

1. Contractual Basis

1.1 Preamble – Subject Matter

Quality First Software GmbH (QFS) is a company developing and distributing software designed to help in testing and thus enhancing other software. Subject matter is the software QF-Test. QF-Test is a tool for an automated test of programs with a graphical user interface. A more detailed description is provided in clauses 1 and 2 of the document “QF-Test Product Description and Licensing Models”, which QFS will provide to Licensee upon request. The aforementioned document also lists the system requirements and the supported versions of operating systems and software required for running QF-Test.

This Leasing Agreement provides the regulations for making QF-Test available for the term agreed between the parties. QFS hereby explicitly object to any counter-confirmations referring to the General Terms and Conditions of Business of contractual partners (Licensee). The foregoing shall also be applicable if submittal or acceptance of offers by contractual partners is made subject to the prior applicability of their own General Terms and Conditions of Business.

1.2 Exchange Agreement

This Agreement shall be the basis for the exchange of services. However, such exchange shall not create any corporate relationship between QFS and the Licensee.

1.3 Assignment of Rights and Obligations

QFS may transfer any of the rights and obligations under this Agreement to third parties at any time. Licensee may not assign or sublicense the rights granted under Section 2 below without prior written approval by QFS.

2. Content of Services

2.1 Granting of License

QF-Test is software protected by copyright. QFS is entitled to grant to third parties rights of utilization and commercial exploitation to QF-Test. The licensing models offered by QFS are described in clause 3 of the document “QF-Test Product Description and Licensing Models”, which QFS will provide to Licensee upon request. The precise extent of the rights granted to Licensee follows from the respective quotation.

Unless agreed otherwise by both parties, on the basis of this License Agreement, the Licensee shall be granted a non-exclusive right of utilization limited in time. Such right of utilization shall be limited to the actually purchased version, which means new versions must have a new license. Moreover, the right of utilization shall be limited to the number of licenses specified in the respective purchase order and the locations and/or networks mentioned therein. Simultaneous use of QF-Test shall be limited to the number of licenses specified in the purchase order. The use of QF-Test shall be limited to internal purposes of the Licensee. It must not be passed on to any third parties. The standard License Agreement transmitted together with the software does not apply to this leasing model.

QFS shall make available a free test version to non-registered Licensees. As a rule, the license granted therefore shall be identical with the license for the full version. However, the use of the test version shall be subject to a time limit and may be limited in other ways at the sole discretion of QFS. Furthermore, there is no obligation to provide any manuals, documentation, updates and/or support for the test version.

2.2 Delivery / Installation

QF-Test shall be exclusively distributed on the Internet as downloads. The Licensee shall have full responsibility for the installation and the functioning of the software on the computers and networks operated by the Licensee. QFS is under no obligation to provide any installation services.

2.3 Manuals / Documentation

Any manuals and the entire documentation for QF-Test shall be made available as HTML and/or PDF files in German and English. The Licensee has no entitlement whatsoever to be provided the mentioned documentation as hardcopy.

2.4 Updates

QFS is free to make available minor updates (bundling of several error corrections in one version) for QF-Test free of cost at its discretion. The Licensee shall not have any entitlement to such updates. The obligations imposed on QFS by statutory warranty regulations shall not be affected by the foregoing (sub-clause 3.1).

New versions of QF-Test will be made available by QFS at its discretion in the form of medium upgrades (version with additional / enhanced functions) or major upgrades (version with substantially enhanced volume of functions) at the conditions indicated at QFS' then current website.

2.5 Intended Use (Operation in a Testing Environment); Increased Care and Diligence in a Productive Environment

QF-Test is developed and intended to be used in a testing environment. Only in an individual case of essential operational needs should Licensee use QF-Test in a productive environment. QFS explicitly points out, that great damage may be caused by use of QF-Test in a productive environment – most notably in case of inappropriate use. Thus Licensee has to ensure that QF-Test is used in a productive environment only by properly trained personnel and with all care and diligence. In particular Licensee has to ensure by continuous monitoring and verification of the operation of the software that a malfunction of QF-Test or the tests created for this purpose is noticed in a timely manner so that appropriate action (e.g. aborting the tests) can be taken. QFS' liability for damages of any kind resulting from use of QF-Test in a productive environment, is limited to the damage that would have occurred if QF-Test had been operated in a similar way in a testing environment, or in compliance with the due diligence regulations above. In addition, liability regulations in sub-clause 3.2 apply.

2.6 Support and Maintenance

Support and Maintenance beyond the statutory warranty obligations in sub-clause 3.1 are not subject to this Agreement and have to be agreed between Licensee and QFS separately. QFS offers a standard Software Maintenance Agreement to that end.

3. Securing of Services

3.1 Warranty

QFS is obliged to cure any deficiencies in QF-Test within a reasonable period of time after Licensee has given QFS notice of such defect. In case of defective products, QFS is free to decide whether it will remedy the defect or supply a product free of defects. QFS is entitled to circumvent a possible defect if the defect as such can only be remedied at a disproportionately high expense, provided such circumvention does not substantially impair the use of the product in line with its purpose and is reasonable for the Licensee.

