

# ENDUSER LICENSE AGREEMENT

„Agreement“

between

**FACTON GmbH**  
Konrad-Zuse-Ring 12 b  
14469 Potsdam  
“FACTON”

and

...

...

...

„Licensee“

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The parties agree as follows:

## 1. DEFINITIONS

### 1.1

**Agreement** means this End User License Agreement, which is comprised of these General Terms, and Quote pursuant to which Licensee placed its order with FACTON.

### 1.2

**Anniversary Date of the License** is the anniversary date of (i) the date which FACTON, has chosen pursuant to Section 4 of these General Terms, or, absent such choice (ii) the corresponding Effective Date of the License.

### 1.3

**Brand** means a brand, trade name, service mark or trademark under which any FACTON Group Company markets a set of Licensed Programs.

### 1.4

**Documentation** means, at any time, the current user documentation (valid at the time of delivery of a Licensed Program) in any form including on media and via download link as made available by FACTON for use in connection with Licensed Programs.

### 1.5

**Effective Date of the License** means, for any license for a Licensed Program, the latest of the following (i) the date on which such Licensed Program was shipped to the Licensee or (ii) on which Licensee will access for the first time electronically such Licensed Program or, if applicable (iii) the date on which Licensee is informed by FACTON that the associated license key can be requested or is available.

### 1.6

**Error** means a material malfunction in the performance of a Licensed Program, as performance is described in its Documentation, and which is reported in accordance with the applicable support policy and reproducible by FACTON.

### 1.7

**FACTON** means FACTON GmbH, a German "Gesellschaft mit beschränkter Haftung" with its registered office at Konrad-Zuse-Ring 12 b, 14469 Potsdam, Germany.

**1.8**

**FACTON Content** means a compilation of benchmark data for the estimation of product costs with a specific service description published on FACTON's website [www.facton.com/en/facton-content](http://www.facton.com/en/facton-content), which can be modified from time to time.

**1.9**

**FACTON Group Company** means FACTON GmbH or any FACTON Subsidiary.

**1.10**

**FACTON Subsidiary** means any company in which FACTON GmbH, directly or indirectly, (i) owns more than 50% of the outstanding equity or ownership interest, or (ii) has the power to designate the managing authority.

**1.11**

**General Terms** means these general terms and conditions.

**1.12**

**Licensed Program** means (i) any data processing program for which a license is ordered by and provided to Licensee pursuant to a Quote, consisting of a series of instructions or databases in machine readable form, (ii) associated Documentation, (iii) Releases. Licensed Programs do include new versions of a Licensed Program.

**1.13**

**Machine(s)** means computer equipment i) belonging to Licensee or under its sole control or supervision, ii) located on Licensee's premises (provided when applicable that employees of Licensee may occasionally use laptop computers outside Licensee's premises) and iii) on which the Licensed Programs are executed.

**1.14**

**QBD (Quotation Break Down)** is a licensed program that allows you to export a calculation to an Excel file in an OEM format. QBDs are offered separately for certain OEMs.

**1.15**

**Quote** means a commercial proposal containing a quote for Licensed Programs made to Licensee by FACTON.

**1.16**

**Release** means a periodic FACTON Release including Update, Upgrade or New Version of a Licensed Program if and when made generally available to the market.

**1.17**

**Specific Terms for Third Party Software** shall mean the specific terms and conditions applicable to certain third party software components or third party software products not developed by or for a FACTON Group Company and licensed to Licensee to be used in connection with or within the Licensed Programs, published on FACTON's website [www.facton.com/en/third-party-software](http://www.facton.com/en/third-party-software), as modified from time to time.

**1.18**

**Support Service** means the maintenance, enhancement and/or other support services referred to in Section 3.2 of these General Terms.

**1.19**

**Update** means a actualization of a FACTON Releases (for example from FACTON 6.3.1 to FACTON 6.3.2) which mainly includes the correction of Error(s) for a given Release, if and when made generally available to the market.

