

Software Maintenance Agreement

Quality First Software GmbH

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1. Contractual Basis

1.1 Preamble

Quality First Software GmbH (QFS) is a company developing and distributing software designed to help in testing and thus enhancing other software.

This Agreement regulates the support and maintenance for the products licensed by the customer. Any counter-confirmation or general terms and conditions of business of contractual parties are hereby explicitly objected to. The foregoing shall also apply if the submission of offers or acceptance of offers by contractual parties is made making reference to the prior-ranking applicability of the own general terms and conditions of business.

1.2 Assignment of Rights and Obligations

QFS may ~~at~~transfer any ~~time assign all~~of the rights and obligations under this Agreement to third parties at any time and is entitled to use agents for fulfilment of QFS' contractual obligations.

2. Content of Services

2.1 Support and Maintenance Services

QFS shall provide the following support and maintenance services for the products licensed by the customer:

- Provision of known error corrections by delivery of available patches via electronic communication and for download via the Internet (www.qfs.de).
- Provision of available minor updates (bundling of several error corrections in one version) for download via the Internet (www.qfs.de).
- Provision of available medium upgrades (version with additional / enhanced functions) for download via the Internet (www.qfs.de).
- Provision of available major upgrades (version with substantially enhanced volume of functions).
- Information via electronic communication (email) when new minor/medium/major updates are available.

The support and maintenance services listed in this clause 2.1 only comprise the products licensed by the customer, but not any new products of the same product family.

The granting of rights of use and the delivery of the relevant license files for all minor, medium and major upgrades shall be limited to the number and type of products, as well as the terms of use thereof, for which this Agreement has been concluded.

2.2 Telephone Support

For the term of this Agreement, QFS shall provide telephone support in the following manner: Queries for specific technical problems and failures are possible at any time. For this purpose, the customer will generally leave a message indicating the exact problem description and a classification in the following priority and error levels:

- Level A: System does not work.

- Level B: System works with limited functions.
- Level C: System basically working. Just errors/problems with specific functions.

QFS ensures the following response times (via phone or e-mail):

- Level A: Response within the next working day (Monday – Friday, 9 a.m. until 5 p.m. local time).
- Level B: Response within the next working day (Monday – Friday, 9 a.m. until 5 p.m. local time).
- Level C: Response within the working day after next (Monday – Friday, 9 a.m. until 5 p.m. local time).

Exclusively applicable is the local time at the seat of QFS. Exclusively applicable regarding holidays are the legal holidays at the seat of QFS.

2.3 Email Support

For the term of this Agreement, QFS shall provide support via email. The error and priority levels set forth in clause 2.2 above and the response times indicated therein are applicable.

2.4 Subject Matter of Support Services

The subject matter of support services in clauses 2.2 and 2.3 above is the help with installation or operation problems and alleged program errors. Installation services or other support services at the customer's location are not a subject matter of this Maintenance Agreement.

2.5 Service Contract

Due to the complex nature of hardware and software applications, networks and specific configurations with the licensee, QFS cannot assume liability for the successful remedy of any error, i.e. despite QFS' best efforts it may occur that errors cannot be rectified in providing the support to the licensee. Consequently, all services are provided as a service contract to this effect.

2.56 Payments

Any and all support and maintenance services under this Agreement shall be compensated for by means of an annual flat rate. The fees are due for payment annually in advance upon invoicing by QFS.

3. Securing of Services

3.1 Warranty

~~Due to the complex nature of hardware and software applications, networks and specific configurations with the licensee, QFS cannot assume liability for the successful remedy of any error, i.e. despite QFS' best efforts it may occur that errors cannot be rectified in providing the support to the licensee. Consequently, all services are provided as a service contract to this effect.~~

3.21 Customer Cooperation

To guarantee the best level of efficiency, the customer commits itself to describe the problems as exactly and

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detailed as possible. Especially all the questions referring to the failure should be answered as accurate as possible. Only the compliance with this obligation to cooperate as an essential contractual performance will enable the provision of all support services in a timely and due manner.

3.32 Limitation / Exclusion of Liability

~~QFS is liable for damages or useless expenses regardless of the legal reason (e.g. contractual agreements, damages for neglect of duty and tort) only under the following circumstances:~~

- ~~In case of damages resulting from the injury of life, the body or health, in case of claims based on the German Product Liability Act, the statutory regulations remain unaffected.~~
- ~~In case of damages caused by a willful act QFS' liability is unlimited.~~
- ~~In case of gross negligence by vicarious agents, QFS' liability is limited to the typically occurring damage which was foreseeable when the parties entered into this Agreement. QFS' liability for gross negligence by QFS' legal representatives and executives is unlimited.~~
- ~~In case of slight negligence resulting in a breach of an obligation essential for performance of this Agreement (cardinal contractual obligation), QFS' liability is limited to the typically occurring damage.~~

~~In all other cases QFS' liability is excluded.~~

3.2.1 Customer's claims for damages or reimbursement of expenses – irrespective of the legal ground – are excluded unless the damage is caused by a wilful or gross negligent act or a breach of cardinal obligations by QFS, its representatives or vicarious agents. Cardinal obligations are material obligations compliance with which makes fulfilment of the contract possible in the first place, especially QFS' obligation to supply the software, including the licensing of rights in the software.

