



**DATATEX
DYNAMICS**

Transcending Telephony Solutions

Cape Town : Cnr. Nelson & Milton Road, Vasco, 7460 • P.O. Box 6560, Welgemoed, 7538 • **Tel:** + 27215924033
Johannesburg : Unit 21, Sunninghill Office Park, Pettier Road, Sunning Hill • **Tel:** + 27113199800

Web : www.datatex.co.za
Fax: + 27215924077 • **Support:** 0861114351

STANDARD SUPPORT SERVICES TERMS

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1. Introduction

The Terms are the general terms of the relationship between the Service Provider and Client. The Terms cover any transactions where the Service Provider provides Support Services to the Client. The commercial terms of any transaction will be contained in a Support Services Order that will incorporate these Terms. The Support Services Order will prevail if there is a conflict of meaning. Nothing in the Terms obligates any party to enter into any Orders.

2. Definitions and interpretation

2.1 Definitions

In these terms, the following words shall, unless otherwise stated or inconsistent with the context in which they appear, bear the following meanings and other words derived from the same origins as such words (that is, cognate words) shall bear corresponding meanings:

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| 2.1.1 | "Agreement" | means the agreement between Service Provider and Client, consisting of the Terms and any Orders the parties enter into; |
| 2.1.2 | "Business Day" | means any day other than a Saturday, Sunday or gazetted national public holiday in the Republic of South Africa; |
| 2.1.3 | "Charges" | means the fees and charges levied by the Services Provider in respect of the Services, as set in clause 4; |
| 2.1.4 | "Client Data" | means materials, data or information, including personal information as defined in Data Protection Legislation, relating to the Client, the Client's Personnel, users of the Software, or the customers, operations, business, or activities of the Client; |
| 2.1.5 | "Confidential Information" | means, in relation to a Party, any information of a confidential and/or commercially sensitive nature, howsoever obtained or received and whether or not |
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marked confidential, including any technical, commercial, financial or scientific information, know-how, trade secrets, processes, marketing and business information, customer and supplier information, pricing information and/or any other information or material of whatever description or nature proprietary to a Party, whether in written, oral, magnetic, or machine-readable or other format;

- 2.1.6 **"Data Protection Legislation"** means any applicable data protection or data privacy laws applicable from time to time;
- 2.1.7 **"Effective Date"** means in respect of each Order, the Effective Date stipulated in each Order, in the absence of which it will be the date the Order is accepted by Service Provider;
- 2.1.8 **"Intellectual Property Rights"** means all intellectual property rights owned by either Party subsisting anywhere in the world, which is in any way capable of protection in law, including without limitation, trademarks, domain names, copyright, patents, designs, Confidential Information, and all proprietary rights in and to ownership of any idea, discovery, artwork, design, concept, technique or improvement, industry information, know-how, system, methodology, data model, computer software, computer source code and object code, report, correspondence, documentation, flow chart, data base, table, calculation, spread sheet, schematic plan, photograph, presentation or invention (whether patented or not) and any other rights of a similar nature which exist now or will in the future exist, by either Party from time to time, and whether registered or not;

- 2.1.9 **"ITIL"** means the Information Technology Infrastructure Library published by the UK office of Government Commerce (or its successor organisation) together with the associated published codes of practice and best practice guides published by the IT Service Management Forum (or the successor organisation to the IT Service Management Forum);
- 2.1.10 **"Licence Agreement"** means the software licence agreement entered into between the Parties, regulating *inter alia*, the use of the Software and any Updates or Upgrades of the Software by the Client;
- 2.1.11 **"Order"** means a Support Services Order agreed to and signed.
- 2.1.12 **"Personnel"** means all directors, employees, agents, representatives, and sub-contractors of a Party who are assigned from time to time to work in connection with the performance of that Party's obligations under or in connection with the Agreement;
- 2.1.13 **"Prime Rate"** means the rate of interest (nominal annual compounded monthly in arrears) from time to time published by Standard Bank South Africa as its prime overdraft lending rate (a certificate from any manager of that bank, whose appointment or authority need not be proved, as to the prime rate at any time and the usual way in which it is calculated and compounded at such time shall, in the absence of manifest or clerical error, be final and binding on the Parties);
- 2.1.14 **"Rand" or "R"** means South African Rand, the lawful currency of the Republic of South Africa;
- 2.1.15 **"Services"** means the services to be provided by the Service Provider to the Client in support of the Software as set out in an Order;

