

# International Terms and Conditions for Delivery and Services of Demag Cranes & Components GmbH

## 1. General Provisions

**1.1** These International Terms and Conditions shall apply to the present and all subsequent contracts ("Contract") on the delivery of goods or the rendering of services ("Goods") between our customers ("Purchaser") and us in business-to-business relationships exclusively.

**1.2** Conflicting or differing Terms and Conditions of the Purchaser are not accepted and do not bind us, even if we do not explicitly object to them or if we unconditionally render performance or accept payments. Any deviations from these International Terms and Conditions shall only become valid if they have expressly been agreed upon in writing.

**1.3** Any agreement shall only become binding by our confirmation in writing.

**1.4** Our offers are generally not binding. However, if an offer is declared as being binding by us in writing, it shall be revised and adapted, if, after its submission, modifications of the contractual obligations are necessary due to new or modified legal requirements or new requirements of public authorities and inspection boards, taking into account the interests of both Parties. This shall apply accordingly after the acceptance of the offer.

**1.5** The Purchaser is entitled to the non-exclusive use of standard software with the agreed properties in unmodified form for use with the agreed equipment. Unless agreed or indicated otherwise, e.g. on the data media or in the software documentation, the Purchaser is entitled to create two back-up copies.

## 2. Prices, Payment, Securities

**2.1** If not agreed upon otherwise, prices shall be "ex works" Wetter/Ruhr (Incoterms 2000) and shall exclude accessory charges including but not limited to packing, freight, insurance, storage, inspection by third parties and any other additional charges or taxes. The minimum order value is € 40.00 (net). Free and net payment to our banking account(s) must be made by the dates agreed in the Contract.

**2.2** If we agreed to render installation or erection services and no other agreement has been concluded, the Purchaser shall bear all necessary additional costs such as travel expenses, costs for transportation of tools or the costs of electricity, water or compressed air in addition to the agreed prices.

**2.3** With regard to export deliveries, any and all taxes, custom duties, social security contributions and any other public charges which are levied on us or our employees (including our subcontractors and their personnel) in connection with the performance of the Contract in the country of destination, if any, shall be reimbursed by the Purchaser.

**2.4** The Purchaser may set off only those claims in accordance with the applicable law that are undisputed between the Purchaser and us or that have been finally adjudicated. Aforementioned rule shall apply mutatis mutandis to any right of retention of the Purchaser.

**2.5** Only if expressly agreed, we shall accept discountable and properly taxed bills of exchange for payment. When accepting bills of exchange, debts shall only be deemed as paid after the bills of exchange have been cashed. When accepting cheques, debts shall only be deemed as paid when the amount is irrevocably credited on our bank account. Discount costs and any costs resulting from honouring the bill of exchange or cheque amount shall be borne by the Purchaser.

**2.6** Should the Purchaser be in arrears with payment, we shall be entitled to charge interest at the annual rate of eight (8) percentage points above the rate for main refinancing operations (minimum bid rate) of the European Central Bank (ECB) as applicable at the respective point of time whereas this shall not exclude our further rights and remedies provided by the applicable law.

**2.7** In the event of a default in payment or danger to our claims due to a significantly impaired creditworthiness of the Purchaser, we shall be entitled to make due immediately all claims we have regardless of the terms of any bills of exchange or to demand securities. We shall also be entitled to effect any outstanding deliveries against prepayment only or against the provision of securities.

## 3. Packing

Unless otherwise agreed, packing will be invoiced separately to the Purchaser. Instead, we may request the packing material to be returned charging use and deposit fees.

## 4. Terms of Delivery, Obstacles to Performance

**4.1** The agreed terms of delivery shall only apply if all details of the order have been clarified in due time, if all necessary documents and approvals to be procured by the Purchaser have been provided to us in due time, if all drawings have been approved by the Purchaser, if any agreed down-payments have been received by us in due time and if any securities agreed upon have been provided in due time. A further condition is the completion in due time of preparatory services for construction and erection to be provided by the Purchaser, in particular provision of electrical power, gas, water and any required auxiliary workers free of charge for us.

**4.2** The agreed terms of delivery shall be considered as fulfilled with the notice of readiness for dispatch, especially if the Goods ready to be delivered cannot be dispatched on time for reasons for which we cannot be held responsible.

**4.3** Should we be hindered in fulfilling our obligations due to an event of unforeseen circumstances affecting us or our sub-suppliers and/or sub-contractors and which we could not avoid with due care based on the circumstances of the specific case, e.g. war, intervention by a higher authority, internal unrest, natural forces, accidents, strikes and lockouts, other interruptions and delays in the supply of major operating material or pre-materials, the delivery deadlines shall be extended by the duration of the interruption and a reasonable start-up time. Should the fulfilment of our obligations become

impossible or unacceptable for us due to the unforeseen circumstances, we may terminate the Contract.