**1.20**

**Upgrade** means the modification of a FACTON Releases to a higher Release, for example from FACTON 6.0 to FACTON 6.1, if and when made generally available to the market.

**1.21**

**Users** means (a) Licensee's employees, or (b) individual employees of Licensee's consultants or subcontractors who access the Licensed Programs on Machines and work for the exclusive internal needs of Licensee.

**1.22**

**New Version** is the migration from a FACTON-Version to a higher FACTON Version, for example from FACTON 5.4 to FACTON 6.0.

**2. GRANT OF RIGHT AND LICENSE BY FACTON****2.1**

**Grant.** Upon the Effective Date of the License, and subject to the terms and conditions of this Agreement, FACTON grants Licensee a non-exclusive, non-transferable license to use the Licensed Programs on Machines and at the maximum usage and/or number of Users, as applicable, which are approved and retained in the Quote. Licensee has no right to sublicense. The Licensed Programs may only be operated by Users for Licensee's internal use, only in the country where the license order is placed by Licensee to FACTON, and in accordance with their Documentation and this Agreement. License keys or license tokens do not themselves grant the legal right to use the Licensed Programs. A transfer to a different country or region is possible with FACTON's consent. FACTON will not unreasonable withheld such consent, but such transfer may, however, require a price adjustment due to regional differences in the price list. Certain Licensed Programs either may contain third party software components or may be third party software products to which certain Specific Terms for Third Party Software apply. The current Specific Terms for Third Party Software may be found at [www.facton.com/en/third-party-software](http://www.facton.com/en/third-party-software). Licensee warrants that it has full knowledge of such Specific Terms for Third Party Software, and agrees to be bound by and to comply with such terms.

**2.2**

**Restrictions.** Licensee is not authorized to use the Licensed Programs (i) to develop software applications for use by or distribution to any third party, whether in whole or part, whether as standalone products or as components, and whatever the means of such distribution (including

without limitation through the Internet or as Internet-based services), or (ii) to perform or offer any type of services relating to the Licensed Programs, including but not limited to, consulting, training, assistance, outsourcing, service bureau, customization or development relating to the Licensed Programs for any third party, irrespective of how such services are offered or performed (including without limitation through the Internet or as Internet-based services).

(iii) The licensee is not entitled to use Licensed Programmes indirectly through their interfaces if the use (also) serves to circumvent the relevant royalties for direct use (e.g. through multiplexing). Should Licensee wish to use the Licensed Programs for any use contemplated under (i) or (ii) here above, Licensee shall enter into a separate agreement with a FACTON Group Company.

Licensee shall not correct Errors, defects and other operating anomalies of the Licensed Programs. Except as is expressly set forth herein, no other express or implied right or license is provided to Licensee.

### 2.3

**Copies.** Licensee may make the necessary number of copies of the applicable Licensed Program for installation and one copy for back-up per Machine in support of Licensee's authorized use as described above.

## 3. DELIVERY AND SUPPORT SERVICE

Obligations described in this Section 3 shall be undertaken by FACTON in the event the Quote is made by FACTON.

### 3.1

**Delivery.** Within a reasonable period of time after FACTON's acceptance of a corresponding order, and only for the first order of a Licensed Program under each operating system, FACTON, will deliver to Licensee one (1) copy of such Licensed Program, or make the Licensed Programs available electronically. Electronic delivery will be made by posting the Licensed Programs ordered by Licensee on FACTON's site and providing Licensee with a user name, password, and instructions for accessing and downloading the Licensed Programs from such website. Licensee is responsible for accessing FACTON's site and downloading the Licensed Programs according to instructions to be provided by FACTON. Unless otherwise agreed in writing by the parties, and in the event the Licensed Programs are not delivered electronically, Licensed Programs ordered by Licensee from FACTON shall be delivered EXW (Incoterms 2000) at FACTON's premises identified in FACTON's Quote.

