

opentext™

The Information Company™

Software Support Terms and Conditions

(Switzerland)

Access and use of Software Support services are provided by Open Text (“**OT**”) in accordance with these Software Support Terms and Conditions (“**Support Agreement**”) and the then current Software Maintenance Program Handbook (“**SMPH**”) located at www.opentext.com/agreements. Licensee agrees that by purchasing Support Services, the terms of this Support Agreement govern. If there is any inconsistency between the provisions of this Support Agreement and any applicable Software Maintenance schedule, quotation or renewal notice (“**Schedule**”), the Schedule will prevail to the extent of the inconsistency. Capitalized terms referenced herein but not defined herein shall have the meaning ascribed in the Software Maintenance Program Handbook.

1. **Definitions.** The following terms shall have the following meaning:

“**Covered Software**” shall mean the licensed software for which maintenance services shall be provided including all documentation provided or made available;

“**Maintenance Fees**” shall mean the fees and other amounts due to OT for Support Services;

“**Support Services**” means the software maintenance and support services described in the then current version of the SMPH available at www.opentext.com/agreements;

“**Support Services Term**” means each twelve (12) month period beginning on the date the Covered Software is delivered by OT to Licensee (which may be accomplished by making the Covered Software available by electronic download) or the anniversary thereof.

2. **Support Services.** Support Services will be provided by OT subject to Licensee’s compliance with its obligations under this Support Agreement and the applicable agreement under which Licensee licenses the Covered Software (“License Agreement”).
3. **Support Services Exclusions.** OT shall have no responsibility to provide Support Services to Licensee with respect to any problem with the Covered Software caused by: (a) any software, device, or other product not supplied by OT; (b) neglect, misuse, alteration, modification, and/or enhancement to the Covered Software by any party other than OT; (c) failure of Licensee to provide a suitable installation or operating environment for the Covered Software; (d) use of the Covered Software for a purpose other than the purpose for which it was designed; (e) use of the Software on a computer platform other than the platform authorized by OT (which may be specified in the Documentation accompanying the Covered Software); or (f) failure of Licensee to install any support software provided by OT.
4. **Determination of Support Services Term.** The initial Support Services Term shall commence on the date the Covered Software is provided by OT to Licensee. Renewal of the Support Services is automatic, unless either party provides written notice ninety (90) days prior to the anniversary date. If Licensee cancels Support Services and then wishes to reinstate Support Services, Open Text may charge Licensee a reinstatement fee in addition to the Maintenance Fees.
5. **Payment of Maintenance Fees.** All amounts due are due and payable upon delivery of the applicable invoice to Licensee. OT shall be entitled to charge interest on all amounts overdue by more than thirty (30) days at the rate of one and one-half percent (1.5%) per month, to the extent permitted by law. Licensee will be obligated to pay the applicable entire annual Maintenance Fee with respect to the Covered Software licensed from OT, failing which OT may suspend some or all of the Support Services until payment has been received.
6. **Limited Warranties.**
 - 6.1. **Limited Support Services warranty.** OT warrants to Licensee that the Support Services delivered to Licensee under this Agreement: (a) will be free of all known viruses at the time of first delivery to Licensee; and (b) will perform substantially in accordance with its accompanying Documentation.
 - 6.2. **Supplementary performance in the event of material defects (“Sachmängel”).**

- 6.2.1. If Licensee provides notification of material defects for which OT is liable as material defects, OT shall provide supplementary performance free of charge within an appropriate period and shall take into account the difficulty of rectifying the material defect and its impact for Licensee.
 - 6.2.2. Supplementary performance may be effected, at OT's option, by rectifying the material defect or by delivering new software or physical media. OT may also provide an update, upgrade or more recent version of the software for supplementary performance purposes, provided that this is reasonable for Licensee.
 - 6.2.3. The material defect may also be remedied by means of written instructions on how to act, or instructions on how to act provided over the telephone, to Licensee by way of remote data transmission or dispatch of data carriers with corrective software. In these cases, in so far as this is reasonable, Licensee is obliged to implement instructions on how to act, to enable remote data transmission or remote access by OT to the defective Covered Software and/or to input corrective software immediately after it is delivered. A technical software workaround also constitutes rectification of a material defect if it does not considerably impair the use of the Covered Software for the contractually envisaged purpose and the workaround is reasonable for Licensee.
- 6.3. Failure of supplementary performance in the event of material defects.**
- 6.3.1. If a material defect cannot be rectified within an appropriate period or if supplementary performance or replacement delivery fails for other reasons, Licensee may after thirty (30) days of grace that has been granted by a registered letter at its option demand a reduction of the Maintenance Fees, or terminate this Support Agreement. Termination is excluded in case of only insignificant defects in the Covered Software.
 - 6.3.2. Supplementary performance has not failed until OT has been given sufficient opportunity to effect supplementary performance or replacement delivery without the desired success being achieved, if the supplementary performance or substitute delivery is impossible, OT declines to effect this or unreasonably delays it or the situation is unreasonable for other reasons.
- 6.4. Supplementary performance in the event of defects of title ("Rechtsmängel").** OT will at its absolute discretion (a) obtain for Licensee a nonexclusive license to continue using the Covered Software; (b) replace the infringing portion of the Covered Software as far as this is reasonable for Licensee in consideration of the purpose of this Support Agreement; or (c) modify the infringing portion of the Covered Software without reasonable degradation in functionality in order to make it non-infringing.

