

General Terms & Conditions (GTC) of Zuhlke Engineering Hong Kong Ltd



1 Application and Interpretation

- (a) These terms and conditions apply to the relationship between Zuhlke Engineering Hong Kong («Zuhlke») and the person requesting services from Zuhlke («Client») as outlined in the accepted proposal («Work Order») accompanying these terms and conditions, and to all services to be supplied by Zuhlke in connection therewith («Services»). These terms and conditions and the Work Order will, on the Work Order being signed and returned by the Client to Zuhlke, together form a binding agreement between the parties («Agreement»). It is acknowledged that although the Client may need to raise a purchase order in order to initiate the Services, the terms of the Agreement override any terms submitted by the Client in any such purchase order. For clarity, once signed, the Work Order forms part of and is governed by this Agreement and will not constitute a separate contract.
- (b) Headings in these terms and conditions are for convenience only and shall not affect their interpretation or construction. Any reference to the singular shall be deemed to include reference to the plural and vice-versa. Any statutory or regulatory reference shall be deemed to include all modifications and replacements thereof from time to time.
- (c) In the event of any conflict between the documents forming the Agreement the following order shall prevail (the lowest numbered taking priority):
 - (1) A document signed by both parties, amending these terms and conditions
 - (2) Work Order (subject to paragraph 1(d))
 - (3) These terms and conditions
 - (4) Any purchase order
- (d) A section of a Work Order may supersede or amend these terms and conditions provided that such section expressly states that it supersedes or amends these terms and conditions and refers to the provision in these terms and conditions that it supersedes or amends. All other purported amendments to the terms and conditions (in so far as they apply to the relevant Work Order) will be of no force or effect.

2 Services

- (a) Zuhlke will use reasonable endeavours to provide the Services identified in the Agreement to the Client. Zuhlke will further use reasonable endeavours to provide the Services in accordance with such dates, milestones and/or timelines (including payment timetables) as are set out in the Work Order or as Zuhlke reasonably specifies from time to time but any such dates, milestones and/or timelines are estimates only and Zuhlke will not be liable for any delay or failure to perform in accordance with them.
- (b) Further services in connection with the Services may be requested by the Client from time to time and shall be provided by Zuhlke subject to written agreement and amendment of the relevant Work Order. Save to the extent the parties expressly agree otherwise in writing, such additional services shall be subject to these terms and conditions and be incorporated within the Services.

3 Client Obligations

- (a) Zuhlke will invoice the Client monthly in arrears in accordance with the charging basis set out in the Work Order. Invoices issued from Zuhlke to the Client shall be paid by the Client within a period of 30 days from the date of the invoice. Zuhlke will be entitled (without prejudice to any other right set out herein or applicable by law) to charge interest on overdue payments on a daily basis at the rate of 2% (two per cent) per annum above the prevailing (3-month) SIBOR rate from time to time until the date on which payment is received by Zuhlke (whether before or after any court judgment). The Client will not be entitled to set-off any payments against any debt owed to Zuhlke.
- (b) The Client shall have no right to dispute any payments due to Zuhlke. All payments made by the Client to Zuhlke under this Agreement shall be made to Zuhlke as specified in a Work Order without any set-off, counterclaim or condition and free and clear of all present and future taxes, deductions or withholdings of any nature whatsoever.
- (c) The Client shall promptly and free of charge provide Zuhlke with all such assistance from time to time in connection with the performance of the Services as Zuhlke may reasonably require and as otherwise set out in the Work Order, including the provision of adequate and appropriately skilled and qualified staff resources. The Client will procure at all times that its employees, agents, contractors and suppliers cooperate fully with Zuhlke and do not delay or inhibit Zuhlke from providing the Services in any way or from performing its obligations under this Agreement. The Client will ensure the health and safety of any officer, employee, agent or sub-contractor of Zuhlke at all times when any such person is on premises, owned, managed or otherwise under the control of the Client.
- (d) The Client agrees and abides to the fact that Zuhlke's ability to provide the Services and perform its obligations under this Agreement is dependent on the Client fulfilling certain tasks. In particular, the Client shall have the following obligations:
 - (i) provide Zuhlke with all information needed to fulfil the Agreement in a timely manner or upon Zuhlke's request;
 - (ii) cooperate in the project organization;
 - (iii) perform any Client responsibilities identified in the Work Order in accordance with good industry practice within any agreed timescales or, if none, as soon as reasonably possible;
 - (iv) appoint a person responsible for the project who has the required skills and capacity and who may only be replaced for good reasons with the consent of Zuhlke;
 - (v) evaluate and procure licenses to any pre-existing rights of third parties, including in particular copyrights, patent, trademark and design rights, if this task is not expressly assigned to Zuhlke in the Agreement;
 - (vi) comply with the terms of any applicable third party licenses;
 - (vii) perform regular data backups;