- 2.1.16 **"Service Levels"** means the qualitative and quantitative performance levels to be achieved by the Service Provider in respect of the Services, described in more detail in an Order;
- 2.1.17 **"Software"** means the AMETHYST software as more fully described in the Licence Agreement;
- 2.1.18 **"Terms"** means the terms, consisting of: these customer relationship terms; and any other relevant specific terms, policies, disclaimers, rules and notices that the Parties agree on
- 2.1.19 **"VAT"** means value-added tax levied in terms of the Value-Added Tax Act, 89 of 1991, as amended.

2.2 **Interpretation**

In the Agreement:

- 2.2.1 unless otherwise defined in the Agreement, the words and phrases used in the Agreement shall have the definitions and shall be interpreted according to the definitions contained in the License Agreement;
- 2.2.2 references to a statutory provision include any subordinate legislation made from time to time under that provision and include that provision as modified or re-enacted from time to time;
- 2.2.3 words purporting the masculine gender include the feminine and neuter genders and vice versa; the singular includes the plural and vice versa; and natural persons include artificial persons and *vice versa*;
- 2.2.4 references to a "person" include a natural person, company, close corporation or any other juristic person or other corporate entity, a charity, trust, partnership, joint venture, syndicate, or any other association of persons;
- 2.2.5 if a definition imposes substantive rights and obligations on a Party, such rights and obligations shall be given effect to and shall be enforceable, notwithstanding that they are contained in a definition;

- 2.2.6 any definition, wherever it appears in the Agreement, shall bear the same meaning and apply throughout the Agreement unless otherwise stated or inconsistent with the context in which it appears;
- 2.2.7 technical terms that are not defined in clause 2.1 have the meaning determined first by reference to ITIL, and if not defined in ITIL, have the generally understood meaning in the information technology industry;
- 2.2.8 if there is any conflict between any definitions in the Agreement then, for purposes of interpreting any clause of the Agreement, the definition appearing in that clause or paragraph shall prevail over any other conflicting definition appearing elsewhere in the Agreement;
- 2.2.9 the use of any expression covering a process available under South African law (such as but not limited to a winding-up) shall, if any of the Parties is subject to the law of any other jurisdiction, be interpreted in relation to that Party as including any equivalent or analogous proceeding under the law of such other jurisdiction;
- 2.2.10 references to any amount shall mean that amount exclusive of VAT, unless the amount expressly includes VAT;
- 2.2.11 the rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (i.e. the *eiusdem generis* rule) shall not apply, and whenever the word "*including*" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given.
- 2.3 The expiration or termination of the Agreement shall not affect such of the provisions of the Agreement which are expressly provided to operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the relevant provisions themselves do not provide for this.
- 2.4 Each of the provisions of the Agreement has been negotiated by the Parties and drafted for the benefit of the Parties, and accordingly the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party

responsible for the drafting or preparation of the Agreement (i.e. the *contra proferentem* rule), shall not apply.

3. **Duration**

The Terms commence on acceptance and continue until terminated.

4. **Charges and Payment terms**

4.1 In consideration of the Service Provider performing its obligations under the Agreement, the Client will pay the Service Provider the Charges as set out in the Order.

4.2 All invoices shall be raised and all payments shall be made in Rand and the Client shall make payment of the Service Provider's invoices without deduction or set-off within 30 (thirty) days of the date of the invoice.

4.3 Any amount overdue shall bear interest at the Prime Rate plus two per cent (2%) from due date until the date of payment. In addition, the Service Provider reserves the right to suspend the Services if payment of an invoice is not received within forty-five (45) days of the date of the relevant invoice and shall reinstate the Services on receipt of the overdue payment.

