



MODEL ENGINEERING SOLUTIONS GMBH - GENERAL TERMS AND CONDITIONS ("GTC")

For: Support and Maintenance Services for MES Products with Perpetual Licenses

Last amended: January 2017

1 GENERAL

- 1.1 The following General Terms and Conditions shall apply for all contracts between Model Engineering Solutions GmbH, business address: Waldenserstraße 2-4, 10551 Berlin, Germany (hereinafter: "MES"), and its client (hereinafter: "Customer") for support and maintenance services.
- 1.2 Subject matter of the pertinent agreement is the provision of product updates for MES Products which the Customer has purchased as a Perpetual License and support by MES for the Customer in using MES Products.
- 1.3 Other General Terms and Conditions of either party shall not apply. This shall apply even if a contractual party has not expressly objected to the General Terms and Conditions of the other contractual party. Additional terms and conditions of the Customer shall require the express written consent of MES.
- 1.4 Offers are always non-binding. Contracts shall only come about upon written confirmation on the part of MES. If the service is rendered without the Customer first receiving an order confirmation, the contract shall come about when the rendering of the service commences.

2 DEFINITIONS

- "Customer Support"** shall mean support services to be rendered to the Customer during the times and to the extent stated in the corresponding agreement and/or the GTC.
- "Designated Territory"** shall mean the geographical area (Europe, Asia and/or the Americas) set forth in the License Certificate.
- "Documentation"** means written information, provided by MES, that is part of the MES Product and that describes the features and various aspects of the software's intended operation, e.g., tutorials, user guides, and product descriptions, whether distributed in print or electronic form, that are in effect as of the date on which the MES Product is shipped to the Customer as licensee of a MES Product.
- "EULA"** shall mean an End User License Agreement for a MES Product.
- "Force Major"** shall mean any event beyond the reasonable control of either party including, amongst other things, unpredictable adverse weather conditions, national industrial strikes (excluding strikes or labour disputes originated by or involving only the relevant party's workforce or any part of it or the workforce of its agents or sub-contractors), war, acts of God, acts of terrorism, floods, earthquakes or civil disturbance.
- "Infringement Claim"** shall mean a claim by a third party against the Customer asserting that the Customer's use of the MES Product in accordance with the EULA violates the third party's intellectual property right in the Designated Territory.

"License Certificate"	shall mean the written confirmation by MES, specifying the type of license and the Designated Territory for a MES Product under the EULA.
"Maintenance"	shall mean the supply by MES to the Customer with updates and upgrades for the designated MES Product stated in the corresponding agreement and the GTC.
"MES Product"	shall mean the computer programs MES Model Examiner®, MES Test Manager®, MES Quality Commander® and MES M-XRAY® in object code along with its Documentation. MES Products may also include software by Third Parties, which are provided under separate license terms that may be subject to other or additional terms and conditions, which are typically provided in a "Read Me"-file of a MES Product.
"Perpetual License"	shall mean a license to use the Licensed MES Product in perpetuity under the EULA.
"Update"	shall mean functional and/or feature improvements made to the MES Product at MES's discretion, and which are deemed to be paid on the basis stated in the corresponding agreement that is intended to keep the current shipping version of the MES Product release competitive with related technology in the respective market, including but not limited to bug fixes, performance enhancements, improvements, or error corrections, but excluding Upgrades.
"Upgrade"	shall mean the unique and significant functional and/or feature improvements made at MES's discretion that are deemed to be a new software product for which Licensor charges separately, or for which MES provides a specific Upgrade path for licenses of previously released MES Product.

3 MAINTENANCE: RANGE OF SERVICES, RIGHTS OF USE

- 3.1 MES shall supply the Customer with updates and upgrades for the designated MES Product. The updates and upgrades shall be made available to the Customer electronically via the internet. The Customer has to register for the newsletter of MES on its website to receive the notification about updates and upgrades. The Customer is obliged to send a request to MES via email to its support email address, as provided by MES, to receive download links for the respective updates and upgrades that were notified in the actual respective newsletter.
- 3.2 The updates and upgrades shall only be provided with respect to the last software release supplied by MES for MES Product. The information provided by MES for MES Product, such as installation information and manuals, shall be updated by MES and made available to the Customer together with the update or upgrade.
- 3.3 Personal support on site at the Customer and customized changes to MES Product and restoration of data pools are not subject matter of this agreement.
- 3.4 All updates or upgrades shall be made available to the Customer on the basis of the EULA valid for a MES Product.
- 3.5 All licenses at a distinguished customer site have to be under maintenance. Support and maintenance services can not be purchased for individual licenses at one customer site.