### 3.2

**Support Service.** FACTON will provide Support Services for Licensed Programs from the Effective Date of the License, subject to payment by Licensee of all applicable charges. Support Services contain following services:

- (1) Provision of Updates, Upgrades and New Versions for the Licensed Programs
- (2) Support Services which are described detailed on FACTON's Support Service Website [www.facton.com/service-and-support](http://www.facton.com/service-and-support) (Support Service & Support Terms for FACTON

Licensed Programs). FACTON may transfer Support Services overall or partly to sub-contractors.

- (3) Instead of the regulations in 3.2 paragraph (1) and paragraph (2), only the following applies to QBD: If the licensee of one or more QBDs informs FACTON that an OEM's calculation format relevant to the specific QBD has changed, FACTON will adapt the respective QBD to the changed calculation formats and provide the licensee with an upgrade. FACTON is not obliged to inform itself if the calculation formats of an OEM have changed. Furthermore, FACTON is not obliged to provide more than two upgrades of a QBD per calendar year.

Support Services relate exclusively to the most current and newest version of the Licensed Programs (displayed on FACTON's website) and the immediate two prior Releases. The Support Services do not support plug-ins. Plug-ins are customer specific software extensions or customer specific interfaces to third-party systems.

Information available on the [www.facton.com](http://www.facton.com) website [www.facton.com/service-and-support](http://www.facton.com/service-and-support) regarding FACTON's Support Services policies is subject to change at FACTON's sole discretion, provided however, except as set forth below, FACTON will not materially reduce the level of Support Services provided for the Licensed Programs during the current annual period for which Licensee has paid recurring charges. Any material reduction of the level of Support Services shall be applicable only if announced before the renewal notice period of Licensee's annual charges. FACTON may terminate Support Service for any Licensed Program starting twelve (12) months after withdrawal of such Licensed Program from marketing has been announced.

#### 4. PRICE AND LICENSEE'S PAYMENT OBLIGATIONS

In consideration of the rights, licenses and services provided hereunder, Licensee shall pay the charges applicable to each license of Licensed Programs and, at the price identified in the Quote pursuant to which Licensee made its order. Payments pursuant to this Section 4 shall be made to FACTON in the event the Quote is made by FACTON or on its behalf.

All prices are exclusive of taxes. Licensee shall be responsible for payment of any and all taxes, duties, excises, import VAT or similar charges of any nature whatsoever, now in force or enacted in the future, that are levied, assessed, charged, withheld, or collected for or in connection with Licensed Programs provided hereunder or otherwise arising in connection with this Agreement, but excluding taxes based on FACTON's net income. If Licensee is or may be required under any law or regulation of any governmental entity or authority, domestic or foreign, to withhold or deduct any portion of any payment due to FACTON pursuant to this Agreement, then the sum payable to FACTON will be increased by the amount necessary to yield to FACTON an amount equal to the sum it would have received had no withholdings or deductions been made. Licensee shall indemnify FACTON against any losses or costs incurred by FACTON due to any failure of Licensee to make such deduction or withholding.

Licensee shall pay interest for late payment at a rate of 8 percent points per year over the basis interest acc. to §§ 247, 288 BGB (German Civil Code), on all sums unpaid at the due date, plus reasonable attorneys' fees and costs incurred by FACTON in collecting unpaid amounts.

FACTON shall have the right to set a common Anniversary Date for the payment charges as the case may be, with respect to any license of any Licensed Program with different Effective Dates of License (subject to prorated calculation of any charges due for any period not covered as a result thereof).

FACTON may invoice a lump sum for travel expenses.

Unless otherwise agreed to in writing by FACTON, (i) all recurring charges will be invoiced yearly and in advance, and (ii) Licensee shall pay all invoices by wire transfer within fourteen (14) days from the date of invoice.

(i) Perpetual License (Purchase)

A one-time, non-refundable charge is to be paid for the purchase of a Perpetual License for a Licensed Program. The payment grants the Licensee a license for an unlimited term (subject to the provisions of these General Terms and Conditions stipulated in Section 2) for the use of the current Release of such Licensed Program delivered on the date of purchase, which FACTON made available on the effective date of the license.