3.2.2 In case of simple negligence by QFS, its representatives or its vicarious agents, QFS' liability for damages are limited to the typically occurring damage.

3.2.3 The limitation and exclusion of liability according sec. 3.2.1 and 3.2.2 are not applicable in case of claims based on the German Product Liability Act. Additionally, those limitations and exclusions are not applicable for damages resulting in the injury of life, the body or health of customer caused by a negligent breach of obligation by QFS or a negligent or wilful breach of obligation by a representative or a vicarious agent of QFS. The limitation or exclusion is also not applicable in case of QFS' deceit regarding defects or where QFS has given a guarantee regarding the quality of a product.

3.2.4 QFS is entitled to invoke contributory negligence on customer's part. Customer is especially obliged to make backup copies and to provide sufficient and up to date anti-virus protection. Backup copies have to be made regularly and to an extent that is appropriate when considering the usage and the risks, typically once a day in order to ensure restoration of data with reasonable time and effort. In case of loss of data, QFS' liability is limited to the restoration expenses that would have arisen if backup copies had been made regularly and where anti-virus protection had been in place.

3.3 Statute of Limitation

The statute of limitation is

- for claims of repayment due to rescission from contract or reduction of purchase price one year after delivery of the software, however for defects orderly notified no less than three months after notification of rescission from contract or of reduction of purchase price has been given;
- for other claims for factual or legal defects of the software one year;
- for other claims for damages or reimbursement of expenses two years, starting from the date Licensee has found out about the relevant facts or should have found out without gross negligence.

At the latest, the statutes of limitation are applicable when the maximum time given in Sec. 199 German Civil Code has lapsed.

The statutes of limitation by law are always applicable in case of claims for damages or reimbursement of expenses based on the German Product Liability Act, for damages resulting in the injury of life, the body or health of the Licensee which are caused by a negligent breach of obligation by QFS or a negligent or wilful breach of obligation by a representative or a vicarious agent of QFS. These statutes of limitation by law are also applicable in case of QFS' deceit regarding defects or where QFS has given a guarantee regarding the quality of a product.

QFS' rectification of defects for the software does not inhibit the statutes of limitation nor do these statutes of limitation start anew in case of such rectification.

3.4 Copyright

QFS is entitled to the copyright as well as the proprietary rights, rights of use and commercialization resulting thereunder to all the materials capable of being protected under copyright, which materials are provided within the frame of support and maintenance services under this Agreement. The granting of rights is made exclusively in the form agreed upon in the license agreement. Any infringements of copyright shall be prosecuted by QFS in terms of both civil and criminal law.

4. Performance of the Agreement

4.1 Commencement and End

This Agreement is concluded with the acceptance of the Software Maintenance Agreement by the customer. The base term is one year and commences on the date on which the Agreement is invoiced by QFS. Termination by the end of the base term is possible by giving three months' notice in writing to take effect by the end of the respective month. In the absence of termination in due time, the Agreement shall be renewed for further one year's periods each time. Termination upon the expiration of the base term is possible at any time by giving three months' notice in writing to take effect by the end of the respective month.

4.2 Termination for Good Cause

This Agreement can be terminated by QFS for good cause if it cannot be reasonably expected to wait until statutory termination of the Agreement is possible due to the fact that

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- the customer has committed a severe breach of the contractual covenants; ~~and~~
- ~~and~~ the consequences of such breach, especially pecuniary damages, have not been remedied without undue delay and without the need for an explicit request in this respect; ~~or~~
- ~~or~~ the consequences of the breaches of the Agreement cannot be remedied due to their nature; ~~and~~
- and termination for good cause has been notified no later than within three months of the date on which the party suffering the breach got reliable knowledge thereof.

5. General Provisions

5.1 Choice of Law and Venue

~~This Agreement is exclusively governed by German law. The application of the UN Sales Convention is explicitly excluded. Exclusive venue for both parties shall be Wolfratshausen, Germany. QFS is free to file a suit also at the statutory venue.~~

This Agreement is exclusively governed by German law. Should German law make reference to foreign jurisdictions, this reference is excluded. The application of the UN Sales Convention is explicitly excluded.

In case the parties are merchants, legal entities under German public law or special assets under German public law, the exclusive venue for both parties shall be QFS' seat of business. The same applies in case one party does not have a legal domicile in Germany. It is in QFS's discretion to bring charges forward also at the other party's seat of business in cases stated in this paragraph.

5.2 Written Form

~~Modifications of and/or amendments to this Agreement as well as all future amendments and all the legal acts during its performance shall only be effective when made in writing.~~

Any modifications of and/or amendments to this Agreement, as well as all other statements of legal import of both parties, shall only take effect if made in writing or simple text without signature (e.g. email, or facsimile). The same applies to modification of this clause; abandoning the formal requirement requires an agreement in writing or simple text without signature.

5.3 Interpretation of the Agreement

If any of the provisions of this Agreement should be or become invalid, ineffective or unenforceable, that will not affect the effectiveness of the remaining provisions. The same applies to omissions in individual provisions and/or parts of these General Terms and Conditions of Business. In such a case the parties shall replace the cancelled or incomplete provision by another, legally effective provision meeting the purpose of the cancelled provision to the largest extent possible.