services to be provided shall be executed in conformity with the parties' contract.

schalk&friends is entitled to honour its warranty in the form of supplemental performance, by providing to the Customer an option for using the product or service provided in a manner which is legally unobjectionable by providing, at the option of schalk&friends, either replacement products/services or modified products/services of equal value. The urgency of the need to eliminate a defect shall be governed by the degree to which the Customer's business operations are impeded. Where elimination of the defect is shown to be impossible, schalk&friends shall be entitled to identify options enabling the Customer to avoid the impact of the defect, in particular by identifying a workaround solution. Where such solution is reasonable to the Customer, this shall be deemed to constitute supplemental performance.

Where schalk&friends's supplemental performance fails within a reasonable time, the Customer must set a further reasonable deadline for an additional attempt at supplemental performance. Where the supplemental performance fails in a final manner by the end of this reasonable grace period, which the Customer is obliged to set, the Customer shall, upon expiry of such grace period, have the right to abate the compensation or, in the case of material defects, to terminate the contract; the parties agree that the Customer shall have no right of rescission [*Rücktritt*].

3.1.2. Customer's rights in the case of defects of title

3.1.2.1 In the case of defects of title in respect of schalk&friends's products and services, the Customer shall be entitled to assert its statutory warranty rights, except where the parties have otherwise agreed.

3.1.2.2. In the event of a defect of a title, schalk&friends shall be obliged and entitled, at its option (which schalk&friends must exercise within a reasonable time) either to remediate the defect or furnish a replacement.

To this end, schalk&friends shall, at its option (which schalk&friends shall exercise within a reasonable time) either grant the Customer (at schalk&friends's cost and expense) the rights required (e.g. right of use under copyright law) to eliminate the defect of title or to modify the product or service such that it no longer infringes on the right but continues to comport with the parties' contract; it shall be sufficient for schalk&friends to modify its product or service such that schalk&friends procures for the Customer the legal right to use the product or service provided or, at schalk&friends's option, to use a replacement product or service of equal value or a modified product or service of equal value, provided that such product or service continues to comport with the parties' contract.

3.1.2.3. Where any third party asserts claims constituting an obstacle to the Customer's exercise of the rights of use granted to it by contract, the Customer shall promptly notify schalk&friends thereof in writing and in a comprehensive fashion. Where the Customer, for reasons of mitigating damages or other substantial reasons, ceases its use thereof, the Customer shall be obliged to alert the third party to the fact that its cessation of use shall not be deemed any acknowledgment of the alleged intellectual property infringement. The Customer shall engage in court litigation with such third party only by agreement with schalk&friends and, by the present contract, authorises schalk&friends to conduct such disputes with third parties both in judicial fora and extra-judicially. Where schalk&friends avails itself of this authority, which shall be at schalk&friends's discretion, the Customer may not acknowledge the third party's claims without schalk&friends's consent; schalk&friends shall take action to defend itself against such claims of third parties at its own cost and expense.

3.1.3. Limitations of liability and prescription

The Customer's claims for damages or for compensation of frustrated expenditures are limited in line with sec. 3.2 (Liability) and sec. 3.6 (Prescription).

3.2. Liability

3.2.1. General liability rules

3.2.1.1. schalk&friends's liability is not contractually limited and shall be governed by the provisions of applicable law in respect of

- a) losses based on the breach of a warranty assumed by schalk&friends;
- b) intentional acts or omissions;
- c) losses based on schalk&friends's fraudulently concealment of the defect;
- d) losses arising from injury to life, limb or health, losses based on an intentional or negligent breach of an obligation by schalk&friends or otherwise based on intentional or negligent conduct by a legal representative or vicarious agent of schalk&friends;
- e) losses other than those listed under letter d) hereof, which are based on an intentional or grossly negligent breach by schalk&friends or otherwise on an intentional or grossly negligent act of a legal representative or vicarious agent of schalk&friends;
- f) claims under the Product Liability Act.

3.2.1.2. In all cases other than those listed in sec. 3.2.1.1., schalk&friends's liability shall be limited to compensation for such losses as are typical for the contract and foreseeable, where the loss is based on a negligent breach of material obligations by schalk&friends or a legal representative or vicarious agent of schalk&friends. Obligations are deemed material where performance of the obligation is a *sine qua non* to proper performance of the contract and in respect of which the counterparty ordinarily would rely on their being complied with and is entitled to so rely. Losses are deemed typical for the contract and foreseeable where schalk&friends foresaw them as a potential consequence of breach at the time of contracting or, in consideration of the circumstances of which schalk&friends were aware or should have been aware, should have foreseen them.

3.2.1.3. In all cases other than those listed at 3.2.1.1. and 3.2.1.2., schalk&friends disclaims all liability for negligence.