If remedy of defect fails within a reasonable period, or if it proves abortive again after a further reasonable period of grace set by Licensee, or if QFS declares in writing that it relinquishes the remedy of the defect, then Licensee is entitled to the further legal warranty rights in accordance with the following provisions.

Licensee is only entitled to terminate the License Leasing Agreement due to non-performance by QFS after QFS has been given a reasonable period for cure of defects and QFS has failed to cure such defects. Licensee is not entitled to reduce the price by deducting certain amounts from the price agreed between the parties except for defects which are undisputed or recognized by declaratory judgment.

Licensee's warranty rights are excluded if changes to the product or attempts to repair the product have been made by Licensee without prior written approval by QFS. Licensee is entitled, however, to explain and prove that such changes and/or attempts of repair are in no connection with the occurred defect, and do not substantially complicate the analysis as well as the removal of the defect. Exclusion of warranty does not extend to changes to which Licensee is entitled - especially in view of self-help - provided such changes have been done professionally and are documented traceably.

Licensee will support QFS in analyzing and removing the defect, prepare and/or print supporting information on QFS' request, as well as provide further information, if any, to support analysis and removal works, and grant immediate access to the documents revealing further details of the occurrence of the defect.

Strict liability under Sec. 536a clause 1 German Civil Code/BGB for defects existing at the time when entering into the agreement is excluded.

3.2 Limitation / Exclusion of Liability

3.2.1 QFS is liable without contractual restrictions in accordance with statutory regulations:

- for damages based on a breach of a guarantee provided by QFS;
- for willful misconduct;
- for damages based on the fact that QFS has fraudulently concealed a defect;
- for damages arising from injury to life, body or health caused by an intentional or negligent breach of duty by QFS or otherwise on the intentional or negligent conduct by a legal representative or a vicarious agent of QFS;
- for damages other than those listed under indent 4 based on intentional or grossly negligent breach of duty by QFS or otherwise on the intentional or grossly negligent conduct by a legal representative or a vicarious agent of QFS;
- pursuant to the terms of the German Product Liability Act.

3.2.2 In cases other than those listed in 3.2.1, QFS' liability for negligent breaches of Cardinal Duties by QFS or by a legal representative or agent of QFS shall be limited to such damage which was typical for this kind of business and foreseeable upon the execution of this Agreement. Cardinal Duties shall mean duties which enable the performance of the Agreement i.e. are precondition of the performance of the Agreement and which the Licensee may therefore rely on. Typical and foreseeable is a damage which QFS has foreseen as a potential consequence of a breach of duties or - taking into consideration the circumstances QFS was or should have been aware of - QFS should have foreseen.

3.2.3 In cases other than those listed in 3.2.1 and 3.2.2 the liability of QFS for negligence is excluded.

3.2.4 The plea of contributory negligence (sec. 254 German Civil Code/BGB) remains unaffected. The Licensee 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.

3.2.5 The foregoing provisions regarding the limitation of liability apply to all contractual and non-contractual claims for damages against QFS regardless of their legal grounds and accordingly to the liability of QFS to compensate futile expenses.

3.3 Copyright

QFS shall be entitled to the copyright as well as any proprietary, utilization and commercial exploitation rights resulting thereof to any and all materials capable of being protected by copyright that are made available to the Licensee in connection with the granting of license. Any granting of rights shall be made exclusively in the form as described in sub-clause 2.1 above. Any violations of copyright shall be brought before the court by QFS both under civil and criminal law.

4. Performance of the Agreement

This Agreement is concluded with the acceptance of the present License Leasing Agreement by the Licensee. A license file limited to two months will be transmitted with the ordered product. Once full payment has been made, a license file for the term agreed between the parties will be transmitted.

The term of this License Leasing Agreement is subject to the agreement between the parties. Have the parties agreed upon a limited term, the Agreement automatically starts and ends with the date agreed. In this case the right to terminate the Agreement with notice is excluded. License fees shall become due for the full term in advance on the date on which they are invoiced by QFS.

Otherwise, the following shall apply in accordance with the provisions of QFS' Software Maintenance Agreement: 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
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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. License fees shall become due for one year in advance on the date on which they are invoiced by QFS.

The right to immediate termination remains unaffected. In case QFS severely and materially breaches this License Leasing Agreement, Licensee is only entitled to immediate termination of this License Leasing Agreement after a reasonable period for cure has lapsed without QFS having cured the severe material breach.

Immediate termination of this License Leasing Agreement is only possible in writing. After termination of this License Leasing Agreement, Licensee is obliged to fully and permanently delete any and all copies of QF-Test, manuals, documentation and installation. Any use of QF-Test after termination of this License Leasing Agreement is prohibited.

5. General Provisions

5.1 Choice of Law and 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 shall be QFS' seat of business. The same applies in case one party does not have a legal domicile in Germany. It is at QFS' discretion to bring charges forward also at the other party's seat of business in cases stated in this paragraph.

5.2 Written Form

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 any gaps in individual provisions and/or parts of this Agreement.