

Software-Nutzungsbedingungen Hoffrogge GmbH

§ 1 Geltung dieser Nutzungsbedingungen

1. Die nachstehenden Nutzungsbedingungen gelten für von der Hoffrogge GmbH (nachstehend: „Hoffrogge“), Am Spascher See 2, 27793 Wildeshausen, ihren Vertragspartnern (nachstehend: „Kunden“) die jeweils vereinbarungsgemäß zum Gebrauch überlassene Software Data Manager, Range Finder®, Range Adapter®, Shelf Maker®, Store Maker® und/oder Mobile App Shopper Activation Mobile (SAM® / mySAM®) sowie die jeweils vereinbarungsgemäß zum Gebrauch zugänglich gemachten, web-basierten Anwendungen KPI-Cockpit und Query Builder (nachfolgend sämtlich auch einheitlich „Lizenz-Software“).
2. Die nachstehenden Bedingungen gelten ausschließlich im Geschäftsverkehr mit Unternehmern, d.h. natürlichen oder juristischen Personen oder rechtsfähigen Personengesellschaften, die bei Abschluss des Vertrags in Ausübung ihrer gewerblichen oder selbstständigen Tätigkeit handeln (§ 14 Abs. 1 BGB), sowie ferner für juristische Personen des öffentlichen Rechts und öffentlich-rechtliche Sondervermögen. Sie gelten nicht für Verbraucher im Sinne des § 13 BGB.
3. Von diesen Nutzungsbedingungen abweichende Vereinbarungen sind nur wirksam, sofern sie schriftlich von uns besonders bestätigt werden.
4. Hoffrogge ist berechtigt, diese Software-Nutzungsbedingungen zu ändern. Änderungen dieser Software-Nutzungsbedingungen werden dem Kunden mindestens sechs Wochen vor ihrem Inkrafttreten schriftlich oder in Textform (z.B. per E-Mail) unter Angabe von Inhalt und Zeitpunkt der Vertragsänderung sowie dem nachfolgend beschriebenen Kündigungsrecht mitgeteilt. Ändert Hoffrogge diese Software-Nutzungsbedingungen einseitig, kann der Kunde den Vertrag ohne Einhaltung einer Kündigungsfrist und ohne Kosten kündigen, es sei denn, die Änderungen sind
 - a) ausschließlich zum Vorteil des Kunden,
 - b) rein administrativer Art (einschließlich solcher im Sinne des § 3 Ziff. 7) und haben keine negativen Auswirkungen auf den Kunden oder
 - c) aufgrund gesetzlicher Änderungen erforderlich.Die Kündigung kann innerhalb von drei Monaten ab dem Zeitpunkt erklärt werden, in dem die Unterrichtung von Hoffrogge über die Änderung dieser Software-Nutzungsbedingungen dem Kunden zugeht. Der Vertrag kann durch die Kündigung frühestens zu dem Zeitpunkt beendet werden, zu dem die Vertragsänderung wirksam werden soll.