**Annually Recurring Maintenance and Support Charge.** Starting from the effective date of the license, the Licensee pays a maintenance and support charge for each license of a Licensed Program, as stipulated in the offer. The annually recurring maintenance and support charge is an annual charge, to be paid in advance. The maintenance and support charge is fixed for a period of two years; upon expiry of this period FACTON may change the maintenance and support charge with a notice period of three months to the end of each contractual period. The Licensee may object to such a price change notice in writing within a four-week period upon the receipt of such price change notice; consequently the services associated with the maintenance and support charge are terminated with the expiry of the respective contractual period. The payment of the maintenance and support charge for a Licensed Program grants the Licensee (a) Support Service for the Licensed Program for one year in accordance with Section 3.2 and (b) a license (subject to the provisions in Section 2 of these General Terms and Conditions) for the use of Versions, Releases and maintenance Releases of this Licensed Program, which FACTON has made available during such period, and substituting the license for the prior Release of the Licensed Programs provided to the Licensee.

(ii) Lease License

An annual license charge is to be paid for the lease of a Licensed Program during the license term (subject to the provisions in Section 2 of these General Terms and Conditions). In return, the Licensee receives (1) the right to utilize the Versions, Releases and maintenance Releases of such Licensed Program, which FACTON has made available during the license term, and (2) Support Services for the Licensed Program during the license term in accordance with Section

3.2. The license charge for the Lease License is to be paid annually in advance. The Lease License incl. the provision of Support Services has a minimum term of three years as of the effective date of the licenses and such licenses are renewed annually by one year upon the expiration of the minimum term or any other agreed upon term, unless the Lease License has been terminated by any of the contracting parties with a notice period of three months to the end of the minimum term or the subsequent terms. Upon the expiration of the aforementioned minimum license term, the Lease License price can be changed, at FACTON's sole discretion, with a notice period of three months.

The Perpetual and Lease License prices are specific to each country or region and apply only to the use of such licenses in the country in which the Licensee, who purchased such licenses from FACTON, has its head office. Any transfer of existing licenses to equipment in a different country requires FACTON's prior written consent and may require price adjustments.

## 5. INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY

The Licensed Programs and Documentation, including any copies, compilations, made by or for Licensee, in whole or in part, are the sole property of FACTON or other owner. All intellectual property rights in the Licensed Programs and associated Documentation belong exclusively to FACTON or its licensors. FACTON and/or its licensors shall retain all title, copyright and other intellectual property rights in the Licensed Programs and all modifications, enhancements or other works derivative of the Licensed Programs.

Licensee shall preserve and reproduce any copyright, patent and trademark notices which may appear in the Licensed Programs and Documentation on all copies thereof, in whole or part. Licensee shall keep full, true and accurate records of all copies of the Licensed Programs and associated Documentation, which records shall be available for audit by FACTON.

Licensee shall not provide, disclose or transmit any Licensed Program, nor any results of tests or benchmarks related to any Licensed Program, or copy thereof, in whole or in part, without the prior written consent of FACTON, except to Users within the limits of the rights granted under this Agreement. Licensee shall take appropriate action with Users, to ensure that Licensee complies with its obligations under this Agreement.

Licensee recognizes that the methodologies, techniques, expressions, ideas and concepts contained in or expressed within the Licensed Programs and associated Documentation are proprietary information or trade secrets of FACTON or other owner. Licensee shall treat them as confidential information and not disclose them as long as this Agreement is in effect and for three (3) years thereafter.