**4.4** In case of delay with delivery culpably caused by us, our liability for damages thereby caused shall be limited to an amount of 0.5 % of the contractual value of the Goods for each full week of delay up to a maximum of 5 % of the contractual value of the Goods whereas such value shall in each case be calculated in relation to the delayed part of the Goods. Payment of damages pursuant to this Clause 4.4 shall constitute the sole and exclusive compensation of the Purchaser for delay to the exclusion of further claims for damages. This does not apply in cases of wilful damage, gross negligence or cases in which liability is obligatory, especially due to death, injury or detriment of health.

**4.5** At our request, the Purchaser is obliged to declare within a reasonable period of time whether he continues to insist on the delivery and/or whether he wants to assert any rights he may be entitled to due to a delay in delivery.

**4.6** Any right of rescission to which the Purchaser or we are entitled shall apply exclusively to the part of the contract not yet fulfilled.

## **5. Acceptance**

**5.1** If an acceptance test has been agreed upon, it must be carried out immediately by the Purchaser after our notification of readiness for acceptance. If, after completion, we request acceptance of the Goods or a portion thereof, the Purchaser shall provide such acceptance in written form within one week of our request.

**5.2** An acceptance test is also carried out if specific performance features of the Goods have been agreed. This shall also apply to completed partial deliveries. The Purchaser must provide for the conditions required for carrying out the acceptance test. With the exception of our labour costs, the Purchaser shall bear all costs arising in conjunction with the acceptance test.

**5.3** In case of Purchaser's failure to accept the Goods in the time frame indicated, the Goods shall be deemed to be accepted. The same shall apply if the Purchaser refuses the acceptance, but does not state the reasons therefore in writing within one week after receipt of our request. The reasons to be stated by the Purchaser shall at least comprise the portion of the Goods that the Purchaser considers as incomplete or substantially defective and why the Purchaser is of such an opinion. Furthermore, deemed acceptance shall occur if the Goods or any portion thereof are put into operation by the Purchaser without our prior consent. The Purchaser shall in particular not be entitled to refuse acceptance in case of

- a) defects which only insignificantly impair the use of the respective Goods,
- b) minor deviations of the Goods from the specification of the Goods,
- c) defective installation or erection not carried out by us.

## **6. Passage of Risk, Dispatch**

**6.1** Risk shall pass to the Purchaser, also in the case of deliveries with carriage paid and including cases where partial deliveries are made, as follows:

**6.1.1** in the case of deliveries not including erection or assembly, as soon as the Goods are dispatched or are collected. At the request and expense of the Purchaser,

we shall insure deliveries against the usual transport risks;

**6.1.2** in the case of deliveries including erection or assembly on the day of handover in own facility or, if agreed, following acceptance by the Purchaser.

**6.2** If dispatch, delivery, the commencement, the implementation of erection or assembly, receipt in own facility or acceptance are delayed for reasons imputable to the Purchaser or in case of the Purchaser's default of acceptance, the risk shall pass to the Purchaser.

**6.3** Means and route of transportation shall be at our discretion. The same shall apply to the selection of the forwarding agent or carrier.

**6.4** Goods which have been notified as ready for dispatch must be called immediately, otherwise we shall be entitled, at our discretion, to store them at the cost and risk of the Purchaser and to invoice them as if delivered.

**6.5** We are entitled to supply partial deliveries and to invoice them correspondingly.

## **7. Reservation of Ownership, Nondisclosure and Data Protection**

**7.1** Regarding the delivered Goods, we reserve our right of title until all of our claims of payment from the business relationship against the Purchaser have been fulfilled ("Reserved Goods"). The Purchaser is obliged to treat the Reserved Goods with care and to sufficiently insure them at full replacement value against theft, breakage, fire, water, and other damage at his cost and shall prove this to us upon request. The Purchaser hereby authorises us to pursue all compensation claims under such insurance policies. Should the Purchaser not fulfil this obligation, we shall be entitled to conclude the above-mentioned insurances in the scope we consider necessary at the cost of the Purchaser with the provision that the rights resulting from the insurance contract are directly assigned to us.

**7.2** In case the legal order at the respective destination of the Reserved Goods does not acknowledge a retention of title or provides for additional requirements such as but not limited to registration requirements etc., the Purchaser undertakes to support us in order to establish a comparable security right in relation to the Reserved Goods. Related costs shall be borne by the Purchaser.

