



## 1 INTERPRETATION

1.1 In these Conditions the following words will (unless the context otherwise requires) have the following meanings:

"Associate" has the same meaning as given to that term in the Corporations Act 2001;

"Attaches" has the same meaning as given to that term in the PPSA;

"Australian Consumer Law" means Schedule 2 of the Competition and Consumer Act 2010 (Cth);

"Collateral" has the same meaning as given to that term in the PPSA;

"Conditions" means the General Terms and Conditions for Specialist Personnel Services set out herein;

"Consumer" has the meaning given to it in section 4B and Schedule 2, section 3 of the Australian Consumer Law;

"Contract" means any contract for Work between the Customer and MAN-ES;

"Customer" means the person, firm or company that has offered to purchase or requested any Goods or Work identified in the Order, and includes any servant, agent, partner, contractor or employee of the Customer;

"Financing Change Statement" has the same meaning as given to that term in the PPSA;

"Financing Statement" has the same meaning as given to that term in the PPSA;

"Goods" means goods supplied by MAN-ES (as defined in MAN-ES's tender or order acknowledgement);

"IPRs" means any intellectual property rights of any nature including without limitation any and all inventions, patents, utility models, design rights, copyright, know how, trade secrets, confidential information, trademarks, service marks, trade names and goodwill;

"MAN-ES" means MAN Energy Solutions Australia Pty Ltd and its associates, and includes any servant, agent, partner, Associate, contractor or employee of MAN-ES;

"Order" means an order placed by the Customer with MAN-ES for Work;

"PPSA" means the Personal Property Securities Act 2009 (Cth);

"PPS Law" means:

(a) the PPSA;

(b) any regulation made pursuant to the PPSA; and

(c) any amendment from time to time made to any other legislation or regulation as a consequence of a PPS Law referred to in paragraph (a) or (b) of this definition;

"Perfect" has the same meaning as given to that term in the PPSA;

"Purchase Money Security Interest" has the same meaning as given to that term in the PPSA.

"Registration Commencement Time" has the same meaning as given to that term in the PPSA;

"Security Interest" means:

(a) any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power, or title retention arrangement;

(b) a security interest as defined in the PPSA; or

(c) any document that grants or creates anything referred to in either paragraphs (a) or (b) of this definition and any other thing which gives a creditor priority over any other creditor with respect to any asset or an interest in any asset;

"Services" means services supplied by MAN-ES (as defined in MAN-ES's tender or order acknowledgement);

"Site" shall mean the place where the Services are to be performed by MAN-ES together with so much of the area surrounding the said place as MAN-ES shall actually use in connection therewith;

"Specialist Personnel" means the specialists chosen by MAN-ES to perform the Services;

"Verification Statement" has the same meaning as given to that term in the PPSA;

"Work" means Goods and/or Services.

"\$" or "dollars" is a reference to the lawful currency of Australia

1.2 The headings in these Conditions are for convenience only and shall not affect their interpretation.

1.3 A reference to "including" means "including without limitation".

1.4 Any agreement, warranty, representation or obligation which binds or benefits 2 or more persons, binds or benefits those persons jointly and severally.

## 2 FORMATION

2.1 All tenders are made and Orders are accepted by MAN-ES subject to these Conditions and they shall apply to all Contracts to the exclusion of any other terms and conditions including without limit those which the Customer purports to apply under any Order. To the extent that there is any inconsistency between any Contract and these Conditions, these Conditions shall apply. Variations to the terms of any Contract will only be effective if agreed in writing. If any such agreed variation increases the time or cost to MAN-ES of performing the Contract then the Contract price and/or programme will be adjusted accordingly.

2.2 These Conditions supersede and exclude all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of the Goods including, but not limited to, those relating to the performance of the Goods.

2.3 Orders from the Customer are only binding on MAN-ES after a written order acknowledgment has been issued by MAN-ES and only on the conditions stated in the order acknowledgment. MAN-ES may refuse to accept an Order or part of an Order without giving reason.

2.4 All information on weight, dimensions, capacity, price, technical and other data stated in catalogues, prospectuses, circulars, advertisements, illustrated matter and price lists is to be considered approximate. Such information is only binding to the

extent expressly stated in the order acknowledgment or in other documents forming part of the Contract expressly referring to such information.

## 3 DELIVERY, NON-DELIVERY, DELAY AND RISK

3.1 Unless otherwise expressly agreed in writing by MAN-ES

(a) delivery times accepted by MAN-ES are given in good faith but are an estimate only; and

(b) delivery of the Goods is made "Ex Works" in accordance with Incoterms 2010, but the delivery price is exclusive of packing, which will be charged extra. To the extent of any inconsistency between the Incoterms 2010 and these Conditions, these Conditions shall prevail.