5. **Warranties**

5.1 Each Party warrants and represents that, as at the date of the Agreement:

5.1.1 it has full capacity and authority to enter into and perform its obligations under the Agreement;

5.1.2 the Agreement is executed by a duly authorised representative of that Party;

5.1.3 there are no actions, suits or proceedings or regulatory investigations pending or, to that Party's knowledge, threatened against or affecting that Party before any court or administrative body or arbitration tribunal that might affect the ability of that Party to meet and carry out its obligations under the Agreement; and

5.2 The Service Provider warrants, represents and undertakes that it will at all relevant times:

- 5.2.1 use staff and/or subcontractors (as the case may be) with suitable training, education, experience and skill to perform the Services;
- 5.2.2 provide the Services with promptness and diligence and in a workmanlike manner; and
- 5.2.3 to the best of the Service Providers knowledge, it has all the necessary licences, certificates, authorisations and consents to provide the required goods and services in terms of this Agreement.
- 5.3 Except as expressly provided in the Agreement, the Service Provider gives no representation, undertaking or warranties, express or implied, by operation of law or otherwise. Without derogating from the generality of the foregoing (but subject to any express warranties provided in the Agreement) the warranties of "fitness for purpose" and merchantability are excluded. Any warranties given by Service Provider extend solely to the Client and are not transferable.

6. Intellectual Property

- 6.1 Subject to the further provisions of this clause, all rights, title, ownership, and interest (including Intellectual Property Rights) in and to any materials, which belong to any of the Parties, and/or their vendors and/or licensors (as the case may be) shall at all times remain the sole property of such Party, and/or their vendors or licensors.
- 6.2 Subject to the further provisions of this clause neither Party shall in any manner alter or remove or affect the display of the respective Intellectual Property Rights notices (and disclaimers) of the other Party and/or their vendors and licensors without the prior written approval of the other Party, and their vendors or licensors where applicable.
- 6.3 All rights, including all Intellectual Property Rights in and to any Client Data shall vest in and shall remain vested in the Client.

7. Confidentiality

- 7.1 A Party hereby undertakes to the other Party that:
- 7.1.1 it will ensure that each of its directors, members, employees, contractors or agents (together, "**Representatives**") to whom the Confidential Information

is made available is advised of its undertakings and confidentiality obligations in terms of the Agreement, and shall ensure that such Representatives agree to these undertakings and obligations;

- 7.1.2 it and its Representatives will treat all Confidential Information as private and confidential and will not review, reproduce, replicate, copy, publish or circulate the Confidential Information, in whole or in part, save with the prior consent of the other Party;
- 7.1.3 it will not, and shall ensure that its Representatives will not, use, permit the use of or apply any of the Confidential Information for any purpose whatsoever, save for the purpose of carrying out the instruction;
- 7.1.4 it will not, and shall ensure that its Representatives will not, divulge, furnish or disclose to any person, in any form or manner whatsoever, either directly or indirectly, any of the Confidential Information;
- 7.1.5 it and its Representatives will not use or exploit, for its or its own benefit, or for the benefit of any third party, in any form or manner whatsoever, directly or indirectly, any of the Confidential Information;
- 7.1.6 ownership in the Confidential Information shall remain vested in the disclosing party and shall not pass to it and/or its Representatives by virtue of the provisions of the Agreement, nor shall it and/or its Representatives be deemed to have been in any way licensed to use any of the Confidential Information in any manner;
- 7.1.7 it will not, and shall ensure that its Representatives will not, disclose to any person that the Confidential Information exists or has come into its possession;
- 7.1.8 it agrees to keep the terms of the Agreement confidential.

8. Limitation of Liability

- 8.1 In no event will a Party be liable to the other Party for any indirect or consequential loss or damages, provided such loss or damages did not arise as a result of a breach of clauses 5, 6 or 7 of the Agreement.