Licensee shall not modify, adapt, reverse engineer, decompile, disassemble, or otherwise translate all or part of the Licensed Programs. In the event Licensee wishes to ensure the interoperability, within the limits of its authorized use as defined in Section 2 of these General Terms, of the Licensed Programs with other computer software or with equipment under conditions provided for by law (including without limitation laws implementing EC Directive



91/250 on the legal protection of computer programs), Licensee must ask FACTON for a license to use standard interfaces, exclusively for internal use to achieve interoperability. FACTON will grant Licensee a license to use the standard interfaces at then current prices and contractual conditions of FACTON or, if standard interfaces are not available, FACTON, for a fee, may provide Licensee with the necessary information to permit interoperability. Licensee is not authorized to give access to these interfaces to any person other than Users.

## 6. PATENT AND COPYRIGHT INFRINGEMENT

Unless otherwise specified in applicable Specific Terms for Third Party Software, FACTON will defend Licensee against any and all claims made by a third party that a Licensed Program delivered under this Agreement infringes a copyright or a patent of the United States or a member state of the European Patent Organization, provided that (i) Licensee provides FACTON with prompt written notice of the claim, and (ii) Licensee gives FACTON control of the defense of the claim and provides reasonable cooperation in the defense of the claim, and (iii) in the case of a patent infringement, the related patent has been granted by the United States as of the date of Licensed Program's delivery to Licensee. Such indemnification is limited to costs, damages and expenses (including reasonable legal fees) finally awarded against Licensee by a court of competent jurisdiction or agreed to in a written settlement agreement signed by FACTON arising out of such claim.

FACTON shall have no obligation to defend or indemnify Licensee against any claim related to (i) any modification of a Licensed Program by Licensee or anybody but the FACTON, or (ii) the use of one or more Licensed Programs in combination with other elements, data, programs not provided by the FACTON, or (iii) the use of Deliveries other than the most recent ones provided by the FACTON.

If operation of a Licensed Program becomes, or in FACTON's reasonable opinion, is likely to become the subject of such an infringement claim, Licensee shall permit FACTON, at FACTON's option and expense, either to secure for Licensee the right to continue using the Licensed Program or to modify it, or replace it with another program which is functionally equivalent. If neither of the foregoing options is available on terms which are reasonable in FACTON's judgment, Licensee shall destroy or return said Licensed Program, and all copies thereof, to FACTON within one (1) month from FACTON's written request. In such a case, FACTON will grant Licensee a credit for the corresponding License charge paid, if applicable, depreciated on a straight-line over three years, to be applied to future licenses, and will reimburse Licensee for the unaccrued portion of any associated recurring charges as the case may be.

This Section 6 states FACTON's entire liability and Licensee's exclusive remedy for any claim of infringement of intellectual property rights under this Agreement.

## 7. WARRANTIES, LIMITATION AND DISCLAIMER OF WARRANTIES

Subject to continuing payment of the applicable charges, FACTON warrants, that the Releases of any Licensed Programs, will materially comply with functions, which are described in Documentation, provided that it is properly used in the operating environment specified by FACTON. For Update-, Upgrade- and New Version-Deliveries warranty is limited on innovations of the Update-, Upgrade- and New Version-Deliveries towards existing Release. If such Release of the Licensed Program will not comply functions, which are described in Documentation, Facton will attempt to make the Licensed Program perform as warranted. FACTON may request Licensee to install a an Update or an Upgrade for such performance. FACTON may remove any and all errors at its choice by correction, workaround or redelivery. If after sixty (60) days from notice by Licensee of the non-conformity received within the Warranty Period, FACTON has not provided a conforming Licensed Program, Licensee's exclusive remedy and Company's entire liability for any breach of such warranty is for Licensee the reduction of the paid remuneration or withdrawal from the contract. For any and all claims for compensation limitation of liability in sec. 8 does apply.

For each Release of a perpetual Licensed Program a warranty period of one (1) year applies from delivery of Release of the Licensed Program to Licensee or from first electronic access on a Release of a Licensed Program or first download by Licensee, depending on what occurs first.