§ 2 Nutzungsrechtseinräumung an der Lizenz-Software

1. Hoffrogge räumt dem Kunden an der jeweils vertragsgegenständlichen, dem Kunden überlassenen und/oder zugänglich gemachten Lizenz-Software ein einfaches (nicht ausschließliches), zeitlich auf die vereinbarte Nutzungsdauer beschränktes, nicht übertragbares und nicht sublizenzierbares Recht zur Nutzung für eigene unternehmensinterne Zwecke des Kunden ein. Alle Datenverarbeitungsgeräte, auf denen und/oder über welche die Lizenz-Software genutzt wird, müssen sich in unmittelbarem Besitz des Kunden befinden. Die Benutzungsmöglichkeit darf jeweils höchstens an der vertraglich vereinbarten Anzahl von Arbeitsplätzen zur Verfügung stehen. Nutzungsberechtigt ist ausschließlich die jeweils vereinbarte Anzahl vom Kunden namentlich benannter Nutzer („Named User“) oder – wenn und soweit die Nutzung durch nicht benannte gleichzeitige Nutzer („Concurrent User“) ausdrücklich vereinbart ist – die vereinbarte Anzahl von Concurrent Usern. Entsprechende Named User und Concurrent User dürfen nur natürliche Personen sein, die mit dem Kunden in einem Dienst-, Arbeits- oder Ausbildungsverhältnis stehen. Hoffrogge stellt dem Kunden für die jeweils vereinbarte Zahl von Nutzern eine Zugangsmöglichkeit in Form persönlicher Zugangsdaten zur Verfügung.
2. Die dem Kunden eingeräumten Nutzungsrechte an ihm überlassener Lizenz-Software beschränken sich jeweils auf die Lizenz-Software im Objekt-Code und umfassen nicht das Recht, Abänderungen, Bearbeitungen oder andere Umgestaltungen der Lizenz-Software vorzunehmen. Unzulässig ist insbesondere die Rückübersetzung des überlassenen Programm-Codes in andere Code-Formen (Dekompilierung) sowie sonstige Arten der Rückerschließung der verschiedenen Herstellungstufen der Lizenz-Software (Reverse-Engineering); § 69e UrhG bleibt, soweit nicht abdingbar, unberührt.
3. Überlässt Hoffrogge dem Kunden Nachbesserungen (z.B. Patches oder Updates) oder eine neue Version der Lizenz-Software (z.B. Upgrades auf neue Versionen), die die zuvor überlassene Lizenz-Software ersetzen, unterliegen entsprechende Nachbesserungen/neue Versionen diesen Nutzungsbedingungen. Stellt Hoffrogge dem Kunden Nachbesserungen/neue Versionen der Lizenz-Software zur Verfügung, so erlöschen in Bezug auf die jeweilige Vorversion die Nutzungsrechte des Kunden auch ohne ausdrückliches Rückgabeverlangen von Hoffrogge, sobald der Kunde die neue Lizenz-Software installiert, spätestens jedoch binnen zwei Wochen seit Überlassung der jeweiligen Nachbesserung/neuen Version, die daher jeweils unverzüglich vom Kunden zu installieren ist, soweit nicht eine automatische Aktualisierung erfolgt.
4. Der Kunde hat keinen Anspruch auf Überlassung oder Zugänglichmachung (Download) von Vervielfältigungsstücken der web-basierten Lizenz-Software Shelf Organiser®, KPI-Cockpit und Query Builder. Web-basierte Lizenz-Software wird für die jeweils vereinbarten Benutzer stets nur über das Internet zum Gebrauch über aktuelle handelsübliche, auf Client-Rechnern des Kunden installierte Webbrowser zugänglich gemacht und setzt die ordnungsgemäße Anmeldung der jeweiligen Benutzer voraus.
5. Die dem Kunden jeweils vereinbarungsgemäß zum Gebrauch zu überlassende Software Range Finder®, Range Adapter, Shelf Maker® und/oder Store Maker® wird Hoffrogge dem Kunden jeweils auf handelsüblichem Datenträger oder zum Download zur Installation auf entsprechenden Client-Rechnern für die jeweils vereinbarte Anzahl von Named- oder ggf. Concurrent-Usern überlassen. Entsprechendes gilt für die ggf. vertragsgegenständliche Mobile App SAM® / mySAM® von Hoffrogge, die dem Kunden zur Installation auf der jeweils vereinbarten Zahl und Art mobiler Endgeräte für die vereinbarten Nutzer überlassen wird.
6. Mit der Einräumung von Nutzungsrechten an der Lizenz-Software erwirbt der Kunde weder an dieser noch an ggf. sonst von Hoffrogge überlassenen und/oder zugänglich gemachten Inhalten, Daten und sonstigen Materialien irgendwelche Ausschließlichkeitsrechte (Exklusivrechte). Alle Urheberrechte und sonstigen Rechte an der Lizenz-Software sowie jeglichen Inhalten, Daten und sonstigen Materialien von Hoffrogge bleiben vorbehalten.
7. Von Hoffrogge überlassene Unterlagen zur Benutzung der Lizenz-Software dürfen nur für betriebsinterne Zwecke kopiert und genutzt werden.
8. Zusammen mit der Überlassung von Lizenz-Software, die dem Kunden zur Installation auf dessen Rechnern überlassen wird, werden ggf. auch solche Fremd-Software-Komponenten überlassen, die in Anlage A nebst den für diese jeweils anwendbaren Lizenzbedingungen jeweils im Einzelnen in Anlage B aufgeführt sind. Die in der Anlage B enthaltenen Lizenzbedingungen gehen in ihrem Anwendungsbereich solchen Bestimmungen dieser Hoffrogge-Lizenzbedingungen vor, deren Geltung anderenfalls der Nutzung der entsprechenden Fremd-Software-Komponenten durch den Kunden entgegenstehen oder diese ausschließen würde. Für die Änderung der Anlagen A und B durch Hoffrogge infolge von Änderungen der Verwendung neuer oder geänderter Drittsoftwarekomponenten oder des Wegfalls solcher Komponenten gilt § 1 Ziff. 4.

9. Von den Nutzungsrechten nach vorstehenden Bestimmungen nicht umfasst und dem Kunden ausdrücklich untersagt ist jede Nutzung der Lizenz-Software zu Zwecken der Entwicklung, der Verbesserung, des Trainings, des Betriebs oder sonstigen Nutzung von KI-Systemen im Sinne des Art. 3 Nr. 1 KI-VO (Verordnung (EU) 2024/1689), insbesondere generativen Sprachmodellen, oder durch solche, insbesondere zur Analyse der Lizenz-Software. Ebenso untersagt ist die Anfertigung von Vervielfältigungen der Lizenz-Software für das Text und Data Mining i.S.d. § 44b UrhG; entsprechende Rechte bleiben ausdrücklich vorbehalten. Diese Verbote gelten in gleicher Weise für die Nutzung jeglicher sonstigen Urheber- oder gewerblichen Schutzrechten von Hoffrogge unterliegenden digitalen oder digitalisierten Gegenständen und Leistungen. Für jeden Fall der Verletzung der vorstehenden Verbote verwirkt der Kunde eine von Hoffrogge nach billigem Ermessen festzusetzende und im Streitfall vom zuständigen Gericht auf die Angemessenheit zu überprüfende Vertragsstrafe. Weitergehende Ansprüche von Hoffrogge bleiben unberührt.