OT shall defend Licensee from any claims, suits, actions or proceedings brought against Licensee in a court of competent jurisdiction by a third party which allege an infringement of such third party's patent, copyright, or trade secret rights of which OT is aware existing under the laws of the covered countries, and in any judgment finally awarded, for which all avenues of appeal have been exhausted, or any final settlement in connection with any such claims, provided all of the conditions set out above related to the defense of such claims are satisfied.

The Licensee (a) will immediately notify OT in writing when first becoming aware of each such claim and its reasons; (b) will grant OT sole control over the litigation and all associated actions with respect to such claim as far as reasonable and will support OT as far as necessary; (c) will provide all reasonable assistance, information and authority to OT which is required to enforce the actions mentioned in (b); and (d) will not make any admission against OT's interests and does not agree to any settlement of any claim without the prior written consent of OT unless made pursuant to a judicial request or order and (e) will enable OT to choose and instruct a lawyer.

6.5. Failure of supplementary performance in the event of defects of title. In case supplementary performance according to section 6.3.2 is not possible, OT shall take back the infringing Covered Software or the infringing portion of the Covered Software. If supplementary performance is not reasonable available as determined by OT, Licensee may at its option demand a reduction of the Maintenance Fees, or terminate the Agreement. Termination is excluded in case of only insignificant defects in the Covered Software.

6.6. Common provisions for material defects and defects of title.

6.6.1. Material defects and/or defects of title which occur shall be documented by Licensee in a manner comprehensible to OT (e.g. in the case of material defects by means of screenshots, error messages and defect records) and shall be reported in writing immediately after determination of any such defect.

6.6.2. OT reserves the right to invoice Licensee for (a) additional costs which arise as a result of a reallocation of the software by Licensee to a location other than the contractually agreed installation location (if this occurs) and/or (b) additional costs which arise as a result of Licensee culpably failing to comply with its obligations to cooperate in accordance with this Support Agreement and/or (c) additional costs which are based on material defects in the software which are asserted by Licensee but do not exist and/or (d) material defects in the Covered Software which arise exclusively as a result of culpable faulty operation and/or (e) additional costs based on non-observance of the software description in accordance with the respectively valid price list for the service.

- 6.6.3. Licensee is not authorized to rectify defects in the Covered Software itself or have them rectified by any third party (replacement performance) unless OT ultimately refuses to rectify the defects.
- 6.6.4. Compensation or reimbursement of futile expenditure. In the event of a Claim, OT shall provide compensation or reimburse futile expenditure on the basis of a defect within the limitations outlined in section 7 of this Support Agreement.

6.7. Warranty Exclusions.

6.7.1. **Material defects.** The warranty in sections 6.1 to 6.3 shall not apply to any material defect caused by: (a) any change to the software, except where such changes were made by OT in relation to the provision maintenance and support services or Licensee proves that defects which have arisen are not attributable to the change/modification and that error analysis and rectification by OT is not effected thereby; (b) Licensee's failure to provide an installation or operating environment for the software according to the Documentation; (c) use of the software on a software or hardware platform not approved by OT in writing; (d) software, hardware, firmware, data, or technology not licensed or approved by OT in writing; (e) any telecommunications medium used by Licensee; (f) Licensee's own computer system; or (g) failure of Licensee and/or user to comply with the Documentation.

6.7.2. **Defects of title.** The warranty in section 6.4 shall not apply in case such claim arises solely as a result of Licensee's use of the software within one or more of the covered countries not in accordance with the provisions of this Support Agreement and the applicable Documentation, and provided: (a) the alleged or actual infringement was caused by the use of a superseded version of the software if the infringement would have been avoided by the use of a then-current release of the software; and (b) the alleged or actual infringement was caused by the modification of the software by any party other than OT; (c) the alleged or actual infringement was caused by the combination or use of the software with software, hardware, firmware, data, or technology not licensed to Licensee by OT or approved by OT in writing.