FACTON does not warrant that Licensed Programs will qualify for certain purposes by Licensee, the functions of Licensed Programs will meet Licensee's requirements or will enable it to attain the objectives Licensee has set for itself, or that they will operate in the combination or environment selected for use by Licensee, or that the operation of the Licensed Programs will be uninterrupted or free of Errors. In all instances, Licensee shall be responsible for ensuring that the results produced by Licensed Programs comply with quality and safety requirements of Licensee's products or services. No employee or agent of FACTON is authorized to give a greater or different warranty. Licensee shall have exclusive responsibility for (a) program selection to achieve Licensee's intended results, (b) Licensed Program installation, (c) taking adequate measures to properly test, operate and use each Licensed Program and (d) results obtained therefrom. Licensee shall also have exclusive responsibility for selection, use and results of any other programs or programming equipment or services used in connection with the Licensed Program.

For each non perpetual Licensed Program the following applies in addition: A termination right of Licensee for not granting the use of a Licensed Program acc. to § 543 Sec. 2 Sentence 1 No. 1 BGB (German Civil Code) is excluded, as far as rework or replacement have not failed. Also a liability of FACTON without a fault for errors in a Licensed Program existing at the time of conclusion of the agreement acc. to § 536a Sec. 1 BGB (German Civil Code) is expressly excluded.

## 8. LIMITATION OF LIABILITY

- FACTON is not liable in cases of slightly negligent violation of minor contractual obligations. Otherwise - i.e. for damages caused by a breach of fulfillment of a duty which is essential for the proper execution of the contract and on which the contracting party may regularly rely - FACTON's liability for damages caused by slight negligence is limited to those damages, which typically can be expected within the scope of the respective contractual relationship (contract-typically foreseeable damages). This also applies to slightly negligent breaches of duty by FACTON's legal representatives, executives or vicarious agents.
- The above limitation of liability does not apply in the case of fraudulent intent, in the case of bodily injury or personal injury, for the violation of guarantees or for claims arising from product liability.
- FACTON is liable without limitation for damages caused intentionally or grossly negligently by FACTON.
- The exclusions and limitations of liability according to this clause 8 apply to the same extent with regard to the actions of FACTON's employees, workers, staff, representatives and vicarious agents. Furthermore, they also apply to their personal liability.
- A reversal of the burden of proof is not intended by the above provisions.

## 9. EXPORT AND REEXPORT LAWS AND REGULATIONS

Export to Licensee of Licensed Programs and Documentation is subject to all applicable countries' export and re-export laws and regulations. Licensee shall provide FACTON as the case may be with all necessary assistance for any application for such authorizations, licenses and other approvals, or other documentation related to the export or re-export of Licensed Programs. FACTON shall have no liability whatsoever towards Licensee if such authorizations, licenses or approvals are not obtained. Licensee shall not export or re-export, either directly or indirectly, Licensed Programs or Documentation when such export or re-export requires an export license or other governmental approval without first obtaining such license or approval. Licensee hereby certifies to Licensor that the Licensed Programs ordered hereunder will not be used in any nuclear, chemical or biological weapons or missile delivery systems in contravention of the applicable export laws of any country or diverted to any country, company or individual in contravention thereof.

## 10. TERM AND TERMINATION

### 10.1

**Termination of access to Support Service for Perpetual License.** Pursuant Nr. 3.2 FACTON may terminate Support Service for Perpetual Licenses one (1) month prior, but not before expiration of twelve (12) months since Effective Date of License. Pursuant Nr. 3.2 Licensee may terminate access to Support Service for Perpetual Licenses, subject to the following conditions: (i) Licensee shall notify thereof FACTON at least three (3) months prior to the Anniversary Date of the License, and (ii) such termination shall apply to Support Services related to all licenses of a