§ 3 Leistungsbeschreibungen, Verfügbarkeit

1. Die Eigenschaften der jeweils vertragsgegenständlichen Lizenz-Software von Hoffrogge sowie die Anforderungen an die vom Kunden jeweils einzusetzende, dem aktuellen Stand der Technik entsprechende Systemumgebung (Hardware, Betriebssystem-Software, ggf. Anwendungs-Software Dritter, Browser-Versionen und dgl.) ergeben sich aus den von Hoffrogge zum Zeitpunkt des jeweiligen Vertragsabschlusses über deren Lizenzierung maßgeblichen Leistungsbeschreibungen. Unberührt bleiben Rechte von Hoffrogge zu Änderungen der Lizenz-Software nach Ziff. 7.
2. Web-basierte Lizenz-Software von Hoffrogge ist durchgehend 24 Stunden, sieben Tage die Woche einsatzfähig mit einer Verfügbarkeit von 99 % im Jahresmittel. Entsprechendes gilt für Systeme von Hoffrogge, die ggf. vertragsgemäß zum Fernzugriff (z.B. Bereitstellung des Internet-basierten Dienstes „CM Toolkit Web-Service“ unter der Adresse <https://cmtoolkit.hoffrogge.com>) durch den Kunden über andere als web-basierte Lizenz-Software bereitgestellt werden. Hiervon ausgenommen sind Ausfallzeiten durch Wartung und Software-Updates, temporäre Nicht-Verfügbarkeiten aufgrund von Sicherheitsmaßnahmen des Security Operations Center (SOC) von Hoffrogge bei bestätigten oder hochverdächtigen Sicherheitsvorfällen sowie Zeiten, in denen die Plattform auf Grund von technischen oder sonstigen Problemen, die nicht von Hoffrogge verursacht wurden, wie insbesondere in Fällen höherer Gewalt, des Verschuldens Dritter, Störungen auf Seiten des internen Netzwerks oder des ISP (Internet Service Providers) des Kunden oder Einschränkung des Internet-Zugangs auf Computern des Kunden durch fehlerhafte Konfiguration oder durch nicht durch Hoffrogge installierte Software und Hardware-Komponenten (z.B. Firewall, Virens Scanner, VPN-Lösungen und andere) oder Nichterfüllung der von Hoffrogge definierten Systemvoraussetzung (z.B. Hardware-Eigenschaften, Betriebssystemversion und Internet-Browser-Version) über das Internet nicht zu erreichen ist. Als „erreichbar“ gilt eine generelle Verfügbarkeit des Server-Dienstes „<https://cmtoolkit.hoffrogge.com>“ über dem Internet über einen Computer, der für einen uneingeschränkten Internet-Zugriff und über einen handelsüblichen und dem Stand der Technik entsprechenden Browser (Google Chrome, Microsoft Edge, Firefox, Safari) eingerichtet ist. Die Erreichbarkeit gilt als gegeben, wenn Hoffrogge eine HTTPS-Anforderung über einen Client-Computer über das Internet an den Server von Hoffrogge senden kann, sofern die Anforderung entweder durch eine HTTPS-Antwortnachricht beantwortet wird oder wenn die Daten an eine für den Empfang vorgesehene Middleware-Anwendung weitergeleitet werden und dies jeweils innerhalb von nicht mehr als 120 Sekunden erfolgt. Dem Kunden bleibt der Nachweis vorbehalten, dass der Web-Service gleichwohl nicht erreichbar ist. Hoffrogge kann den Zugang zu web-basierten Leistungen vorübergehend einstellen oder beschränken, sofern die Sicherheit des Netzbetriebes, die Aufrechterhaltung der Netzintegrität, insbesondere die Vermeidung schwerwiegender Störungen des Netzes, der Interoperabilität der Dienste oder datenschutzrechtliche Anforderungen dies erfordern.
3. Unterbrechungen der Verfügbarkeit, Übertragungsverzögerungen und andere Fehler der webbasierten und sonstigen Lizenzprogramme, die Hoffrogge zu vertreten hat (nachfolgend "Störungen" genannt), sind wie folgt zu klassifizieren:
 - a) Unwesentliche Störungen:
 - Kosmetische Fehler (Rechtschreibfehler auf dem Bildschirm oder im Ausdruck, visuelle Fehler auf dem Bildschirm)
 - Geringe Unannehmlichkeiten (zusätzliche Mausklicks erforderlich, wenige Sekunden Wartezeit)
 - Fehler mit geringer Auswirkung (z. B. Anzeige fehlerhafter Werte bei korrekten Ergebnissen)
 - Fehler mit bestehenden Workarounds (Schritte zum Erreichen eines gewünschten Ziels mit zusätzlichen Mausklicks / Eingaben)
 - b) Wesentliche Störungen
 - Reproduzierbare Fehler in den Berechnungsergebnissen
 - Fehler bei der Erzeugung der Bildschirm- oder Druckausgabe
 - Unmöglichkeit der Öffnung einzelner Verkaufseinrichtungen zur Flächenoptimierung
 - Signifikante Leistungseinschränkungen (Wartezeiten von mehr als 2 Minuten bei einfachen Aufgaben, Wartezeiten von mehr als 30 Minuten bei Batch-Aufgaben (pdf-Erstellung))
 - c) Kritische Störungen:
 - Die Anwendung kann nicht gestartet werden
 - Die Anwendung stürzt ab (reproduzierbar)
 - Unmöglichkeit der Durchführung von wesentlichen Anwendungsfällen (Flächenoptimierung insgesamt unmöglich, Planogramme lassen sich nicht anzeigen usw.)
 - Reproduzierbare Fehler in den Berechnungsergebnissen
 - Der Webservice ist nicht erreichbar
4. Hoffrogge erbringt nur 2nd und 3rd Level-Support, d.h. Hoffrogge wird nur auf Störungen reagieren, die von einer begrenzten Anzahl benannter Key-User und Systemadministratoren gemeldet werden, die gesondert zwischen den Parteien vereinbart wurden. Hoffrogge wird auf Störungsmeldungen der jeweiligen Key-User / Systemadministratoren, die über das Hoffrogge Online Ticket System (verfügbar unter <https://support.hoffrogge.com/servicedesk>) während der üblichen Geschäftszeiten von Hoffrogge (Montag bis Freitag von 8.00 bis 17.00 Uhr MESZ, ausgenommen Feiertage in Niedersachsen und Samstage, nachfolgend "Servicezeiten" genannt) eingehen, innerhalb der folgenden, über die Servicezeiten zu berechnenden Fristen reagieren:
 - a) Unwesentliche Störungen: Zwei Werktage
 - b) Wesentliche Störungen: Ein Werktag
 - c) Kritischen Störungen: Vier Stunden
5. Störungen von anderer als webbasierter Lizenz-Software (z. B. lizenzierte Software, die auf Client-Computern des Kunden installiert oder auf Servern des Kunden gehostet wird) werden durch Überlassung von zur Störungsbeseitigung erforderlicher Patches, Bug Fixes, Betafixes, Betaupdates, Service Packs, Updates oder anderen neuen Versionen behoben. Die Überlassung erfolgt nach Wahl von Hoffrogge per E-Mail, durch Zurverfügungstellung zum Download oder durch Überlassung auf handelsüblichen Datenträgern.