- (viii) inform Zuhlke of regulatory requirements and specific technical standards, provided that the provision of this information is not expressly assigned to Zuhlke in the Agreement; and
 - (ix) obtain and maintain all necessary licenses, consents, and permissions to enable Zuhlke working in conjunction with the Client to perform their respective roles, responsibilities, obligations and duties under this Agreement.
- (e) Zuhlke shall have no liability for any failure to perform any Services or provide any related deliverables or further carry out its obligations under this Agreement and shall not be in breach of this Agreement if Zuhlke is prevented, hindered or delayed in doing so as a result of any failure by the Client to comply with its obligations set out inter alia in the preceding paragraphs or a Work Order or due to any other act or omission of the Client or its personnel.

4 Ownership

- (a) All materials (including without limitation) training course materials, data, information and records (in whatever form, material or otherwise) (collectively «Material») and all intellectual property rights connected with the Services, including without limitation any copyright, registered or unregistered trademarks, service marks, topography rights, patents, registered or unregistered designs, database rights, confidential information or process and know-how, and any applications for any of the above, and any other intellectual property rights recognised anywhere in the world, whether or not presently existing, and in each case all goodwill attaching thereto, either vest in Zuhlke (subject to the provisions of the following paragraph) or are licensed from third parties to Zuhlke.
- (b) The intellectual property rights in all Material specifically created by Zuhlke for the Client in the performance of the Services and which are free and clear of any third party ownership or lien shall vest in the Client upon receipt by Zuhlke of payment of all valid Zuhlke invoices in respect of the applicable Work Order (collectively «Client Material»). Such vesting shall not imply or grant any right which is subject to a third party patent right. The Client expressly acknowledges that such vesting is subject to all third party patent rights or rights to apply for a patent (whether existing at the date of this Agreement or in the future) and that the Client must rely on its own searches and investigations in relation to such rights.
- (c) The Client hereby grants Zuhlke a perpetual, irrevocable, royalty-free, sub-licensable and worldwide license to use, modify and adapt all such Client Materials and intellectual property rights vesting in the Client Material for Zuhlke's internal business purposes as Zuhlke sees fit (in its sole and absolute discretion), taking into account the obligation of confidentiality. In addition, Zuhlke will be free to use its general knowledge, skills and experience, and any ideas, concepts, know-how, methodologies and techniques that are acquired or used in the course of providing the Services and/or Client Material.
- (d) The contents of all reports, documents, specifications, presentations, software, materials and documentation prepared, made or written by or on behalf of Zuhlke for or to the Client, all advice given by Zuhlke to the Client, all the methodologies used by Zuhlke in working for the Client and the results of the work done by Zuhlke for the Client, in each case howsoever recorded in any form, material or otherwise, are for the use of the Client only and the Client will not use them for any purpose other than for the Services as contemplated by and in accordance with the Agreement.