**7.3** Treatment or processing of the Reserved Goods will be carried out for us. Goods processed shall be considered as Reserved Goods as specified in Clause 7.1.

Should the Purchaser process, combine or mix the Reserved Goods with other goods, we shall be entitled to co-ownership of the new property right in the ratio of the objective value of the Reserved Goods to the objective value of the goods added. Should our ownership of the goods become void due to processing, combining or mixing, the Purchaser shall already at this moment transfer to us the Purchaser's right of ownership of the new stock or new property to an amount which covers the objective value of the Reserved Goods and the Purchaser shall hold the said goods in safe custody free of charge for us.

**7.4** The Purchaser shall be allowed to sell the Reserved Goods in the normal course of business subject to his normal terms of delivery and only as long as the Purchaser is not in arrears with payment and provided

that the claims resulting from the sale are transferred to us in accordance with Clause 7.5. The Purchaser shall not be entitled to any other disposal of the Reserved Goods.

**7.5** Claims of the Purchaser resulting from the resale of Reserved Goods, whether processed or not, or combined with other goods not delivered by us, shall be transferred at this moment to us in an amount necessary to cover the invoiced value or the amount of co-ownership according to Clause 7.3; this shall also apply to balances which are due to the Purchaser if the claims resulting from resale are entered into a current account.

**7.6** The Purchaser shall be obliged to maintain the Reserved Goods in perfect condition and to have any repair work that may become necessary carried out immediately by specialist companies; he shall provide information regarding the Reserved Goods at any time, in particular regarding the corresponding locations. We shall be entitled to access to the location of the Reserved Goods at any time; if required, the Purchaser shall ensure access to us or our authorised representatives to the location of the Reserved Goods at any time.

The Purchaser shall be obliged to notify us immediately of any threat to our property.

**7.7** Should the Purchaser fail to meet essential obligations in accordance with Section 7, we shall be entitled to make due immediately the entire remaining debt for the Reserved Goods regardless of the terms of any bills of exchange or to demand securities.

If the Purchaser fails to pay the entire remaining debt within a period of seven days after a corresponding request made by us or if he fails to provide the demanded securities within this period, his right of use for the Reserved Goods shall expire. We shall then be entitled to demand the immediate return at the cost of the Purchaser of the Reserved Goods excluding any retention rights.

**7.8** We shall be entitled - regardless of the payment obligation of the Purchaser - to make the best possible use of the Reserved Goods returned to our possession in voluntary sale or to accept them back at the current market price. The market price of the Reserved Goods shall be estimated by a sworn expert appointed by the Chamber of Commerce competent for the area of our respective production site and it shall be binding for the Purchaser and us. The proceeds of the sale or the market price shall be offset against the payment obligation of the Purchaser after deducting any costs incurred by us.

**7.9** Withdrawal from or the assertion of the right of reservation of ownership as well as garnishment of the Goods supplied by us shall not be considered withdrawal from the Contract unless this is expressly declared by us.

**7.10** We shall release securities at our discretion up to a corresponding amount on request of the Purchaser if the total value of the securities given to us exceeds our claims by more than 10 %.

**7.11** We retain the ownership, copyrights and all other rights concerning models, estimations of costs, drawings and other material.

**7.12** The Purchaser will keep secret all information obtained from us in hardcopy or electronic version containing drawings, models, estimations, business secrets

and other confidential documents. They may only be revealed to third parties if necessary and with our written consent. This obligation persists after termination of the Contract until the information has ceased to be of a confidential nature.

**7.13** We may, for the execution of this contract, store and treat the obtained individual-related data or confer this task to a third person. We will ensure the respect of the applicable laws on privacy and data protection.

## **8. Liability for Defects**

We assume liability for defects as follows:

**8.1** Any Goods which display a defect or a deficiency in title within the warranty period – regardless of the period of service – are to be rectified, replaced by new parts or rendered again free of charge by us at our discretion provided the cause of the defect already existed at the time of the passage of risk.

In the case of software with source code that we are able to modify ourselves ("Class A"), we shall rectify defects in the software at our discretion by provision of an update to the software in which only the defects are rectified or by provision of an upgrade in which the defects are also rectified.

In the case of software with source code that we are unable to modify ourselves ("Class C"), this presupposes that such an update or upgrade is made available to us or can be procured by us at appropriate cost.

Claims for defects of software extended by the Purchaser beyond an interface provided by us may only be asserted up to the interface.