6. Der Kunde hat nach besten Kräften an der Störungsermittlung und -beseitigung mitzuwirken. Diese Mitwirkungsverpflichtung beinhaltet insbesondere (i) die Verpflichtung, Hoffrogge unverzüglich über alle Störungen zu unterrichten und so detailliert wie möglich die Symptome der jeweiligen Störung zu beschreiben, (ii) den Vorgaben von Hoffrogge bei der Störungsermittlung und -beseitigung nachzukommen, und (iii) Hoffrogge Änderungen an eigenen IT-Systemen zu melden, die in Verbindung mit Hoffrogges Webservice verwendet werden. Der Kunde muss einen eigenen technischen Ansprechpartner benennen, der Zugriff auf das betroffene Client-System (remote oder physisch) hat. Hoffrogge ist berechtigt, insbesondere folgende Informationen und Materialien anzufordern:
 - a) Störungsbericht mit detaillierter Beschreibung der Störung einschließlich:
 - Zeit und Datum
 - Benutzer
 - Plattform (OS, Version)
 - Ausgangsnummer (falls zutreffend)
 - Erwartetes Ergebnis
 - Tatsächliche Ergebnis
 - b) Netzwerktest: Hoffrogge kann verlangen, die Netzwerkkonnektivität unter Verwendung hierfür üblicher Mittel auf der Client-Plattform zu testen (z. B. Ping, Webbrowser usw.)
 - c) Bildschirmfotos, welche die Störung dokumentieren
 - d) Lokale Logfiles der Software, Übermittlung per E-Mail
7. Hoffrogge behält sich vor, Lizenz-Softwarekomponenten (einschließlich Drittsoftwarekomponenten) jederzeit zu ändern und/oder auszutauschen, soweit dies
 - a) zur Aufrechterhaltung der Vertragsgemäßheit der Lizenz-Software, insbesondere zur Fehlerbehebung oder aus Sicherheitsgründen,
 - b) zur Produktverbesserung, insbesondere zur Erhöhung der Nutzerfreundlichkeit oder der Leistungsfähigkeit der Lizenz-Software, oder
 - c) zur Einhaltung gesetzlicher Vorschriften
 erforderlich und für den Kunden mit keinen Mehrkosten verbunden ist.