3.2.1.4. schalk&friends disclaims liability in the absence of fault under sec. 536a (1) (1) BGB for defects which were already present at the time of contracting.

3.2.1.5. The defence of contributory negligence remains unaffected by the foregoing.

3.2.1.6. The provisions set forth above (with the exception of sec. 3.2.1.4) shall apply *mutatis mutandis* in respect of schalk&friends's liability for compensation of frustrated expenditures.

3.2.2. Special rule on liability for provision of telecommunication services

Where, in connection with the products and services under the contract with the Customer, schalk&friends furnishes telecommunication services within the meaning of sec. 3 (24) of the German Telecommunications Act ([German acronym:] "TKG"), the liability rules set out in sec. 44 a TKG shall apply.

3.3. Rights; references

3.3.1. The Customer hereby warrants that it is the holder of the requisite rights of use to the content provided by it to schalk&friends in order to enable schalk&friends to provide the products and services under the contract (e.g. texts, images, logos etc.) and other materials. The Customer shall indemnify and hold schalk&friends harmless against all claims asserted by third parties based on an infringement of rights, in particular copyright, ancillary copyright, other intellectual property rights or rights of personality, relating to the use of the content and materials furnished to schalk&friends to enable it to provide the products and services under the contract.

3.3.2. Unless the parties have otherwise expressly agreed in writing, schalk&friends is deemed to grant the Customer a simple right of use with respect to the products and services to be provided by schalk&friends pursuant to the purpose of the parties' contract, for the Customer's own business. The principal is not entitled to process the products and services of schalk&friends without the prior consent of schalk&friends, to grant third parties rights of use thereto or to re-market them in any form whatsoever.

3.3.3. The Customer hereby grants schalk&friends the right to refer to it and the project performed by schalk&friends for the Customer as a reference, and to include the foregoing in schalk&friends's advertisements for its services in online and offline media, including by referring to the Customer's name and logo.

3.4. Data protection/Contract data processing

schalk&friends hereby undertakes that it shall comply with the provisions of data protection law. Where the Customer transmits personal data in connection with its cooperation with schalk&friends (in particular: where the Customer has a maintenance agreement with schalk&friends), the Customer warrants that it is entitled under the relevant data protection laws, to collect and store the personal data forwarded to schalk&friends and to pass such data on to schalk&friends in connection with their contractual collaboration and that, in particular, it has procured the consent notices required for this purpose. Where the Customer engages schalk&friends to process personal data at its behest, or engages schalk&friends to perform equivalent measures within the meaning of sec. 11 (5) of the German Federal Data Protection Act ([German acronym:] BDSG), the parties shall conclude an agreement for contract data processing. The Customer shall indemnify and hold schalk&friends harmless with respect to all losses, damages and costs, including the costs of legal enforcement, arising out of any breach of the provisions of data protection law by the Customer, including losses, damages and costs arising from the need to make expenditures to defend against charges of third parties, including by the competent regulatory authorities.

3.5. Confidentiality

Both of the parties hereby mutually warrant to each other that they shall keep confidential *vis-à-vis* third parties the proprietary knowledge and business secrets of the other party to which they have become privy in undertaking their contractual collaboration and all proprietary knowledge that is not generally in the public sphere, and shall impose a corresponding obligation on their staff members. The foregoing shall apply in particular (but not solely) to all information concerning business partners, customers, internal corporate matters, technologies and processes utilised. This duty of confidentiality under these GTCs shall not apply if and to the extent the information in question is verifiably shown to be previously known to the public or, without the fault of the other party, it becomes generally known to the public or is acquired in a lawful manner by a third party, or was already in the possession of the other party before the first party provided it. In addition, the parties shall be relieved of any duty to treat material as confidential if, based on legal requirements or orders of governmental bodies, they are required to disclose it, but not before giving written notice to the other party of the facts and circumstances thereof.

3.6. Prescription

3.6.1. To the extent that schalk&friends provides products and services on the basis of commercial law (secs. 433 ff. BGB) or the law governing contracts for works and services (sec. 651 BGB), e.g. for delivery of goods, claims shall be deemed prescribed without any contractual limitation in accordance with the statutory rules

- a) claims of the Customer against us for intentional torts;
- b) claims of the Customer against us for defects of goods, where we fraudulently conceal the defect or have assumed a warranty for the quality of the good;

c) claims of the Customer against us for defects of the goods where the defect consists of an *in rem* right of a third party, on the basis of which the party may demand surrender of such goods;

d) claims of the Customer for compensation of damages

aa) based on an intentional or grossly negligent breach by us, or otherwise based on an intentional or grossly negligent act of our legal representative or vicarious agent;

bb) based on injury to life, limb or health, based on an intentional or negligent breach by us or otherwise based on an intentional or negligent act of our legal representative or vicarious agent;

cc) under the Product Liability Act.