- 8.2 Subject to clause 8.3, and except for liability arising out of a party's infringement and/or misappropriation of the other Party's Intellectual Property Rights, the maximum liability of the Service Provider, whether in contract or delict (including negligence) for all breaches of the Agreement, and all other events, acts, claims, omissions and causes of action of whatever nature and however arising, relating to or arising directly or indirectly from the Agreement or the Services, shall be limited to the Charges paid by the Client in (i) the preceding year or (ii) the year following the Effective Date of the Agreement (whichever is the latest).
- 8.3 Nothing in the Agreement shall limit or exclude the liability of the Parties for any matter to the extent to which such liability cannot be lawfully excluded or limited.

9. Termination

- 9.1 Either Party shall have the right to terminate these Terms for convenience and without cause on sixty (60) days' written notice to the other Party. The termination of these Terms will not result in any currently existing Orders or Agreements being terminated as well, but rather will stop the Parties entering into any further Orders.
- 9.2 Either Party shall be entitled to give notice to terminate any Agreement with immediate effect, such termination to be effective upon deemed receipt of such notice, if the other Party:
- 9.2.1 commits a material breach of any of the terms of the Agreement and (if such a breach is remediable) fails to remedy that breach within 14 days of that Party being notified in writing of the breach;
 - 9.2.2 takes steps to place itself, or is placed in liquidation, whether voluntary or compulsory and whether provisionally or finally;
 - 9.2.3 takes steps to deregister itself or is deregistered;
 - 9.2.4 ceases or threatens to cease to carry on business; or
 - 9.2.5 is insolvent or commits an act which would be an act of insolvency which results in such insolvency procedure being instituted against the other Party and such proceedings are not dismissed within thirty (30) calendar days from the date the proceedings are instituted or the other Party makes an assignment for the benefit of its creditors.

9.3 In the event that the Licence Agreement is terminated for any reason whatsoever, all Agreements shall automatically terminate with effect the date of termination of the Licence Agreement.

10. **Non-solicitation and restraint**

10.1 Except as expressly permitted by the Agreement or as required by law, the Parties will not, without the written consent of the other Party, at any time during the term of the Agreement or for a period of 12 months after termination of the Agreement, engage, employ or otherwise solicit for employment whether directly or indirectly, any person who during the currency of the Agreement was a director, officer or employee of the other Party.

10.2 Nothing in this clause 10 shall prevent the Parties hiring or contracting with any person who applies for a job or contract as a response to a generally advertised invitation by a Party.

11. **Mediation and arbitration**

11.1 **separate, divisible agreement**

This clause is a separate, divisible agreement from the rest of the Agreement and shall:

11.1.1 not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of the Agreement and not to this clause. The Parties intend that any such issue shall at all times be and remain subject to arbitration in terms of this clause;

11.1.2 remain in effect even if the Agreement terminates or is cancelled.

11.2 **disputes subject to mediation and arbitration**

Save as may be expressly provided for elsewhere in the Agreement for the resolution of particular disputes, any other dispute arising out of or in connection with the Agreement or the subject matter of the Agreement, including without limitation, any dispute concerning:

11.2.1 the existence of the Agreement apart from this clause;

- 11.2.2 the interpretation and effect of the Agreement;
- 11.2.3 the Parties' respective rights or obligations under the Agreement;
- 11.2.4 the rectification of the Agreement;
- 11.2.5 the breach, termination or cancellation of the Agreement or any matter arising out of the breach, termination or cancellation;
- 11.2.6 damages arising in delict, compensation for unjust enrichment or any other claim, whether or not the rest of the Agreement apart from this clause is valid and enforceable,

shall be referred to mediation as set out in 11.3.

11.3 **mediation**

If the Parties are unable to agree on a mediator or to resolve any dispute by way of mediation within 14 days of any Party in writing requesting that the dispute be resolved by mediation, then the dispute shall be submitted to and decided by arbitration as set out in this clause.

