

# 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, differing or supplementing terms and conditions of the Purchaser are not accepted and shall 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 shall generally not be 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 shall be entitled to the non-exclusive use of any delivered standard software 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 shall be entitled to create two back-up copies.

## 2. Prices, Payment, Securities

**2.1** If not agreed upon otherwise in writing, prices shall be FCA, our premises (Incoterms 2010) and shall exclude accessory charges, in particular, but not limited to packing, freight, insurance, storage, inspection by third parties, value added tax (if applicable) and any other additional charges or taxes. The minimum order value shall be €40.00 (net). Payment shall be made to our banking account(s) free of charge for us and without any deductions 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 a) are owed in the same currency as the main claim and b) are

undisputed between the Purchaser and us or have been finally adjudicated. Aforementioned rule shall apply mutatis mutandis to any right of retention of the Purchaser.

**2.5** Only if expressly agreed upon, we shall accept discountable and properly taxed bills of exchange or cheques 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 to 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 Contract or the applicable law.

**2.7** Without prejudice to any further rights and remedies, in the event of a default in payment of the Purchaser or in the event of a material deterioration of the Purchaser's creditworthiness or application or commencement of insolvency proceedings relating to the assets of the Purchaser we shall be entitled to make due immediately all claims we have against the Purchaser, 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 or to declare the Contract avoided.

## 3. Packing

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

## 4. Dates of Delivery, Obstacles to Performance

**4.1** The agreed dates of delivery shall only apply if in due time a) all details of the Contract have been clarified, b) all necessary documents and approvals to be procured by the Purchaser have been provided to us, c) all drawings have been approved by the Purchaser, and d) any agreed down-payments have been received by us and any securities agreed upon have been provided. A further precondition shall be the completion of the preparatory services for installation and/or erection to be provided by the Purchaser in due time, in particular provision of electrical power, gas, water and any required auxiliary workers free of charge for us.

**4.2** The agreed dates of delivery shall be considered as met 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 have avoided 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 any pre-materials or other necessary supplies, the delivery deadlines shall be extended by the duration of the interruption and a reasonable start-up time. Regarding the adjustment of the other terms of the Contract, the Purchaser shall enter into good faith negotiations with us. 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 or delay with any other performance related to the Contract we shall only be liable if the delay has been culpably caused by us. Our liability for damages thereby caused (including damages as a result of a declaration of avoidance of the Contract by the Purchaser due to the delay) shall in the aggregate be limited to an amount of 0.5 % of the contractual value of the Goods (net) for each full week of delay up to a maximum of 5 % of the contractual value of the Goods (net) 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 limitation of liability shall not apply in any of the events stipulated in Clause 10.4 below.

**4.5** At our request, the Purchaser is obliged to declare within a reasonable period of time whether it wants to assert any rights it may be entitled to due to a delay.

**4.6** Any right of the Purchaser to declare the Contract avoided shall apply exclusively to the part of the Contract not yet fulfilled.

## **5. Acceptance**

**5.1** If an acceptance has been agreed upon, the acceptance test must be carried out immediately by the Purchaser after our notification of readiness for acceptance. After completion of the acceptance test the Purchaser shall confirm the acceptance in written form within one week. 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 relation with the acceptance.

**5.2** An acceptance pursuant to Clause 5.1 shall also be carried out if specific performance features of the Goods have been agreed upon. This shall also apply to completed partial deliveries.

**5.3** In case of Purchaser's failure to carry out the acceptance test or to confirm the acceptance of the Goods in the time frame indicated or if the Goods or any portion thereof are put into operation by the Purchaser without our prior consent, the Goods shall be deemed to have been accepted by the Purchaser. The same shall apply if the Purchaser refuses the

acceptance, but does not state the reasons therefor in writing within one week after receipt of our request. The reasons to be stated by the Purchaser shall at least indicate the portion of the Goods that the Purchaser considers incomplete or substantially defective and why the Purchaser is of such an opinion. 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** Unless otherwise agreed upon in writing, risk of loss to the Goods shall pass to the Purchaser upon delivery FCA, our premises (Incoterms 2010).