§ 4 Anzeige-, Sicherungs- und Obhutspflichten des Kunden, Bild-, Artikel und Stammdaten, personenbezogene Daten, SAP-Datenaustausch

1. Der Kunde ist verpflichtet, Hoffrogge Fehler (Mängel, Störungen) der Lizenz-Software unverzüglich zu melden. Er wird hierbei die Hinweise von Hoffrogge zur Problemanalyse im Rahmen des ihm Zumutbaren berücksichtigen und alle ihm vorliegenden, für die Beseitigung des Mangels erforderlichen Informationen an Hoffrogge weiterleiten. Er hat insoweit insbesondere im Rahmen des Möglichen und Zumutbaren Fehlersymptome, Einsatzbedingungen, vorangegangene Eingaben und betroffene Arbeitsplätze mitzuteilen.
2. Der Kunde hat regelmäßige Sicherungen aller lizenzierten Programme und der von diesen verarbeiteten Daten nach dem jeweils aktuellen Stand der Technik durchzuführen, soweit diese nicht ausschließlich als Web-Anwendung auf Systemen von Hoffrogge gespeichert sind.
3. Der Kunde hat geeignete Vorkehrungen zu treffen, um ihm überlassene Lizenz-Software vor dem unbefugten Zugriff Dritter zu schützen. Er wird die Originaldatenträger und von ihm im Rahmen seiner allgemeinen Datensicherung erstellte Sicherungskopien der Lizenz-Software sowie die Dokumentation an einem gesicherten Ort verwahren. Er wird seine Arbeitnehmer und die sonstigen gem. § 2 Ziff. 1 zur unselbständigen Nutzung berechtigten Personen darauf hinweisen, dass die Anfertigung von Kopien über den vertragsmäßigen Umfang hinaus unzulässig ist.
4. Der Kunde steht dafür ein, dass von ihm zum Zwecke oder im Rahmen der Nutzung von Lizenz-Software oder der Inanspruchnahme sonstiger Dienste von Hoffrogge auf Systemen von Hoffrogge gespeicherten oder Hoffrogge in andere Weise übermittelten Bild-, Artikel-, Stammdaten oder andere Inhalte (nachstehend nur „Inhalte“) frei von Rechten Dritter sind. Der Kunde hält Hoffrogge von allen entgegenstehenden Rechten Dritter an entsprechenden Inhalten frei und erstattet Hoffrogge alle Schäden und Aufwendungen, die Hoffrogge aus einer Inanspruchnahme Dritter wegen der Verletzung der diesen zustehenden Rechte entstehen.
5. Die Lizenz-Software beinhaltet ggf. eine Autorisierung, die den Datenaustausch zwischen der Lizenz-Software und – soweit anwendbar – einem vom Kunden genutzten SAP-Cloud-Service oder einer SAP-Software ermöglicht, die der Kunde direkt bei SAP, SAP-verbundenen Unternehmen oder SAP-Wiederverkäufern abonniert oder lizenziert hat. Die Nutzung des SAP-Cloud-Services und/oder der SAP-Software durch den Kunden unterliegt der zwischen SAP, SAP-verbundenen Unternehmen oder SAP-Wiederverkäufern und dem Kunden geschlossenen Cloud-Service- oder Softwarelizenzvereinbarung („SAP-Vereinbarung des Kunden“). Hoffrogge selbst bietet SAP-Cloud-Services und SAP-Software weder an noch lizenziert diese, ist jedoch gegenüber SAP verpflichtet, sicherzustellen, dass die Übermittlung von Daten zwischen der Lizenz-Software und einem vom Kunden genutzten SAP-Cloud-Service oder einer SAP-Software im Einklang mit der SAP-Vereinbarung des Kunden einschließlich der SAP-Dokumentation erfolgt. Ist der Kunde SAP-Nutzer und ermöglicht die Lizenzsoftware einen Datenaustausch mit einem vom Kunden genutzten SAP-Cloud-Service oder einer SAP-Software, steht der Kunde daher Hoffrogge gegenüber im Wege des selbstständigen Garantieversprechens dafür ein, dass die Nutzung seines SAP-Cloud-Service bzw. seiner SAP-Software, insbesondere soweit sie einen Datenaustausch zwischen dem SAP-Cloud-Service bzw. der SAP-Software einerseits und der Lizenz-Software andererseits umfasst, im Einklang mit der SAP-Vereinbarung des Kunden einschließlich der SAP-Dokumentation erfolgt. Der Kunde hält Hoffrogge frei von allen Ansprüchen Dritter und erstattet Hoffrogge jegliche Schäden und Aufwendungen, die Hoffrogge aus einem Verstoß des Kunden gegen die SAP-Vereinbarung des Kunden entstehen.

§ 5 Rechte des Kunden bei Sachmängeln

1. Hoffrogge wird Mängel an der überlassenen Lizenz-Software einschließlich der Dokumentation beheben. Die Behebung von Mängeln erfolgt nach Wahl von Hoffrogge durch kostenfreie Nachbesserung oder Ersatzlieferung.
2. Eine Kündigung des Kunden gem. § 543 Abs. 2 Satz 1 Nr. 1 BGB wegen Nichtgewährung des vertragsgemäßen Gebrauchs ist erst zulässig, wenn Hoffrogge ausreichende Gelegenheit zur Mängelbeseitigung gegeben wurde und diese fehlgeschlagen ist. Von einem Fehlschlagen der Mängelbeseitigung ist erst auszugehen, wenn diese unmöglich ist, wenn sie von Hoffrogge verweigert oder in unzumutbarer Weise verzögert wird, wenn begründete Zweifel bezüglich der Erfolgsaussichten bestehen oder wenn aus anderen Gründen eine Unzumutbarkeit für den Kunden gegeben ist.
3. Beruht die Mangelhaftigkeit der Leistung auf dem Einsatz von Software/Programmen oder Leistungsbestandteilen, die Hoffrogge zum Zweck der Leistungsinanspruchnahme von Dritten erworben (bzw. lizenziert) hat, beschränken sich die Gewährleistungsrechte des Kunden auf den Umfang der Rechte, die Hoffrogge gegenüber den Dritten zustehen. Hoffrogge ist soweit möglich berechtigt, diese Rechte an den Kunden abzutreten.