11.4 **arbitration**

- 11.4.1 The Parties shall agree on the arbitrator who shall be an attorney or advocate on the panel of arbitrators of the Arbitration Foundation of Southern Africa ("**AFSA**"). If agreement is not reached within 10 Business Days after any Party calls in writing for such agreement, the arbitrator shall be an attorney or advocate nominated by the Registrar of AFSA for the time being.
- 11.4.2 The request to nominate an arbitrator shall be in writing outlining the claim and any counterclaim of which the Party concerned is aware and, if desired, suggesting suitable nominees for appointment as arbitrator, and a copy shall be furnished to the other Parties who may, within 7 days, submit written comments on the request to the addressee of the request with a copy to the first Party.
- 11.4.3 The arbitration shall be held in Cape Town or Johannesburg and the Parties shall endeavour to ensure that it is completed within 90 days after notice requiring the claim to be referred to arbitration is given.

- 11.4.4 The arbitration shall be governed by the Arbitration Act, 1965, or any replacement Act and shall take place in accordance with the Commercial Arbitration Rules of AFSA.
- 11.4.5 The arbitrator need not strictly observe the principles of law and may decide the matters submitted to him according to what he considers equitable in the circumstances.
- 11.4.6 Nothing contained in this clause shall prohibit a Party from approaching any court of competent jurisdiction for urgent interim relief pending determination of the dispute by arbitration.

12. Miscellaneous matters

12.1 domicilia and notices

- 12.1.1 For the purposes of any Agreement, including the giving of notices and the serving of legal process, the Parties choose *domicilium citandi et executandi* as the addresses listed on the coversheet of any Order:
- 12.1.2 The notice shall be deemed to have been duly given:
- 12.1.2.1 on delivery, if delivered to the Party's physical address in terms of either this sub-clause, during normal business hours (or on the first Business Day after that if delivered outside such hours);
- 12.1.2.2 on despatch, if sent to the Party's then fax number (provided that the sender has evidence of successful transmission) during normal business hours (or on the first Business Day after that if despatched outside such hours),
- unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.
- 12.1.3 A Party may change that Party's address or fax number for this purpose, by notice in writing to the other Party such change to be effective only on and with effect from the seventh Business Day after the giving of such notices.

12.2 **entire contract**

The Agreement contains all the express provisions agreed on by the Parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the Parties in respect thereof, and the Parties waive the right to rely on any alleged provision not expressly contained in the Agreement.

12.3 **no stipulation for the benefit of a third person**

Save as is expressly provided for in the Agreement, no provision of the Agreement constitutes a stipulation for the benefit of a third person (ie a *stipulatio alteri*) which, if accepted by the person, would bind any Party in favour of that person.

12.4 **no representations**

A Party may not rely on any representation which allegedly induced that Party to enter into the Agreement, unless the representation is recorded in the Agreement.

12.5 **variation, cancellation and waiver**

No contract varying, adding to, deleting from or cancelling the Agreement, and no waiver of any right under the Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.

12.6 **indulgences**

The grant of any indulgence, extension of time or relaxation of any provision by a Party under the Agreement shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.

12.7 **cession and delegation**

Except as provided for elsewhere in the Agreement, a Party may not cede any or all of that Party's rights or delegate any or all of that Party's obligations under the Agreement without the prior written consent of the other Party whose consent shall not be unduly delayed or unreasonably withheld.

12.8 **applicable law and jurisdiction**

The Agreement is to be governed, interpreted and implemented in accordance with the laws of the Republic of South Africa and the Parties consent to the non-exclusive jurisdiction of the High Court of South Africa, Western Cape, Cape Town for any proceedings arising out of or in connection with the Agreement. In the event that any of the terms of the Agreement are found to be invalid, unlawful or unenforceable, such terms will be severable from the remaining terms, which will continue to be valid and enforceable.

12.9 **costs**

Each Party shall bear that Party's own legal costs and disbursements of and incidental to the negotiation, preparation, settling, signing and implementation of the Agreement. Any costs, including all legal costs on an attorney and own client basis and VAT, incurred by a Party arising out of or in connection with a breach by another Party shall be borne by the Party in breach.