5 IP Indemnity

- (a) Subject to the provisions of this clause 5, Zuhlke will defend or fully settle, at its sole election and expense, any unrelated third party claim against the Client alleging that the deliverables supplied by Zuhlke infringe the intellectual property rights, except in relation to patent claims, of any such third party. In the event that any damages are finally awarded against the Client in respect of such a claim by a court of competent jurisdiction, or are agreed by Zuhlke in final settlement, these will be compensated by Zuhlke in such cases where the task to evaluate such pre-existing rights have been explicitly assigned to Zuhlke in accordance with paragraph 3(d)(v).
- (b) The Client will indemnify and keep indemnified Zuhlke and its respective officers, employees, contractors, agents, members, and successors in interest, on written demand against any losses and any other liability arising from, in connection with or in relation to any action, proceeding, claim or demand relating to any claim or allegation that Zuhlke's use of any software, documents, data, plans, strategies, graphics, artworks or any other products, material or information provided to Zuhlke by the Client infringes the intellectual property rights of any unrelated third party.
- (c) The respective indemnities set out in the preceding paragraphs are subject to the indemnified party («the Indemnified Party»):
- (i) promptly notifying the indemnifying party («Indemnifying Party») of any such potential claim («IP Claim»);
 - (ii) (upon the Indemnifying Party's request) lending the Indemnifying Party reasonable assistance in the defense of such IP Claim at the Indemnifying Party's reasonable cost;
 - (iii) the Indemnifying Party being authorised to conduct the defense and/or settlement of such claim provided that the Indemnifying Party shall neither undertake nor permit anything to be undertaken which may damage the reputation or standing of the Indemnified Party without first obtaining the prior consent of the Indemnified Party (not to be unreasonably withheld or delayed); and
 - (iv) not making any admission of liability or other prejudicial statement and not agreeing to any settlement or compromise.
- (d) Zuhlke shall have no liability for any claim of infringement of intellectual property rights and no liability under the indemnity referred to in paragraph 5(a):
- (i) if the infringement or claimed infringement is the result of:
 - (1) the Client's modification or misuse of the relevant deliverable (by reference to the relevant feature or specification),
 - (2) the Client's provision of deliverables to a third party,
 - (3) the Client's failure to use enhancements or modifications offered by Zuhlke to avoid infringement,
 - (4) the use of the deliverables in association or combination with any other product, or
 - (5) the deliverables having been provided, supplied or created pursuant to a design, specification and/or instruction given by the Client;
 - (ii) caused by the Client's use of any version of software other than the latest version supplied by Zuhlke, if such claim could have been avoided by the use of such supplied version; or
 - (iii) caused by Zuhlke's use of any software, material, information, data, know-how, instructions or scripts provided by the Client that contain any errors or omissions.
- (e) If use of any deliverable or service by the Indemnified Party becomes or, in the opinion of the Indemnifying Party, is likely to

become the subject of an IP Claim, the Indemnifying Party may at its expense and option:

- (i) modify the deliverable or service as necessary to avoid any infringement, provided that the deliverable or service (as amended) functions in substantially the same way as the deliverable or service prior to modification; or
- (ii) obtain for the Indemnified Party entity the right to use such deliverable or service in accordance with this Agreement; or
- (iii) replace all or part of the deliverable or service with functionally equivalent deliverables or documentation without any degradation in performance; or
- (iv) (where Zuhlke is the Indemnifying Party) initiate the return of software and refund to the Client the element of the charges paid for such software less a reasonable amount for the Client's use of the software up to the time of return.

6 Termination

- (a) Zuhlke may suspend or terminate provision of any or all of the Services forthwith upon notice in writing to the Client if
 - (i) the Client fails to pay any sum due to Zuhlke from time to time under the terms of the Agreement and that sum remains unpaid for 30 (thirty) days following written notice from Zuhlke that the sum has not been paid; or
 - (ii) the Client commits any material or persistent breach of any term of the Agreement and (in the case of a breach which is capable of being remedied) has failed to remedy such breach, within 30 (thirty) days after the receipt of a request in writing from Zuhlke to do so.
- (b) Either party may immediately terminate the Agreement upon notice in writing to the other party if the said other party has a receiver or administrative receiver appointed over it or any of its undertakings or assets, or if it passes a resolution for winding-up (other than for the purposes of a bona fide scheme of solvent amalgamation or reconstruction), or if a court of competent jurisdiction makes an order to that effect, or if it becomes subject to an administration order or enters into any voluntary arrangement with its creditors, or if any similar process to any of the above is begun, or if it ceases or threatens to cease to carry on any substantial part of its business.
- (c) The Client may terminate any Services immediately after:
 - (i) giving notice in writing to Zuhlke if Zuhlke commits any breach of any term of the Agreement; and additionally
 - (ii) (in the case of a breach capable of being remedied) has failed to remedy such breach within 30 (thirty) days after receipt of a request in writing from the Client to do so.
- (d) Any suspension or termination of a Service (however it happens) will not affect any accrued rights or liabilities of either party. Nor will it affect the coming into force or the continuing in force of any provision of the Agreement which is expressly or by implication intended to come into or continue in force on or after the termination or expiry of that Service.