In all cases other than those listed in the first sentence hereof, the prescription period for Customer claims which are based on substantive defects of goods shall be one year from the date the goods were delivered to the Customer.

3.6.2. To the extent schalk&friends provides products and services on the basis of the law governing works and services (secs. 631 ff. BGB), and the subject-matter of the contract is works and services, the successful completion of which consist of creating, maintaining or modifying an item of property or in providing planning or supervisory services, then the prescription periods shall apply without any contractual limitations under the statutory rules as follows in respect of

a) claims of the Customer against us for intentional torts;

b) claims of the Customer against us for defects of goods, where we have fraudulently concealed the defect or have assumed a warranty for the quality of the good;

c) claims of the Customer for compensation of damages

aa) based on an intentional or grossly negligent breach by schalk&friends, or otherwise based on an intentional or grossly negligent act of our legal representative or vicarious agent;

bb) based on injury to life, limb or health, based on an intentional or negligent breach by schalk&friends or otherwise based on an intentional or negligent act of our legal representative or vicarious agent;

cc) under the Product Liability Act.

In all cases other than those listed in the first sentence hereof, the prescription period for Customer claims which are based on substantive defects of works and services shall be one year from the date the goods were delivered to the Customer.

3.7. Reservation of title

Items of physical property supplied by schalk&friends in performance of a contract of purchase or for works and services shall remain the property of schalk&friends until such time as full payment for them has been received.

4. Contract performance

4.1. Term/Termination

4.1.1. Where the products and services of schalk&friends are provided in the form of a long-term contract of obligation (such as *inter alia* domain hosting and server hosting), and where the service specifications do not otherwise provide, the parties are deemed to agree a minimum contract term of twelve (12) full calendar months. Where the contract is not terminated upon three (3) months' written notice to the end of its term, it shall be deemed to automatically be extended for a further six (6) calendar months in each case, until terminated in writing upon proper notice.

4.1.2. The parties' right to terminate the contract for good cause in respect of long-term contracts of obligation shall remain unaffected hereby.

4.2. Prices and payment

4.2.1. The Customer shall pay the agreed remuneration to schalk&friends. schalk&friends provides its products and services for a fee, except where the parties have expressly otherwise agreed. Where the amount of remuneration has not been expressly agreed, the parties shall be deemed to have agreed to such remuneration as we offer to third parties for comparable products and services ("list price"). All prices are quoted net of the statutory rate of VAT applicable in each case, unless otherwise indicated. All payment terms shall be governed by the offer in the specification of services and these GTCs. Unless otherwise agreed, all payments shall be due within fourteen (14) calendar days from receipt of the invoice, without any cash discounts. Invoicing is in Euros.

4.2.2. Where schalk&friends estimates a price, such estimates shall be deemed non-binding on schalk&friends, except where the parties expressly otherwise agree. The agreement of a fixed price or of a maximum amount for services shall require an express agreement of the parties.

4.2.3. schalk&friends reserves the right to provide products and services solely in exchange for advance payment if substantively justified grounds for requiring advance payment are present and are not opposed by overriding interests on the part of the Customer.

4.2.4. The Customer is entitled to assert the defence of non-performance under applicable law without any contractual limitations (sec. 320 BGB). The Customer shall, in this regard, only be entitled to a right of retention where the Customer's counterclaim is based on the same contract relationship.

4.2.5. The Customer is entitled, without any contractual limitation, to assert a right of set-off of its own claims for non-performance or defects pursuant to applicable law against schalk&friends against payment of the remuneration. With respect to claims other than those listed in sentence 1 hereof, the Customer may only

assert a right of set-off against schalk&friends's claims where the Customer's rights are undisputed or have been adjudicated with *res judicata* effect or are ripe for decision. schalk&friends is entitled to apply payments to the Customer's oldest debt, notwithstanding any terms and conditions of the Customer to the contrary.

4.2.6. In the event of a default of payment by the Customer, statutory default interest shall be applied (sec. 288 BGB). However, schalk&friends shall be at liberty to assert against the Customer such default damages as are proven to exceed the amount of default interest.

4.2.7. The Customer shall assert objections to payment claims invoiced by schalk&friends within a period of eight weeks from the date of receipt of the notification in writing to schalk&friends. The failure by the Customer to assert timely objections shall be deemed to constitute approval of the invoice, where schalk&friends has separately alerted the Customer in the invoice to the consequences of a failure to raise timely objections. Statutory claims of the Customer in respect of objections asserted after the expiry of the relevant period shall remain unaffected hereby.