**8.2** The Goods shall only be deemed to be defective if already at the time of the transfer of risk they are clearly different to the specifications laid down in the Contract, or in the absence of agreed specifications, the Goods are not fit for the purpose for which products of the same description would ordinarily be used in Germany. Except for any express warranties stated in the Contract, we disclaim any other express or implied warranties, including but not limited to implied warranties of merchantability and fitness for a particular purpose, or otherwise. We shall in particular not be liable for compliance of the goods with any legal requirements existing outside of Germany. Our liability does not apply to defects which are

- a) due to reasons beyond our control,
- b) defects in expendable and/or consumable parts regularly replaced due to normal wear and tear arising after the transfer of risk,
- c) nonconformities caused by faulty or negligent handling, excessive strain, or other abuse by Purchaser or any third party,
- d) attributable to non-compliance with the instructions contained in the operation and maintenance manuals of the original equipment manufacturer,
- e) non-reproducible software errors,
- f) minor defects or
- g) attributable to incorrect or negligent treatment, incorrect, inappropriate, omitted or untimely maintenance, inappropriate storage, excessive loading or operation, unsuitable operating equipment, defective civil engineering or building work, unsuitable building site or due to special influences (e.g. chemical, electrochemical or

electrical influences or exceptional temperature and atmospheric influences) not specified as requirements according to the Contract.

**8.3** Without prejudice to any exclusion or reduction of our liability pursuant to the applicable law, the Goods have a deficiency in title if they are not free from enforceable rights or claims of third parties at the time of transfer of risk. Without prejudice to further legal requirements, third parties' rights or claims founded on industrial or other intellectual property shall only be deemed to constitute a defect to the extent that the industrial or intellectual property is registered and made public in Germany and the usual use of the Goods by the Purchaser is thereby impeded.

**8.4** Notification of defects must be submitted immediately and in writing. We shall be given adequate time and opportunity to remedy the defect. For this purpose, the Purchaser shall grant to us working access to the non-conforming goods, including disassembly and reassembly, as well as a complete technical data report free of charge.

**8.5** To the extent that we have incurred cost or expenses, we shall be entitled to compensation in the event the defect notified by the Purchaser to us is subsequently determined to

- a) not exist or
- b) if we are not responsible for the notified defect.

**8.6** We shall not be liable if

- a) the Purchaser or a third party carries out modifications or repairs to the goods,
- b) the Purchaser does not notify us during the defects liability period in writing of a defect or a deficiency in title without undue delay, at the latest however fourteen (14) calendar days after Purchaser's discovery or after the Purchaser should have discovered the respective defect (whereas the Purchaser is obliged to examine the goods with regard to potential defects immediately after take over) or deficiency in title, if Purchaser had exercised due care pursuant to the requirements of the applicable law,
- c) if the Purchaser has not immediately taken all appropriate steps to mitigate a damage caused by a defect, or
- d) if the Purchaser prevents us from remedying a defect.

With regard to his duties to notify any defect or deficiency in title without undue delay to us, the Purchaser shall not be entitled to rely on any excuse for its failure to give the required notice.

**8.7** The defects liability period shall be twenty-four (24) months from the commissioning, however, limited to thirty-six (30) months from the date of passage of risk, if not agreed upon otherwise. Any actions against us based on a defect of the Goods shall be time-barred thereafter. For the avoidance of doubt, no new defects liability period shall commence with regard to any repaired or replaced parts of the Goods.

**8.8** To the extent that the Purchaser in accordance with the terms of the Contract is entitled to remedies because of delivery of defective Goods or Goods with a deficiency in title, such remedies are limited to the remedies as expressly provided in this Section 8.

Finally, and subject to all and any requirements set forth by applicable law and Section 8, the Purchaser is only

entitled to declare the contract avoided if the non-performance or deficiency amounts to a fundamental breach of contract and a reasonable period of time required for appropriate remedial works has been expired to no avail subsequent to the Purchaser's written claim of default towards us.

**8.9** With regard to claims for damages, Clause 10 shall apply. Subject to Clause 9 and 10, any other claims or rights of the Purchaser due to a defect or a deficiency in title of the Goods shall be explicitly excluded.

### **9. Industrial Property Rights, Copyright**

**9.1** Unless agreed otherwise, we undertake only to effect deliveries which are free of third-party industrial property rights and copyright (referred to hereafter as property rights) which are registered and made public in Germany. If a third party asserts a justifiable claim against the Purchaser for the violation of property rights by deliveries furnished by us and used as set forth in the contract, we shall be liable to the Purchaser within the claim period (Clause 8.7) as follows:

**9.1.1** At our discretion and at own cost, we shall either effect a right of use for the relevant Goods, or change them in such a way that the property right is not violated or replace them. If this is not possible on economically appropriate conditions, the Purchaser shall be entitled to assert his statutory rights of withdrawal or price reduction.