7 Client Warranties

The Client warrants to Zuhlke that:

- (a) no data, information or material of any kind (including without limitation any software) supplied or made available from time to time by or on behalf of the Client to Zuhlke or for Zuhlke's use will breach any applicable data protection legislation or guidelines;
- (b) it will comply with all applicable data protection legislation or guidelines in relation to its use, processing and disclosure of personal data in connection with this Agreement; and

- (c) it has obtained all consents and made all disclosures required under applicable data protection legislation or guidelines in respect of personal data relating to this Agreement.

8 Zuhlke Warranty and Liability

8.1 Warranty

- (a) Zuhlke warrants that it will perform the Services with reasonable skill and care in a timely and professional manner. In the event that the Client, in the thirty day period following performance of the related Services by Zuhlke, notifies Zuhlke in writing that the performance of the Services is not in accordance with the warranty set out in the preceding sentence, the Client's sole and exclusive remedy for breach of the warranty is that Zuhlke shall re-perform such Services, at Zuhlke's expense, such that they conform so far as reasonably possible to the foregoing warranty.
- (b) Zuhlke gives no representation or warranty that all errors, defects or deficiencies can be corrected or remedied.
- (c) All terms, conditions, representations and warranties, express or implied, not set out in the Agreement are, to the fullest extent permitted by law, excluded from applying to the Agreement, including without limitation implied warranties, terms and conditions as to performance, fitness for purpose, title, non-infringement, merchantability and satisfactory quality.
- (d) Where a third party product or open source software is a component of the Services, the license provisions of the third party manufacturer or the applicable open source license shall apply to such third party product.

8.2 Liability

- (a) Except as expressly set out in this Agreement, Zuhlke's aggregate liability to the Client (including to any person claiming under or through the Client) arising out of or in connection with this Agreement (including under an indemnity) shall not exceed 100% of the aggregate fees paid by the Client under the Agreement during the one year period immediately prior to the date on which the first cause of action giving rise to a claim occurs under this Agreement or the relevant Work Order. In addition, Zuhlke will be liable for direct loss of or damage to the tangible property of the Client to the extent the same has been caused directly by the negligence of Zuhlke (or its employees or agents acting in the course of their employment or agency), provided that Zuhlke's liability for any such loss or damage will be limited to the sum of HKD50,000 in aggregate.
- (b) Zuhlke will not be liable to the Client or any third party in contract or in tort (including without limitation negligence) or in any other way whatsoever for any loss of profit, loss of goodwill, loss of business or revenue, loss of anticipated savings, loss of opportunity, loss or spoiling of data, loss of use of any software or equipment or (without prejudice to the specificity of the aforementioned) any special, indirect or consequential loss or damages arising out of or in connection with any act or omission of Zuhlke in connection with this Agreement or due to any defect, deficiency or error in any Service, deliverable, equipment, software or in any associated material or documentation, or for any failure or interruption of any telecommunications facilities or network systems loss, whether or not of a kind foreseeable by Zuhlke.
- (c) The limitations and exclusions of liability in paragraphs 8.2(a) and 8.2(b) above do not apply to Zuhlke's liability in respect of death or personal injury caused by the negligence of Zuhlke or of its employees acting in the course of their employment or in respect of any fraudulent misrepresentation made by or on behalf of Zuhlke, as to each of which Zuhlke's liability will be unlimited.