**6.2** Unless the passage of risk has already taken place, the risk shall pass to the Purchaser if dispatch, delivery, commencement or implementation of installation, erection or assembly, receipt in own facility or acceptance of the Goods are delayed for reasons imputable to the Purchaser or in case of the Purchaser's default of acceptance.

**6.3** In case we are in charge of transportation of the Goods pursuant to the agreed delivery terms, 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 off immediately by the Purchaser, 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 Title, Nondisclosure and Data Protection**

**7.1** As security for payment of the full purchase price, legal and equitable title in the Goods shall not pass to Purchaser until receipt by us of payment in full for the Goods. Purchaser is authorized to use the Goods in the ordinary course of business or sell the Goods to a third party. The entire proceeds of any sale or disposition of the Goods shall be held by Purchaser in a fiduciary capacity for us. Until receipt by us of payment in full, Purchaser shall hold the Goods in a fiduciary capacity as bailee for Seller and insure the Goods for their full replacement value against all risks. Purchaser's right to possess and sell the Goods shall automatically terminate if Purchaser becomes insolvent or the subject of any bankruptcy, insolvency or similar proceedings; makes an assignment for the benefit of creditors; or is unable to pay its debts as they become due. Upon termination of the right to possession, we and our representatives may at any time enter the premises of Purchaser or any third party to repossess the Goods. If Purchaser pledges or otherwise encumbers any Goods that have not been paid for in full, all monies owed by Purchaser to us shall immediately become due and payable. If any portion of this clause shall be invalid or

unenforceable, then such provisions shall be enforced to the maximum extent permitted by law, and such invalidity or unenforceability shall not affect the validity or enforceability of the other provisions of this clause.

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

**7.3** The Purchaser shall keep secret all information obtained from us in hardcopy, electronic version or in any other way, such as, in particular, drawings, models, estimations, business secrets and other confidential documents and information. They may only be revealed to third parties if necessary and with our prior written consent. This obligation shall persist after termination of the Contract until the information has ceased to be of a confidential nature.

**7.4** 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**

Without prejudice to any further legal and contractual preconditions and restrictions set forth notably under the applicable law, our liability for defects shall be subject to the following provisions:

**8.1** The Goods shall only be defective if already at the time of the passage of risk a) the Goods are clearly different from the specifications laid down in the Contract (which shall conclusively describe the applicable conformity standard of the Goods) or, in the absence of agreed specifications, they are not fit for the purpose for which they were designed or b) the Goods are not free from enforceable rights or claims of third parties. 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 shall 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 passage of risk,
- c) 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.

**8.2** We shall be entitled to rectify any defective Goods or to replace them by new parts or to render them again free of charge at our discretion.

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 to the software 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.

**8.3** Notification of defects must be submitted immediately and in writing. We shall be given adequate time and opportunity to cure any defect. For this purpose, the Purchaser shall grant to us working access to the defective Goods. The Purchaser shall provide us with a complete technical data report and shall carry out the disassembly and reassembly of the Goods upon our request, all of this without cost to us.

**8.4** To the extent that we have incurred cost or expenses, we shall be entitled to compensation if

- a) the defect notified to us by the Purchaser is subsequently determined to not exist or
- b) we are not liable for the notified defect.

**8.5** 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 limitation period in writing of a defect 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 if Purchaser had exercised due care pursuant to the requirements of the applicable law (whereas the Purchaser is obliged to examine the Goods with regard to potential defects immediately after take over),
- 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.

**8.6** The limitation period for any rights or claims due to defects shall be twenty-four (24) months from the commissioning, however, limited to thirty (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 limitation period shall commence with regard to any repaired or replaced parts of the Goods.

**8.7** Subject to all and any additional requirements set forth by applicable law and this Section 8, the Purchaser shall not be entitled to declare the Contract avoided unless a defect amounts to a fundamental breach of contract and a reasonable period of time required for appropriate remedial works has expired to

no avail after the receipt of the Purchaser's written notification of the defect.

**8.8** With regard to claims for damages due to defects, Section 10 shall apply in addition and take precedence. Without prejudice to Sections 9 and 10, any other claims or rights of the Purchaser due to any defect of the Goods shall be explicitly excluded. The Purchaser shall in particular not be entitled to rescind the Contract based on any error about conditions which it considered to be a necessary basis for the Contract, notably an error about the actual condition of the Goods.