3.2 Performance of the Services shall be at the Site specified in MAN-ES's tender or order acknowledgement.

3.3 MAN-ES may deliver Goods in installments and perform Services in sections in any sequence. Default by MAN-ES, howsoever caused, in respect of one or more instalments and/or sections shall not entitle the Customer to terminate the relevant Contract as a whole.

3.4 Risk

The risk in the Goods passes to the Customer on delivery to the Customer or into custody on the Customer's behalf, including but not limited to delivery to the Customer's agent or carrier, provided that where:

(a) the Customer fails or refuses to accept delivery of any Goods when they are ready for delivery in accordance with the relevant Order; or

(b) MAN-ES agrees (at its sole discretion) to postpone delivery of the Goods at the request of the Customer; or

(c) the Customer fails to provide any instructions consents or authorisations required to enable the Goods to be delivered on the due date;

the risk in the Goods shall pass immediately to the Customer, delivery of the Goods shall be deemed to have taken place and MAN-ES may store or arrange for storage of such Goods and charge the Customer for all related costs and expenses (including storage, insurance, reasonable costs and interest) and may sell such Goods after expiry of 28 days following such failure or refusal and deduct any monies payable to MAN-ES by the Customer from the sale proceeds and charge the Customer for any shortfall below the Contract price.

3.5 Shortages and Non-Delivery

Upon delivery to the Customer, all Goods should be examined. MAN-ES shall not be liable for any shortages in, or non-delivery of Goods unless the same is notified by the Customer to MAN-ES (together with all specific details) in writing within ten (10) days of the actual date of delivery. Subject to such notice being provided MAN-ES shall, if it is satisfied that any Goods have not been delivered and the cause thereof being beyond the reasonable control of MAN-ES, at its sole discretion, either arrange for delivery as soon as reasonably possible or give credit to the Customer for such Goods and this shall be the Customer's only remedy and in lieu of all other rights and remedies which might otherwise be available to the Customer. Shortages in, or non-delivery of some or part of the Goods shall not affect the Contract in respect of the other or other parts of the Goods.

3.6 Delay

If the contractual delivery time for the Work or part of the Work is delayed and this delay was caused by negligence or intention of MAN-ES and if the Customer has suffered a loss caused by such delay, the Customer shall to the exclusion of any other claims based on delays of contractually agreed dates, be entitled to claim liquidated damages for default for each full week of delay of delivery at a maximum amount of 0.5% of the Contract net price of the delayed part of the Work, but the liquidated damages shall only be payable from the period starting two weeks after the contractual delivery time (Grace Period). The liquidated damages for delay will be limited to a maximum of 5% (five per cent) of the Contract price of the delayed part of the Work.

3.7 Liquidated damages shall be Customer's sole and exclusive measure of damages and remedy against MAN-ES with respect to the failure to achieve the contractual delivery time for the Work.

3.8 The Customer acknowledges that:

(a) liquidated damages under this clause 3.8 represent a genuine pre-estimate of the costs and losses likely to be incurred by the Customer if the delay of delivery of Goods was caused by the negligence or intention of MAN-ES; and

(b) any such amounts payable are not to be construed as a penalty.

## 4 PROPERTY

4.1 Retention of Title

Property in the Goods will remain with MAN-ES and will not pass to the Customer until such time when the Customer pays all monies owing to MAN-ES by the Customer, on all accounts and under any contract (which payments are not to any extent subsequently claimed or clawed back by any person standing in the place of or representing the Customer).

4.2 Covenants

While the Goods remain the property of MAN-ES, the Customer agrees with MAN-ES that:

(a) the Customer holds the Goods as a fiduciary bailee of MAN-ES;

(b) the Goods will be stored separately so that they are readily identifiable as the property of MAN-ES;