given Licensed Program held by Licensee. In such case (x) Licensee shall have no further obligation to pay the maintenance and support charges related to the corresponding Licensed Programs, (y) Licensee shall duly certify in writing to FACTON that all copies, whether in whole or in part, of all Releases of the Licensed Programs and associated Documentation other than those of the latest Release of the Licensed Programs installed by Licensee, have been duly destroyed or returned to FACTON and (z) Support Service for such Licensed Programs will terminate at the expiration of the then current term. Subject to payment by Licensee of the then applicable process charge, FACTON will deliver the license keys necessary for Licensee to operate its Perpetual License. FACTON shall have no further obligation to provide any service or deliver any Release in support of any such licenses, including for operation of the licenses in their hardware or software environment. Licensee may reinstate license to Support Service, provided such reinstatement is activated for all licenses of a given License Program held by Licensee, and Licensee pays a reinstatement charge of an amount equal to one hundred and fifty percent (150%) of all maintenance and support charges that would have been due from the date of termination of access to the Support Services to the date of the reinstatement of such Support Services.

## 10.2

### **Termination by Licensee of licenses for Licensed Programs.**

Section 4 (ii) is applicable for termination of Lease Licenses.

## 10.3

**Term and Termination of this Agreement.** This Agreement shall come into force on the Effective Date of the License in respect of the first License ordered by Licensee and shall remain in full force and effect until the expiration of all licenses granted under this Agreement, unless terminated as provided hereunder.

Either FACTON or Licensee may terminate this Agreement and/or any licenses granted under this Agreement, if the other is in material breach of any of its obligations and has failed to remedy such breach within one (1) month of receipt of written notice. The termination will not prejudice the rights and remedies of the non-breaching parties. In case of termination of the Agreement for uncured material breach by Licensee, Licensee shall provide promptly to FACTON a written certificate that all copies, in whole or in part, of the Licensed Programs and associated Documentation, have been destroyed or returned to FACTON.

## 11. SIGNMENT

FACTON may transfer its rights and obligations under the license agreement, in particular the right to collect the license fees for the purpose of refinancing, to third parties, so that only the third party is entitled to payment of the license fee and is the holder of the rights regarding the granted license right. FACTON may authorize the third party to notify the assigned claims. The licensee hereby declares his irrevocable consent to this transfer. The same applies to a reassignment of the rights and obligations from the license agreement to FACTON by the third party. In relation to the third party, but not in relation to FACTON, the licensee waives all objections and defences, in particular defences of challenge and retention.



## 12. MISCELLANEOUS

### 12.1

**Purchase Orders.** Licensee's purchasing terms and conditions as well as other general terms and conditions shall not in any way supersede, modify, vary or otherwise supplement the terms of this Agreement and do not become subject matter of contract, even if these are not contradicted.

### 12.2

**Notices.** All notices required hereunder shall be communicated in English or German and shall be personally delivered or sent by certified or registered mail or reputable express courier service, addressed to the parties at their addresses first mentioned above, or at such other address as either party may designate to the other by notice served as hereby required, or contained in the relevant order form, or sent by facsimile transmission to the facsimile machine telephone number provided by the receiving party.

### 12.3

**Force majeure.** Neither party shall be liable for failure to perform its obligations hereunder, if such failure results from causes beyond its reasonable control such as acts of God, acts of terrorism, fire, explosion, strikes or labor disputes, delays by vendors or manufacturers, governmental acts, staff unavailability due to illness or airline flight delay or similar causes.

### 12.4

**Severability.** In the event any part of this Agreement (other than the provision obliging Licensee to make payment) is found to be invalid, illegal or unenforceable in any respect, the remaining provisions shall nevertheless be binding with the same effect as if the invalid, illegal or unenforceable part was originally deleted.

### 12.5

**Transfer, Assignment & Subcontract.** Licensee shall not subcontract, assign, delegate or otherwise transfer (including without limitation, by way of merger or contribution) any or all of its rights, duties, benefits or obligations under this Agreement, or sublicense Licensed Programs to any third party. This Agreement shall be binding upon, and inure to the benefit of FACTON and its successors and assigns. FACTON shall be free to assign, delegate or otherwise transfer (including without limitation, by way of merger or contribution), any of its rights or obligations hereunder and/or otherwise subcontract any of its obligations hereunder, in whole or in part, to FACTON GmbH, any FACTON Subsidiary and/or to any third party, without Licensee's consent.