4 CUSTOMER SUPPORT: RANGE OF SERVICES

- 4.1 MES shall also render the following services under Customer Support:
 - Advice and services in conjunction with MES Product functions;
 - Dealing with defects arising during the proper and intended use of MES Product or becoming apparent in the related Documentation.
- 4.2 The services also cover defects or other faults reported to MES about MES Product, regardless of use, by the Customer. This shall be without prejudice to the Customer's existing warranty claims.
- 4.3 Fault handling within the meaning of this agreement includes localisation of the cause, fault diagnosis and services aimed at rectifying the fault (especially patches and service packs). MES accepts no responsibility for rectification of the fault. MES can also opt to provide fault handling in the form of a workaround, update or upgrade delivery and, after liaison with the Customer, also by supplying a new version.

- 4.4 Customer Support does not include:
- Services outside agreed support hours;
 - Services for MES Product not used under the operating conditions stipulated by MES;
 - Services for MES Product changed by programming work not carried out by MES;
 - Services for computer programs or parts thereof not forming part of MES Product;
 - Services for a MES Product with a release version no longer maintained by MES;
 - Services required because the Customer fails to meet duties to participate.
- 4.5 Customer Support shall be rendered during MES' service hours that are from Monday to Friday between 9 am to 5 pm CET/CEST excluding German public holidays.
- 4.6 Upon receipt of a sufficiently specific fault description, sent via email to MES' to the support email address, which includes the fault behaviour, affected product components and steps already taken, the stated reaction times pursuant to MES offer shall apply. A specific reaction time is not provided. The reaction shall be within a reasonable time period.
- 4.7 If failing to meet a given performance period is due to events for which MES is not answerable, also in the event of Force Majeure, the performance periods shall be postponed by the duration of the resulting downtime plus a reasonable period for recommencing provision of the services.

5 THE CUSTOMER'S DUTIES TO PARTICIPATE, DATA BACKUP

It shall be the Customer's sole responsibility to install the update or upgrade. It is also the Customer's responsibility to regularly back up data, especially before installing updates or upgrades.

6 REMUNERATION

- 6.1 For the contractually agreed services for Maintenance and Customer Support the Customer shall owe the pertinent agreed remuneration due and payable for the agreed term in advance, within 14 days after invoicing at the latest. Unless agreed otherwise in a particular case, prices are quoted "net", plus the pertinent sales tax valid at the time. Payments shall only be deemed rendered once they have been credited to a MES bank account.
- 6.2 The Customer can only offset against undisputed or legally established claims; this also applies for the assertion of a right of retention.

7 WARRANTY

- 7.1 **Free of defects** - MES and the Customer are aware that independently of the current state of the art, defects in MES Product cannot be excluded completely even when taking the greatest possible care; unlimited functionality of MES Product and/or correction of all defects cannot therefore be completely warranted. MES warrants that the services are free of defects at the time the risk passes and does not infringe any rights of third parties in the Designated Territory.
- 7.1 **Notification by Customer** - The Customer shall notify MES of any defect in writing and without undue delay. The assertion of warranty claims is otherwise excluded.
- 7.2 **Rectification of Quality Defects** - MES shall rectify defects at its own election by either repairing or replacing the defective MES Product or respective parts thereof.
- 7.3 **New Versions of MES Product** - MES may replace a defective MES Product with newer versions of the same, provided that (i) the replacement is at least equal in performance and functionality to MES Product to be replaced and (ii) the replacement does not require undue adjustments on the Customer's side, (e.g. the use of a different operating system or hardware with higher performance). For the avoidance of doubt, additional training of

personnel required due to minor changes in the structure of MES Product shall not be construed as undue adjustment in the meaning of the aforesaid sentence.

- 7.4 **Workarounds** - If a Quality Defect cannot be rectified by repairing or replacing MES Product, MES may provide the Customer with workarounds for the respective defect. To the extent reasonable, such workarounds shall be considered a rectification of the Quality Defect.
- 7.5 **Statutory Rights** - The Customer's rights pursuant to mandatory statutory law to lower payment, withdraw from the agreement and to claim damages or futile expenses in case of a Quality Defect remain unaffected.
- 7.6 **Notification and Indemnification** - The Customer shall notify MES without undue delay of any Infringement Claim giving reasonable details. The MES shall promptly assume full control over any court- or out-of-court defense activities of the Customer against such Infringement Claim and shall indemnify the Customer of all reasonable expenses and costs, including reasonable attorney's fees and damages finally awarded against the Customer.
- If (a) a final and binding court decision confirms the infringement of Third Party's intellectual property rights through the use of MES Product by the Customer in the Designated Territory, or (b) a preliminary injunction is properly served upon the Customer, or (c) MES concedes that MES Product infringes third party's intellectual property right, MES shall promptly procure an irrevocable release for the Customer, free of cost to the Customer, from such alleged Infringement Claim(s) for past use; and for continued use of MES Product, subject to the Infringement Claim(s), do one of the following:
- procure for the Customer a license for future use MES Product free of charge for the Customer, and if unable to procure such right,
 - modify or replace MES Product so as to make it non-infringing to the satisfaction of such third party while retaining their form, fit and functionality.
- 7.7 **Failure To Assume Control** - If MES fails to assume full control over the defense of the Customer as set forth in the section above within thirty (30) days upon notification by the Customer, the Customer may conduct the defense and MES shall reimburse the Customer for the costs incurred by it including reasonable attorney's fees and damages finally awarded against the Customer.
- 7.8 **Assistance by the Customer** - The Customer shall provide, upon the written request by MES and at the expense of MES, reasonable assistance to MES to support MES in the settlement of and/or defense against the Infringement Claim. MES agrees to provide such reasonable assistance to the Customer where the Customer undertakes to conduct the defense pursuant the provisions of this Section.