### **9. Defects due to Intellectual Property Rights**

**9.1** Third parties' enforceable rights or claims which are founded on industrial or other intellectual property ("Property Rights") shall only constitute a defect to the extent that already at the time of the passage of risk the Property Right was registered and made public in Germany and that the usual use of the Goods by the Purchaser is thereby impeded. Without prejudice to further preconditions, notably pursuant to Section 8, we shall be liable for such defects 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 its statutory rights to declare the Contract avoided or to reduce the price.

**9.1.2** The above obligations relevant to us shall apply only if the Purchaser informs us immediately and in writing 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 the Goods to mitigate losses or for other significant reasons, it undertakes to inform the third party that the cessation of use implies no acknowledgement of the infringement of Property Rights.

**9.2** Any claims of the Purchaser shall be excluded, insofar as it is responsible for the infringement of Property Rights. Any claims shall also be excluded, insofar as Property Rights are infringed upon as a result of special requirements laid down by the Purchaser or if the Purchaser modifies the Goods or uses them together with products not supplied by us.

**9.3** Clauses 8.3, 8.4, 8.5, 8.6, 8.7 and 8.8 shall apply accordingly.

**9.4** Section 10 shall apply in addition and take precedence with regard to any claims for damages of the Purchaser due to an infringement of Property Rights.

**9.5** Any further rights or claims other than those regulated in this Section 9 asserted against us and any parties employed by us in fulfilling our obligations due to a defect of the Goods resulting from third parties' Property Rights shall be excluded.

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

**10.1** Subject to any further legal and contractual preconditions and restrictions set forth notably by the applicable law and without prejudice to further limitations set forth below in this Section 10, we shall in any

event not be liable for damages that have been not intentionally or negligently caused by us.

**10.2** Without prejudice to Clause 4.4, but notwithstanding anything to the contrary elsewhere in the Contract, 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, the costs of assembly and reassembly of the 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.

**10.3** Furthermore, our overall liability shall in the aggregate be limited to the contractual value of the Goods (net).

**10.4** 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 shall 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.

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

### **11. Anti-Corruption; Export Controls**

**11.1** Purchaser agrees that it shall, and that any party retained by the Purchaser shall, comply with all applicable laws including, but not limited to, laws prohibiting public corruption and commercial bribery. Purchaser further agrees that it shall, and that any party retained or paid by the Purchaser shall, comply with all applicable export controls, economic sanctions, embargoes and regulations regarding the export, re-export, distribution and sale of the Goods, including without limitation U.S. Export Control laws, regulations, policies and executive order as may be amended from time to time. Purchaser further agrees that it shall not, and any party retained or paid by Purchaser shall not, export or re-export the Goods, directly, or with its knowledge, indirectly, into Sudan, Cuba or Iran or to any other country for which the United States government (or agency thereof) may require an export license or other approval or any country, person or entity to which such export or re-export may be prohibited by applicable United States law, regulation, policy or executive order. Notwithstanding anything to the contrary contained in any agreement between us and Purchaser or in any other document (including purchase terms and conditions) or instrument relating to the Goods, we will not comply with requests related to the boycott of any country or other jurisdiction, except to the extent such boycott is required by or otherwise not inconsistent with United States law. Failure to comply strictly with this Clause and all applicable laws prohibiting public corruption or commercial bribery or relating to embargoes, sanctions, export

or re-export shall be grounds for immediate termination of this Contract by us.

**12. Assignment**

We are entitled to transfer our rights and duties under this Contract to third parties. No rights arising under the Contract may be assigned by the Purchaser unless expressly agreed upon in writing by us.

**13. Miscellaneous**

**13.1** Place of delivery for our supplies shall be the location of our delivery plant. Should we 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.

**13.2** 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, to any competent judicial authority for interim and conservatory measures.

**13.3** 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.

**13.4** The legal relationship between the Parties shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG). The substantive laws of Switzerland shall apply with regard to all matters that are not governed by the CISG, including but not limited to any concurring claims under tort.