4.3 Force majeure

To the extent and for so long as a *force majeure* event is present, schalk&friends shall have no obligation to provide the products and services. In particular, '*force majeure*' shall be deemed to include (i) a strike within schalk&friends's business, (ii) a lock-out within schalk&friends's business, (iii) delays or breakdowns in supply to schalk&friends by suppliers as a result of *force majeure*, (iv) power outages and interruptions or destruction of data-transmission cables beyond schalk&friends's scope of responsibility, (v) regulatory or court orders for which schalk&friends are not responsible and (vi) attacks (e.g. by malware, such as viruses or DoS attacks), which in the exercise of reasonable care in the circumstances of the case, schalk&friends would not have been able to avert. It shall not automatically rule out the possibility that an event will be deemed *force majeure* where schalk&friends is obliged to undertake security measures. schalk&friends shall notify the Customer within a reasonable time whenever an event of *force majeure* occurs and when resumption of services is anticipated.

4.4. The Customer's duties of cooperation

4.4.1. The precondition to schalk&friends's proper and timely provision of the products and services is the Customer's proper and timely provision of its necessary acts of cooperation. Where the Customer fails to provide its acts of cooperation, or fails to properly provide them, schalk&friends's duty to provide the products and services shall cease to apply to such extent and for such period as was dependent on the Customer's prior provision of its acts of cooperation. The Customer shall bear all disadvantages and additional costs resulting from having failed to provide its acts of cooperation.

4.4.2. In particular, the Customer is responsible for timely provision of the data to be processed as well as for the completeness and correctness thereof and for verifying the completeness and correctness of schalk&friends's work product to a reasonable extent.

4.4.3. The Customer shall give written notice of defects in the products and services of schalk&friends, in verifiable and detailed form, indicating the information deemed expedient to enable troubleshooting by schalk&friends, and shall, in particular, indicate the work steps that led to the occurrence of the defect and the impacts and manifestation thereof.

4.4.4. Where schalk&friends has not undertaken to assume responsibility for storage of data for back-up purposes or data for archiving on behalf of the Customer, the Customer shall itself be responsible for backing-up its data in line with the state-of-the-art, at intervals which are adequate to the application in question, so that the Customer is able to reconstruct the data with reasonable efforts.

4.4.5. The Customer shall bear all costs

- a) incurred by it for utilisation of telecommunications services or other third-party services and
- b) incurred by it for procuring and keeping the IT infrastructure required to enable it to utilise our services.

4.4.6. Where schalk&friends provide maintenance services for a website for a Customer, it shall be the Customer's responsibility to ensure that the website and the downloadable content thereof do not violate the relevant provisions of law or any third-party rights. The Customer shall, in particular, be responsible for furnishing a masthead complying with the requirements of telemedia law and for providing copyright and/or licence notices and protections against removal or deletion of such copyright and/or licence notices. schalk&friends is neither entitled nor obliged to render any legal services.

5. General provisions

5.1. Applicable law

Contracts of schalk&friends with the Customer shall be governed by the laws of the Federal Republic of Germany, excluding its choice-of-law and *renvoi* rules, and excluding application of the United Nations Convention for the International Sales of Goods (CISG).

5.2. Amendments and addenda

Amendments and addenda to contract terms shall be recorded in writing for evidentiary purposes. The foregoing shall also apply to any rescission of this clause. Either party may demand a written record of any amendment or addenda of the contract terms.

5.3. Written form

Specific warranties of quality by schalk&friends and declarations of the Customer in respect of legal dunning notices, notices of defects, setting of deadlines, rescission for mistake, abatement, exercise of a right of rescission, notice of termination or the assertion of claims for damages shall only be valid if given in written form.

Where the parties agree that a declaration is only valid if given in written form, the written form requirement shall be deemed satisfied by transmission by telecommunications-based transmission by facsimile, and in the case of a contract, by exchange of letters. However, sec. 127 (2) and (3) BGB shall not apply in any other respects.

5.4. Place of performance and jurisdiction and venue

The place of performance for the provisions of schalk&friends's products and services and for payments to schalk&friends is schalk&friends's registered office.

Jurisdiction and venue for all disputes arising out of or in connection with this contract between schalk&friends and the Customers, where the latter are legal merchants, legal entities under public law or public law special funds shall, at schalk&friends's option, be vested in the courts at the place of the Customer's registered office or at the place of schalk&friends's registered office; for lawsuits against schalk&friends, sole jurisdiction and venue shall be vested in the courts at the place of schalk&friends's registered office. Mandatory statutory requirements regarding exclusive venue, including sec. 689 (2) of the German Code of Civil Procedure ([German acronym:] ZPO) shall remain unaffected by sentence 1 hereof.

5.5. Partial invalidity

In the event that any term of this contract should be deemed invalid in whole or in part, the validity of the remaining terms of this contract shall be unaffected thereby.