4. Die Rechte des Kunden wegen Mängeln sind ausgeschlossen, soweit dieser ohne Zustimmung von Hoffrogge Änderungen an der Lizenz-Software vornimmt oder vornehmen lässt. Der Kunde ist nicht berechtigt, Fehler selbst zu beseitigen und Ersatz der hierfür erforderlichen Aufwendungen zu verlangen.
5. Erbringt Hoffrogge Leistungen bei Fehlersuche oder -beseitigung, ohne hierzu verpflichtet zu sein, so kann Hoffrogge hierfür eine Vergütung entsprechend ihrer üblichen Sätze verlangen. Das gilt insbesondere, wenn ein Mangel nicht nachweisbar oder Hoffrogge nicht zuzurechnen ist. Zu vergüten ist außerdem der Mehraufwand auf Seiten von Hoffrogge, der dadurch entsteht, dass der Kunde ihm obliegenden Mitwirkungspflichten nicht oder nicht ordnungsgemäß nachgekommen ist.

§ 6 Rechte des Kunden bei Rechtsmängeln

1. Hoffrogge wird den Kunden gegen alle Ansprüche verteidigen, die innerhalb der gesetzlichen Verjährungsfrist für Rechtsmängel aus einer Verletzung eines gewerblichen Schutzrechts oder Urheberrechts durch die vertragsgemäß genutzte Lizenz-Software hergeleitet werden. Für Schäden aufgrund von Rechtsmängeln, insbesondere dem Kunden gerichtlich auferlegte Kosten und Schadenersatzbeträge haftet Hoffrogge nur, sofern der Kunde Hoffrogge von solchen Ansprüchen unverzüglich schriftlich benachrichtigt hat und Hoffrogge alle Abwehrmaßnahmen und Vergleichsverhandlungen vorbehalten hat.
2. Sind gegen den Kunden Ansprüche gemäß Ziffer 1 geltend gemacht worden oder zu erwarten, kann Hoffrogge die Lizenz-Software auf eigene Kosten in einem für den Kunden zumutbaren Umfang ändern oder austauschen. Ist dies oder die Erwirkung eines Nutzungsrechts mit angemessenem Aufwand nicht möglich, richten sich die Rechte des Kunden nach der entsprechend anzuwendenden Bestimmung des § 5.
3. Hoffrogge hat keine Verpflichtungen, falls die Ansprüche gemäß Ziff. 1 auf vom Kunden bereitgestellten Programmen, Daten oder darauf beruhen, dass die Lizenz-Software nicht in einer gültigen, unveränderten Originalfassung oder unter anderen als den vertragsgemäßen Einsatzbedingungen genutzt wird.

§ 7 Haftungsbeschränkungen

1. Hoffrogge haftet für zu vertretende Schäden (einschließlich vergeblicher Aufwendungen) des Kunden - gleich aus welchem Rechtsgrund - nur, sofern die Schäden vorsätzlich oder grob fahrlässig verursacht wurden, sie die Folge des Nichtvorhandenseins einer garantierten Beschaffenheit der Leistung sind, sie auf einer schuldhaften Verletzung vertragswesentlicher Pflicht (siehe Ziff. 2) beruhen, sie die Folge einer schuldhaften Verletzung der Gesundheit, des Körpers oder Lebens sind oder für die eine Haftung nach dem Produkthaftungsgesetz vorgesehen ist. Im Falle einer lediglich fahrlässigen Verletzung einer wesentlichen Vertragspflicht (siehe Ziff. 2) ist die Haftung von Hoffrogge jedoch beschränkt auf solche Schäden, mit deren Entstehung im Rahmen der Erbringung der vereinbarten Leistungen typischerweise und vorhersehbar gerechnet werden muss. Diese Beschränkung gilt nicht, soweit Schäden die Folge einer Verletzung der Gesundheit, des Körpers oder des Lebens sind.
2. Wesentliche Vertragspflichten sind solche vertraglichen Pflichten, deren Erfüllung die ordnungsgemäße Durchführung des Vertrages überhaupt erst ermöglichen und auf deren Einhaltung der Kunde regelmäßig vertrauen darf, und deren Verletzung auf der anderen Seite die Erreichung des Vertragszwecks gefährdet.
3. Als vertragstypischer, vorhersehbarer Schaden gilt ein Schaden in Höhe des durchschnittlichen Jahresumsatzes des Kunden mit Hoffrogge (sollte die Vertragsbeziehung kürzer sein, ist dieser anhand der monatlichen 1/12 – ggf. taggleichen 1/30 – Umsatzkennwerte zu ermitteln).
4. Hoffrogge haftet, unbeschadet der in Ziff. 1 bis 3 genannten Fälle, nicht für entgangenen Gewinn, mittelbare Schäden, Mangelfolgeschäden und Ansprüche Dritter mit Ausnahme von Ansprüchen aus der Verletzung von Schutzrechten Dritter sowie nicht für auftretende Mängel, die im Zusammenhang mit einer durch den Kunden vorgenommenen oder sonst veranlassten Änderung der Leistungen von Hoffrogge oder sonstigen Fremdeinflüssen stehen, und die aus dem Risikobereich des Kunden stammen. Es obliegt dem Kunden nachzuweisen, dass auftretende Mängel nicht kausal auf einer Änderung der Systemumgebung oder sonstigen Fremdeinflüssen beruhen.
5. Im Übrigen ist die Haftung von Hoffrogge unabhängig vom Rechtsgrund ausgeschlossen.
6. Die Haftungsbeschränkungen gem. Ziff. 1 bis 5 gelten sinngemäß auch zu Gunsten der gesetzlichen Vertreter, Arbeitnehmer, freien Mitarbeiter und sonstigen Erfüllungs- bzw. Verrichtungsgehilfen von Hoffrogge.
7. Unberührt bleiben weitergehende Haftungsbeschränkungen und –ausschlüsse nach individuell zwischen Hoffrogge und dem Kunden geschlossenen Rahmen- und Einzelverträgen.