**9.1.2** Clause 10 shall otherwise apply for any claims for damages.

**9.1.3** The above obligations relevant to us shall apply only if the Purchaser informs us in writing immediately of any claims made by third parties, the violation is not acknowledged and if all defensive measures and settlement negotiations are reserved for us. If the Purchaser ceases to use our deliveries for reasons of limitation of damages or other significant reasons, he undertakes to inform the third party that the cessation of use implies no acknowledgement of the infringement of patent rights.

**9.2** Any claims by the Purchaser are excluded, insofar as he is responsible for the infringement of patent rights. Any claims are also excluded, insofar as patent rights are infringed upon as a result of special requirements laid down by the Purchaser or if the Purchaser modifies our deliveries or uses them together with products not supplied by us.

**9.3** Any further claims or claims other than those regulated in Section 9 asserted against us and any parties employed by us in fulfilling our obligations due to a defect in title are excluded.

### **10. Limitation of Liability**

**10.1** We shall in no event and irrespective of the legal basis (contract, tort or any other area of law) be liable towards the Purchaser for loss of profit or revenue, loss of use, loss of data, cost of capital, down-time costs, cost of substitute goods, property damage external to the Goods and any damage or loss arising out of such damage or any special, incidental, indirect or consequential damage or any of the foregoing suffered by any third party.

**10.2** The aforementioned restrictions of liability shall not apply

- a) in the event of gross negligence or wilful misconduct of our managing partners or of our executive employees

but they do apply in the case of wilful misconduct and gross negligence of any other party acting for us, including without limitation our subcontractors, agents, advisors and employees;

b) in case of bodily injury or insofar as mandatory law provides otherwise.

**10.3** These limitations of liability shall also apply for the benefit of our subcontractors, agents, advisors, directors and employees.

#### **11. Impossibility, Contract Modification**

**11.1** Insofar as the performance of the agreed deliveries is impossible, the Purchaser shall be entitled to demand damages if we are responsible for the impossibility.

However, the claim for damages by the Purchaser shall be limited to 10% of the value of the part of the delivery which cannot be used appropriately due to the impossibility. This limitation does not apply in cases of wilful damage or gross negligence or cases in which liability is obligatory due to death, injury or detriment of health.

**11.2** Clause 4 (delay) shall be applied in the event of temporary impossibility.

**11.3** Insofar as unforeseeable circumstances in the sense of Clause 4.3 result in considerable changes to the economic significance or the contents of the deliveries or considerably influence our operation, the contract shall be modified appropriately taking into consideration good faith. Insofar as this is not economically acceptable, we shall be entitled to withdraw from the Contract.

#### **12. Compliance with Export Control Regulations**

**12.1** Our obligation to deliver the Goods shall be subject to the condition that the required export licenses are issued and that no other restrictions exist, arising from German, European, U.S. or any other applicable export control regulations, which are to be observed.

**12.2.** The Purchaser undertakes to comply with all export control regulations of the national export control authorities applicable to him, in particular the authorities in Germany, in the European Community and in the United States of America. In particular, the Purchaser undertakes not to directly or indirectly export or re-export the Goods to any country for which such export may be prohibited by the aforementioned regulations. Failure to comply strictly with all laws relating to embargoes, sanc-

tions, export and re-export applicable to Customer shall be grounds for immediate termination of the Contract by us.

#### **13. Assignment**

We are entitled to transfer our rights and duties from this Contract to third parties. The transfer shall not become effective if the Purchaser objects in writing within four weeks after receipt of a corresponding notification. No rights arising under the Contract may be assigned by the Purchaser unless expressly agreed upon in writing by us.

#### **14. Miscellaneous**

**14.1** Place of delivery for our supplies is the location of our delivery plant. Should we also have to render services (e.g. erection), place of delivery shall be the location where the services are to be rendered. For the payment obligation of the Purchaser, payment of debts shall be rendered at the bank quoted in our invoice.

**14.2** All disputes arising out of or in connection with the Contract shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC) by one arbitrator appointed in accordance with the said rules without recourse to the ordinary courts of law. The language to be used in arbitration shall be English. The seat of arbitration shall be Zurich, Switzerland. The parties may apply, however, for any competent juridical authority for interim and conservatory measures

**14.3** Should any of the provisions of the Contract be or become invalid or otherwise unenforceable, this shall not affect the validity and enforceability of the remaining provisions. The invalid or unenforceable provision shall be replaced by an operative one coming as close as possible to the economic purpose and effect intended by the original provision.

**14.4** The legal relationship between the Parties shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (UN-Convention). Outside the application of the UN-Convention, the legal relationship between the Parties shall be governed by the material laws of Switzerland.