- (d) WITHOUT PREJUDICE TO THE GENERALITY OR OTHERWISE OF THIS CLAUSE, ZUHLKE WILL NOT BE LIABLE TO THE CLIENT FOR ANY LOSS OR DAMAGE ARISING OUT OF:
- (i) ANY FAILURE BY THE CLIENT TO KEEP FULL AND UP-TO-DATE BACKUP COPIES OF THE COMPUTER PROGRAMS AND DATA WHICH IT USES,
 - (ii) ANY FAILURE BY THE CLIENT TO COMPLY WITH ANY TECHNICAL PREREQUISITES SPECIFIED FROM TIME TO TIME BY THE LICENSOR OF ANY SOFTWARE OR THE MANUFACTURER OF ANY EQUIPMENT,
 - (iii) ANY ERROR OR INCOMPLETENESS IN THE DATA, INFORMATION OR OTHER MATERIAL SUPPLIED FROM TIME TO TIME BY THE CLIENT,
 - (iv) ANY FAULT IN ANY MEDIA USED BY THE CLIENT,
 - (v) ANY DELAY OR FAILURE ON THE PART OF THE CLIENT TO PROVIDE ANY DATA, INFORMATION OR MATERIAL TO ZUHLKE,
 - (vi) ANY DELAY OR FAILURE ON THE PART OF THE CLIENT TO NOTIFY ZUHLKE OF ANY ERROR IN ANY OUTPUT OR OF ANY ACTUAL OR SUSPECTED FAILURE OF, OR ERROR OR DEFECT IN THE BUSINESS SYSTEMS,
 - (vii) LOSS OR DAMAGE INCURRED OR SUFFERED BY ANY PERSON IN ANY WAY WHATSOEVER AS A RESULT OF ANY USE OR APPLICATION OF DELIVERABLES WHICH MAY BE MADE BY THE CLIENT OR ANY OTHER THIRD PARTY; OR
 - (viii) ANY DELAY OR FAILURE ON THE PART OF ANY SERVICES, HARDWARE OR SOFTWARE SUPPLIER OR MAINTAINER TO CORRECT ANY FAULT OR DEFECT OR TO PROVIDE ANY OTHER SERVICE.
- (e) Without prejudice to the generality of the foregoing, the Client agrees that the responsibility for ensuring that any Service provided by Zuhlke is adequate for the Client's purposes rests entirely with the Client.

9 Confidentiality

- (a) Each party agrees not to, without the written consent in each case of the other party, disclose any non-public information in any form obtained by a party pursuant to the Agreement, whether orally, in writing or otherwise, including without limitation any trade secrets, processes, data, information, material or documents in whatever form (material or otherwise) relating to the administration, business, finances, operations, plans or intentions of the other party, together with all information derived from any such information and any other information clearly designated by the disclosing party as being confidential to it (whether or not it is marked «confidential»), or which shall reasonably be considered to be confidential («Confidential Information») regarding the said other party to any third party or use Confidential Information for any purpose whatsoever other than the purpose for which such Confidential Information was provided and as contemplated by the Agreement. Parent companies and subsidiary companies of a party and (in the case of Zuhlke only) third party subcontractors under paragraph 11(b) are not considered third parties for the purposes of this paragraph.
- (b) Each party will procure that each of its employees and agents who may be exposed to such Confidential Information is aware of their obligations to keep such information confidential.
- (c) Notwithstanding the aforementioned, each party may disclose such Confidential Information pursuant to any applicable law or court order or governmental or regulatory request; and to its legal, accounting and other professional advisors to whom the provision

of such information is necessary to ensure the proper performance of this Agreement, provided in each instance that the parties to whom such disclosure is made undertake that they shall abide by confidentiality obligations no less restrictive than those set out herein. The confidentiality provisions of this Clause shall not extend to information which is publicly known, or which becomes publicly known, otherwise than as a result of breach of this Clause, known to the receiving party without an obligation of confidentiality attaching to it, independently developed by the receiving party (as to which the burden of proof shall be on the party claiming such independent development), or rightfully obtained by the receiving party from a third party free lawfully to disclose the information to the receiving party without any obligation of confidentiality attaching to its further disclosure.

10 Data

- (a) Zuhlke shall be the data user with regard to the data of the Client (the «Client Data»). All Client Data shall solely belong to the Client.
- (b) Zuhlke undertakes to process the Client Data solely on behalf of the Client and in accordance with the Personal Data (Privacy) Ordinance (Cap. 486 of the laws of Hong Kong).
- (c) For this purpose, Zuhlke may employ the services of accordingly qualified third parties.
- (d) The return of any Client Data may be requested by the Client at any time. The Client may furthermore at any time by way of written notice request that Zuhlke deletes the Client Data as far as reasonably practical with regard to technical backup procedures and in accordance with legislative provisions obliging respective storage.