§ 8 Lizenzdauer, Beendigung des Lizenzverhältnisses

1. Soweit zwischen den Parteien nichts Abweichendes vereinbart ist, beginnt die initiale Vertragslaufzeit mit Überlassung bzw. Zugänglichmachung der jeweils vertragsgegenständlichen Lizenz-Software (das jeweils frühere Datum ist maßgebend) und endet mit Ablauf des Kalenderjahres, in dem die Überlassung bzw. Zugänglichmachung erfolgte. Das Vertragsverhältnis verlängert sich danach automatisch für jeweils ein weiteres Kalenderjahr, sofern das es nicht zuvor von einer der Parteien mit einer Frist von sechs Monaten zum Ende der jeweiligen Laufzeit gekündigt wird.
2. Die Kündigungsrechte des Kunden nach § 5 Ziff. 2 dieser Nutzungsbedingungen bleiben unberührt.
3. Das Recht jeder Partei zur außerordentlichen Kündigung aus wichtigem Grund bleibt unberührt.
4. Kündigungen bedürfen zu ihrer Wirksamkeit der Schriftform.

§ 9 Einspielung von Updates

Unterlässt es der Kunde, eine Aktualisierung, die ihm zur Aufrechterhaltung der Vertragsgemäßheit der Lizenz-Software (einschließlich Sicherheitsaktualisierungen) bereitgestellt worden ist, unverzüglich zu installieren, so haftet Hoffrogge nicht für einen Mangel, der allein auf das Fehlen dieser Aktualisierung zurückzuführen ist, sofern

- a) Hoffrogge den Kunden über die Verfügbarkeit der Aktualisierung und die Folgen einer unterlassenen Installation informiert hat und
- b) die Tatsache, dass der Kunde die Aktualisierung nicht oder unsachgemäß installiert hat, nicht auf eine dem Kunden bereitgestellte mangelhafte Installationsanleitung zurückzuführen ist.

§ 10 Rückgabe/Löschung

1. Bei Beendigung des Vertragsverhältnisses hat der Kunde Hoffrogge die Lizenz-Software auf den Originaldatenträgern einschließlich Dongles, Handbüchern und etwaigen weiteren Dokumentationen zurückzugeben. Gegebenenfalls erstellte Kopien des von Hoffrogge überlassenen Programms sind unverzüglich vollständig und endgültig zu löschen. Die Löschung ist schriftlich zu bestätigen.
2. Hoffrogge kann statt der Rückgabe auch die Löschung der Lizenz-Software einschließlich jeglicher Kopien hiervon sowie die Vernichtung der überlassenen Handbücher und Dokumentationen verlangen.
3. Jede Nutzung der Lizenz-Software nach Beendigung des Vertragsverhältnisses ist unzulässig.