8 LIABILITY

No claims for damages may be asserted against MES (including its legal representatives and agents) on any legal grounds whatsoever except in compliance with the following terms:

- 8.1 The MES is liable for intentional acts and in cases where liability is mandatory by law, including, but not restricted to, cases where product liability law applies, where there is culpably caused injury or damage to health or loss of life, or material damage due to the absence from the services that are guaranteed by MES.
- 8.2 If none of the foregoing applies, MES is liable as follows:
- a. In cases of gross negligence. In such cases, the liability for damage to property and assets shall be limited to the amount of damage that might reasonably be predicted, unless the damage is caused by members of the executive body or managers of MES, or unless an essential contractual duty, which has to be fulfilled in order to reasonably fulfill the contract and which the contractual partner may reasonably expect to be fulfilled (cardinal duty), is violated.
 - b. In cases of slight negligence, in as much as a cardinal duty is violated. In such cases liability for damage to property and financial damage shall be limited to the damage that might reasonably be expected in such cases.
- 8.3 In the event of data loss, MES is liable under the conditions stated above only for and up to the cost of recovering the data, and only on the condition that proper data backup has been performed by the Customer.
- 8.4 No liability is otherwise accepted. This particularly applies to consequential harm caused indirectly by a defect, including loss of profit or non-achievement of savings.

9 DURATION OF CONTRACT / TERMINATION

- 9.1 The concluded contract has the term as individually agreed between the Customer and MES.
- 9.2 An ordinary termination is excluded. This shall be without prejudice to the right to terminate for good cause.
- 9.3 Termination shall require the written form.

10 CONFIDENTIALITY, DATA PROTECTION

- 10.1 MES and the Customer undertake to keep business secrets and other information marked confidential secret. Passing on such information to persons who are not involved in concluding, executing or winding up the contractual relationship is permitted - in so far as there is no statutory duty - only with the written consent of the other contractual partner. Unless the contractual parties have agreed other-wise, this obligation shall end three years after the pertinent information becomes known, but not before the contractual relationship between MES and the Customer ends. The contractual partners shall also impose these obligations on their employees and any third parties they might involve.
- 10.2 In so far as MES has access to the Customer's personal data, this shall only be as a contract data processor, so that such data shall be processed and used by MES only to carry out the contract and in compliance with the statutory data protection regulations. The Customer shall draw MES's attention to any requirements such as compliance with deletion and blocking duties. The Customer shall bear any detrimental consequences of such instructions on the execution of the contract. The contractual partners shall also impose these obligations on their employees and any third parties they might involve.

11 FINAL PROVISIONS

- 11.1 MES Model Examiner®, MES Test Manager®, MES Quality Commander® and MES M-XRAY® are registered trademarks in Germany.
- 11.2 MES Products and their updates and upgrades may be subject to export and import restrictions; in particular, there may be permit requirements and/or their use or associated technologies may be subject to restrictions abroad. Fulfilment of the contract by MES is subject to the provision that this is not prevented by any impediments arising from national or international foreign trade legislation or by any other regulations.
- 11.3 Unless expressly agreed otherwise, all declarations by the parties shall always require the written form. This shall also apply to the revoking of this written form requirement. The parties are in agreement that transmission by fax and email satisfy the written form requirement, in so far as receipt of the same can be proven.
- 11.4 Should individual provisions be invalid, this shall have no effect on the validity of the remaining provisions. A valid or feasible provision shall be agreed instead of the void or infeasible one that comes closest to the commercial intention of the void or infeasible provision.
- 11.5 The place of fulfilment is where MES has its registered offices. German law with the exclusion of UN international trade law and laws referring to foreign jurisdictions shall apply.
- 11.6 Legal forum for all legal disputes arising under contracts and for all disputes relating to the creation and effectiveness of those contractual relationships with respect to merchants, a legal person under public law or a special fund under public law is where MES has its registered offices. The above notwithstanding, MES shall be entitled to assert claims under the Customer's registered address.