11 General

- (a) During the time of the Agreement and for a time period of one year after the completion thereof, the Client and Zuhlke hereby declare and agree that they will not mutually canvass any persons in the service or occupation of the other party who contributed to the Services and will not solicit such persons for employment provided this will not prevent either party from making appointments resulting from unsolicited approaches or approaches following general advertising campaigns.
- (b) Zuhlke may subcontract the provision of all or any part of the Services or any other obligations of Zuhlke under this Agreement to third party subcontractors without the Client's consent, provided that Zuhlke shall remain responsible for the Services and obligations performed by the third party subcontractors to the same extent as if those Services and obligations were performed by Zuhlke.
- (c) Any notice permitted or required to be provided pursuant to the Agreement may be delivered by e-mail (except in relation to disputes), personally or by registered mail or, in each case to the address of the recipient set out in the Work Order, unless that information has been updated by written notice from one party to the other in accordance with this Clause. Any notice delivered by hand shall be deemed to have been delivered when received. Any notice delivered by registered mail shall be deemed to have been delivered on the day its receipt is acknowledged by signature by or on behalf of the intended recipient. Any notice delivered by e-mail shall be deemed to have been delivered on the day of transmission (in the jurisdiction of the recipient), as evidenced by a read receipt from the recipient's e-mail.
- (d) The Client may not assign, sublicense or otherwise transfer, in whole or part, any of its rights or obligations under the Agreement without the prior written consent of Zuhlke. Save as otherwise provided herein, Zuhlke may assign, sublicense or otherwise transfer

in whole or part any of its rights or obligations under the Agreement without the prior written consent of the Client.

- (e) This Agreement and any documents to which it refers contains and sets out the entire agreement and understanding of the parties relating to the subject matter hereof and supersedes all prior oral or written agreements, understandings or arrangements relating to the subject matter of this Agreement. The Client warrants to Zuhlke that it has not been induced to enter into the Agreement by any warranties or representations except those expressly contained in the Agreement. The Client waives any claim for breach of any representation and for any misrepresentation, save in respect of any fraudulent misrepresentation.
- (f) Neither party will be liable for any delay or failure in performing its obligations under the Agreement (except an obligation to make payment) if that delay or failure is caused by circumstances beyond its reasonable control, and the party so delaying will be entitled to a reasonable extension of time for the performance of its obligations.
- (g) The Agreement may be varied, amended or replaced only by a document signed by both parties. Notwithstanding the foregoing, changes to Services of minor importance may be agreed upon in meetings of project committees, through the exchange of e-mails or in a similar manner.
- (h) No failure by either party to enforce any rights hereunder shall constitute a waiver of such right then or in the future. Any waiver of any term of this Agreement shall be effective only in the instance and for the purpose for which it is given. No breach of any provision of this Agreement shall be waived or discharged except with the express written consent of the party not in breach. The rights and remedies herein provided are cumulative with, and not exclusive of any rights or remedies provided by law.
- (i) If any provision of the Agreement for any reason is or becomes invalid, illegal or unenforceable in any respect under the law of any jurisdiction, the validity, legality and enforceability under the law of that (and that of any other) jurisdiction of any other provision, shall not be affected or impaired in any way thereby.
- (j) The Agreement shall be governed by and construed in accordance with the laws of Hong Kong, and the parties irrevocably submit to the exclusive jurisdiction of the Hong Kong Courts.
- (k) Unless expressly stated otherwise, this Agreement does not give rise to any rights to a third party to enforce any term of the Agreement (including under any Work Order). The rights of the parties to rescind or amend this Agreement are not subject to the consent of any third party.
- (l) If a party considers that a dispute arising out of or in connection with this Agreement has occurred:
 - (i) that party must serve a written notice on the other party notifying it of the relevant dispute; and
 - (ii) following the other party's receipt of the dispute notice, each party's appointed representatives shall promptly meet with a view to resolving the dispute.Should the parties be unable to reach an acceptable solution to the dispute within the maximum timeframe of 40 (fourty) days following the written notification, either party may initiate court proceedings in accordance with preceding paragraph 11(j).
- (m) Nothing in paragraph 11(l) will prevent or delay either party from:
 - (i) seeking orders for specific performance, interim or final injunctive relief; or
 - (ii) exercising any rights it has to terminate this Agreement.