### 12.6

**Amendments & Non-Waiver.** No waiver, alteration, modification, or cancellation of any of the provisions of this Agreement shall be binding unless made in writing by all parties. Notwithstanding the foregoing, FACTON may add, modify or cancel any provision of this Agreement to the extent required by FACTON's agreements with its licensors by written notice to Licensee if applicable, at any time. Such additions, modifications and cancellations shall not require the separate consent of Licensee and shall be effective immediately upon receipt of such notice. A

party's failure at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce such provision.

### 12.7

**Marketing.** FACTON may publish a joint press release regarding the conclusion of the Agreement and the use of the Licensed Programs at the Licensee's company. FACTON is entitled to create and publish a user report for the trade/technical press. The exact content of the press release, publication, and user report are coordinated with the Licensee in advance; the Licensee provides its consent to the release of such publications. The licensee supports FACTON during the contractual term as a reference customer by granting two reference visits per year at the licensee's company. Such reference visits will be coordinated with an appropriate lead-time by mutual consent. FACTON is permitted to utilize the licensee's company logo for reference purposes.

### 12.8

**Audit.** During the term of this Agreement, Licensee shall establish and maintain accurate information records relating to the use, and when applicable, destruction of the Licensed Programs, and keep such records available for a period of three (3) years after the term of this Agreement. During the term of this Agreement and for a period of three (3) years thereafter, the FACTON shall have the right at any time, at its own expense and under reasonable conditions of time and place, to audit and copy these records. Licensee also hereby entitles and authorizes FACTON to verify its compliance with the terms of the Agreement. For such purpose FACTON may conduct any review on Licensee's premises during normal business hours, in a manner that minimizes disruption to its business. FACTON may require Licensee to provide it or any third party the FACTON engages to conduct such verification, with machine access, copies of system tools outputs, or other electronic or hard copy system information as appropriate. If the audit reveals that Licensee has underpaid charges to FACTON, Licensee shall promptly pay to FACTON such charges at the then current list price. In the event such underpayment is five percent or greater, then in addition to Licensee paying the applicable charges, Licensee shall reimburse FACTON for the cost of such audit. In a joint effort to prevent software piracy, Licensee shall comply with any changes in the Licensed Programs licensing security mechanism that aims at preventing fraud. By invoking the rights and procedures described above, FACTON does not waive its rights to enforce this Agreement or to protect its intellectual property by any other means permitted by law.

### 12.9

**Entire Agreement.** This Agreement is the complete agreement between the parties relating to the subject matter hereof and supersedes all prior and contemporaneous proposals, agreements, understandings, representations, purchase orders and communications, whether oral or written. Licensee acknowledges that it has not relied on the future availability of functionality or product updates with respect to any Licensed Programs in entering into this Agreement. The terms of this Agreement shall have no force or effect with respect to any claim based on the use of any intellectual property rights of FACTON outside the scope of the licenses expressly granted herein. Except as expressly permitted herein, this Agreement may be modified only by written amendment signed by the parties and no other act, document, usage or custom shall

be deemed to amend or modify this Agreement, including but not limited to Licensee's terms and conditions.

#### 12.10

**Governing law and jurisdiction.** This Agreement shall be governed by and construed in accordance with, and the legal relations between the parties shall be determined in accordance with, the laws of the Federal Republic of Germany, without regard to any conflict of laws principles and excluding application of the United Nations Convention for the International Sale of Goods. Place of jurisdiction is Munich.

#### 12.11

**Survival.** The following sections of these General Terms shall survive termination thereof: 2.2, 5, 7, 8, 9, 10.3, 11 and 12.

FACTON GmbH

LICENSEE

\_\_\_\_\_  
(Place, Date)

\_\_\_\_\_  
(Place, Date)

\_\_\_\_\_  
(Stamp, Signature)

\_\_\_\_\_  
(Stamp, Signature)