§ 11 Geheimhaltung

1. Der Kunde verpflichtet sich gegenüber Hoffrogge, alle ihm anvertrauten, zugänglich gemachten oder sonst bekannt gewordenen Geschäfts- und Betriebsgeheimnisse von Hoffrogge unbefristet geheim zu halten sowie weder aufzuzeichnen noch weiterzugeben oder zu verwerten. Geschäfts- und Betriebsgeheimnisse sind alle geschäftlichen, betrieblichen, organisatorischen und technischen Kenntnisse, Vorgänge und Informationen, die von Hoffrogge als vertraulich bezeichnet sind und/oder nach sonstigen Umständen als vertraulich erkennbar sind und alle nur dem unternehmensinternen Gebrauch dienenden Dokumente und Materialien. Zu den Geschäfts- und Betriebsgeheimnissen von Hoffrogge, die der Kunde geheim zu halten hat, zählen insbesondere technische Daten, Know-how, Funktionsumfang und Funktionalitäten der Software von Hoffrogge sowie insbesondere deren Quellcodes und andere IT-bezogene Informationen, die Hoffrogge dem Kunden überlässt, zugänglich macht oder sonst offenbart.
2. Der Kunde wird - soweit dies nicht bereits geschehen ist - durch geeignete vertragliche Abreden mit den für ihn tätigen Mitarbeitern sicherstellen, dass auch diese jede eigene Verwertung, Weitergabe oder unbefugte Aufzeichnung der in Ziff. 1 beschriebenen Informationen, Geschäfts- oder Betriebsgeheimnisse von Hoffrogge unterlassen und sich in gleicher Weise zur Geheimhaltung verpflichten.
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 - a) ihm vor der Mitteilung nachweislich bekannt waren und nicht durch Bruch einer Geheimhaltungsverpflichtung durch einen Dritten offengelegt worden sind, oder
 - b) der Öffentlichkeit vor der Mitteilung bekannt oder allgemein zugänglich waren, oder
 - c) der Öffentlichkeit nach der Mitteilung ohne Mitwirkung oder Verschulden des Kunden bekannt oder allgemein zugänglich geworden sind, oder
 - d) aufgrund einer vollstreckbaren behördlichen oder richterlichen Anordnung oder zwingender rechtlicher Vorschriften zu offenbaren sind.
4. Ist der Kunde aufgrund einer vollstreckbaren behördlichen oder gerichtlichen Anordnung oder aufgrund zwingender rechtlicher Vorschriften zur Offenbarung vertraulicher Informationen verpflichtet, so hat er Hoffrogge unverzüglich hierüber zu informieren und sich vor der Offenbarung mit Hoffrogge über den Umfang der zu offenbarenden vertraulichen Informationen abzustimmen. In jedem Fall hat sich der Umfang der zu offenbarenden vertraulichen Informationen auf dasjenige zu beschränken, was nach der behördlichen oder gerichtlichen Anordnung oder aufgrund der rechtlichen Vorschrift zu offenbaren ist.
5. Der Kunde verpflichtet sich, nach Wahl von Hoffrogge sämtliche Dokumente, Akten oder Daten, welche geheime Informationen von Hoffrogge enthalten, sowie Kopien hiervon, an Hoffrogge zurückzugeben oder diese zu vernichten, soweit und sobald diese nicht mehr zur Erfüllung von Verpflichtungen aus der Geschäftsverbindung mit Hoffrogge oder zur Erfüllung von gesetzlichen Aufbewahrungspflichten benötigt werden. Ein Zurückbehaltungsrecht steht dem Kunden an solchen Materialien im Übrigen nicht zu.

§ 12 Höhere Gewalt

Unvorhersehbare, unvermeidbare und außerhalb des Einflussbereichs von Hoffrogge liegende und nicht zu vertretende Ereignisse wie höhere Gewalt, Krieg, Naturkatastrophen oder Arbeitskämpfe entbinden Hoffrogge für deren Dauer von der Pflicht zur Leistung. Vereinbarte Leistungsfristen verlängern sich um die Dauer der Störung; vom Eintritt der Störung wird der Kunde in angemessener Weise unterrichtet. Ist das Ende der Störung nicht absehbar oder dauert sie länger als einen Monat, ist jede Partei berechtigt, den Vertrag zu kündigen. Dies gilt entsprechend, wenn die genannten Umstände bei einem Subauftragnehmer von Hoffrogge eintreten.

§ 13 Verjährung

1. Nach den gesetzlichen Vorschriften verjähren Ansprüche gegen Hoffrogge, die auf einem vorsätzlichen oder grob fahrlässigen Handeln eines gesetzlichen Vertreters oder Erfüllungsgehilfen von Hoffrogge beruhen, sowie Ansprüche für Schäden aus der Verletzung des Lebens, des Körpers oder der Gesundheit, die auf einer vorsätzlichen oder fahrlässigen Pflichtverletzung von Hoffrogge, eines gesetzlichen Vertreters oder Erfüllungsgehilfen.
2. Für alle übrigen vertraglichen und gesetzlichen Ansprüche gegenüber Hoffrogge beträgt die Verjährungsfrist ein Jahr.

§ 14 Schlussbestimmungen

Es gilt deutsches Recht unter Ausschluss der Bestimmungen des einheitlichen UN-Kaufrechts (CISG) und solcher kollisionsrechtlichen Bestimmungen, nach denen ausländisches Recht anwendbar wäre. Gerichtsstand ist Sitz von Hoffrogge.

Anlage A: Übersicht Software-Lizenzen der Fremd-Software

Zusammen mit der Überlassung von Hoffrogge-Lizenz-Software, die dem Kunden zur Installation auf dessen Rechnern überlassen wird, werden ggf. auch folgende Fremd-Software-Komponenten überlassen:

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Spring Modulith v0.2.0 (or higher)	© Spring Contributors	Apache License, version 2.0 (copy below)
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Swing Application Framework v1.03 (or higher)	© 2006, Sun Microsystems Inc.	LGPL license, version 2.1 (copy below)
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Anlage B: Lizenzbedingungen der Fremd-Software-Komponenten

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Version 2.0, January 2004

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