6.8. **Exclusion of limited warranties.** Except for the express limited warranties provided in above sections 6.1 to 6.7, OT and OT's licensors make no representations and disclaim any and all express, implied, or statutory warranties and conditions, written or oral, including without limitation any implied warranty or condition of merchantability, fitness for a particular purpose, non-infringement, or the adequacy of the software to produce a particular result.

7. **Limitation of Overall OT Liability.** OT's total liability for any and all Claims shall be subject to the limitation set out herein:

- 7.1. For direct damages.** OT is liable for the direct damage incurred by the Licensee from or in relation to the performance of this Agreement on any legal grounds whatsoever (such as delay, failure to perform or defective performance, warranty for defects), including the restoration of properly-saved data, up to the amount of the license fee paid, however up to a maximum of CHF 200,000 per loss. The total liability under this Support Agreement is limited to a maximum of CHF 1,000,000. Liability for bodily injury that has culpably been caused is excluded from this limitation.
- 7.2. Liability for further and indirect damages.** Any further liability of OT for other or further claims and damage, in particular claims for compensation of direct, indirect or consequential damage, loss of profit, loss of use, unrealized savings, loss of earnings or production and loss of data (except for data restoration costs) – irrespective of their legal grounds – is expressly excluded as far as this is legally permissible.
- 7.3. Liability for loss of data.** In case of a loss of data caused by OT, OT is exclusively liable for the costs of reconstructing saved data that would also have been lost if backup copies had been made at appropriate intervals. The Licensee is responsible for regularly backing up its data. Any failure to fulfil this obligation will be deemed contributory negligence.
- 8. Covered Software.** All Covered Software provided to Licensee under this Support Agreement is licensed to Licensee on a non-exclusive, non-assignable, and non-transferable basis in accordance with the provisions of the License Agreement.
- 9. Term and Termination.** The Support Agreement shall begin on the date of execution and shall continue until terminated in accordance with the provisions of this Support Agreement. If Licensee fails fully to remedy a material breach within thirty (30) days of notice by OT, including failure to pay an invoice, OT may terminate this Support Agreement upon the provision of written notice to Licensee. OT may immediately terminate this Support Agreement in the event that the License Agreement is terminated. Either party may terminate this Support Agreement if the other party: (a) becomes insolvent; and (b) has a receiver or receiver manager appointed with respect to it or any of its assets. The provisions contained in Sections 5, 7, 9 and 10 of this Support Agreement shall survive any termination.
- 10. General Provisions.**

 - 10.1. Assignment.** Licensee shall not assign, or transfer this Support Agreement or any right or obligation hereunder, including by operation of law or otherwise, without OT's prior written consent, which consent shall not be unreasonably withheld.

- 10.2. **Notices.** Any notice under this Support Agreement must be given in writing and is deemed effective when sent either: (a) via certified or registered mail, postage prepaid, or (b) via express mail or nationally recognized courier service to the other party's address specified in the applicable order form. Notices to OT should also be sent to the attention of the General Counsel.
- 10.3. **Amendments.** Any changes in and amendments to this Support Agreement shall only be made in writing. This shall also apply to any changes in this section "Amendment".
- 10.4. **Governing Law.** This Support Agreement and each party's performance hereunder shall be governed by the laws of Switzerland excluding (a) its conflicts of law rules, and (b) the United Nations Convention on Contracts for the International Sale of Goods (CISG) from 11.04.1980. Except for a request by OT for injunctive or other equitable relief, any dispute arising out of this Support Agreement will be subject to the exclusive jurisdiction of the competent court in Baden (AG). The prevailing party will be entitled to an award of its reasonable attorney's fees and court costs.
- 10.5. **Export Laws.** Software and Program(s), including Documentation and technical data, is subject to U.S. export control laws, including the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee agrees to comply strictly with all such regulations and acknowledges that it has the responsibility to obtain licenses to export, re-export, or import Software, Documentation and/or technical data.
- 10.6. **Waiver; Severability.** The waiver or failure of a party to exercise in any respect any right provided herein shall not be deemed a waiver of such right. If any provision of this Support Agreement is invalid, illegal or unenforceable under any applicable statute or rule of law, such provision shall be adapted to achieve the desired objective as best as possible. All remaining provisions shall continue in full force and effect.
- 10.7. **Headings.** The headings contained in this Support Agreement are intended for convenience or reference only and shall not control or affect the meaning or construction of any provisions of this Support Agreement.
- 10.8. **Entire Agreement.** This Support Agreement and the corresponding Software Maintenance Program Handbook is the complete and exclusive statement of the agreement between OT and Licensee. This Support Agreement may not be amended, except by written agreement.

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