- (c) the Customer will not dispose of the Goods except with MAN-ES prior written consent or in the ordinary course of the Customer's business;
- (d) the Customer will hold all money received, relating to the sale of MAN-ES Goods in a separate account on trust for MAN-ES and will pay such monies immediately on request to MAN-ES;
- (e) the Customer will not cause the Goods to lose their identifiable character or be intermingled with other goods, in any way, either by any process of its own or by a third party, except with MAN-ES prior written consent;
- (f) the money received for the sale of any intermingled goods, which contain the Goods of MAN-ES, will be held in trust for MAN-ES (to the maximum extent that such "trust" monies represent the total outstanding debt owed to MAN-ES on all accounts by the Customer (and will pay such monies immediately on request to MAN-ES));
- (g) the Customer has no right or claim to any interest in the Goods to secure any liquidated or unliquidated debt or obligation MAN-ES owes to the Customer;
- (h) the Customer cannot claim any lien over the Goods;
- (i) the Customer will not create any absolute or defeasible interest in the Goods in relation to any third party, except with MAN-ES prior written consent;
- (j) pending payment in full for all amounts owed by the Customer to MAN-ES on all accounts, the Customer:
- (i) subject to clause 4.5, must not allow any person to have or acquire any Security Interest in the Goods;
  - (ii) must insure the Goods for their full insurable or replacement value (whichever is higher) with an insurer licensed or authorised to conduct the business of insurance in the place where the Customer carries on business;
  - (iii) must not remove, deface or obliterate any identifying mark or number on any of the Goods; and
  - (iv) must not move the Goods from the Customer's premises.
- 4.3 MAN-ES's Rights**
- If the Customer fails to pay for any Goods within the period of credit extended by MAN-ES to the Customer:
- (a) MAN-ES may recover possession of all Goods (in which property has remained with MAN-ES) at any site owned, possessed or controlled by the Customer and the Customer agrees that MAN-ES has an irrevocable licence to do so without incurring any liability to the Customer or any person claiming through the Customer;
  - (b) if required, the Customer will assign to MAN-ES any rights of the Customer to any outstanding money relating to the re-supply of the Goods. The Customer irrevocably appoints MAN-ES or its nominee as its attorney to sign all documents and do all things necessary to assign the debts to MAN-ES under this clause 4.4, where the Customer has failed to do so within seven (7) days of receiving written notice to do so, and ratifies any acts the attorney lawfully does or causes to be done with respect to any such assignment of debts.
- 4.4 PPSA Further Assurances**
- Clause 4.5 shall be only applicable for Goods located in the jurisdiction of the Australian or where the grantor of a security interest is an Australian entity.
- (a) If MAN-ES determines that a PPS Law applies, or will in the future apply, to any agreement that incorporates these Terms and Conditions of Sale (**Supply Agreement**) or the supply of any Goods, then the Customer must promptly upon request from MAN-ES:
    - (i) do anything (including obtaining consents, making amendments to the Supply Agreement or executing a New Supply Agreement) for the purposes of:
      - (A) ensuring that any Security Interest created under, or provided for by, the Supply Agreement:
        - attaches to the collateral that is intended to be covered by that Security Interest;
        - is enforceable, perfected, maintained and otherwise effective; and
        - any Security Interest created under, or provided for by, the Supply Agreement has the priority contemplated by the Supply Agreement; or
      - (B) enabling MAN-ES, on and from the Registration Commencement Time, to prepare and register a financing statement or financing change statement; or
      - (C) enabling MAN-ES to exercise any of its powers in connection with any Security Interest created under, or provided by, the Conditions; and
    - (ii) provide any information requested by MAN-ES in connection with the Conditions to enable it to exercise any of its powers or perform its obligations under the PPS Law.
  - (b) Except if section 275(7) of the PPSA applies, each of MAN-ES and the Customer agree not to disclose any information of the kind referred to in section 275(1) of the PPSA that is not publicly available.
  - (c) Where the Goods supplied under the Supply Agreement are not used predominantly for personal, domestic or household purposes, the Customer agrees that, on and from the Registration Commencement Time:
    - (i) MAN-ES is under no obligation to dispose of or retain any secured property MAN-ES seize within a reasonable time under section 125 of the PPSA;
      - (ii) following a default, the Customer has no rights to redeem the secured property under section 142 of the PPSA;
      - (iii) the Customer has no rights to reinstate this document following a default under section 143 of the PPSA; and
      - (iv) despite the Customer paying for particular Goods itemised in an invoice or order or otherwise in respect of moneys owing under or in connection with the Supply Agreement, any payments received by MAN-ES from the Customer shall be applied in the following order:
        - (A) first, to satisfy any obligations owed by the Customer to MAN-ES which are unsecured, in the order in which the obligations were incurred;
        - (B) second, to satisfy any obligations that are secured but which are not secured by a Purchase Money Security Interest, in the order in which the obligations were incurred; and
        - (C) third, to satisfy any obligations that are secured by a Purchase Money Security Interest, in the order in which the obligations were incurred.
  - (d) Where the Goods supplied under the Supply Agreement are not used predominantly for personal, domestic or household purposes, on and from the Registration Commencement Time, the Customer waives its rights to receive:
    - (i) a notice of MAN-ES's proposal to remove PPSA personal property which has become an accession under section 95 of the PPSA;
    - (ii) a notice of MAN-ES's proposal to exercise our rights in accordance with land law under section 118(1)(b) of the PPSA;
    - (iii) a notice of MAN-ES proposal to dispose of any PPSA personal property under section 130 of the PPSA;
    - (iv) a notice of MAN-ES proposal to retain PPSA personal property under section 135 of the PPSA;
    - (v) details of the amounts paid to other secured parties in a statement of account provided by MAN-ES under section 132(3)(d) of the PPSA;
    - (vi) a statement of account under section 132(4) of the PPSA; and
    - (vii) a copy of, or notice of, any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement relating to any Security Interest under, or provided for by, the Supply Agreement.
  - (e) Anything that is required by MAN-ES to be done under this clause 4.5 shall be done by the Customer at its own expense. The Customer agrees to reimburse the costs of MAN-ES in connection with any action taken by MAN-ES under or in connection with this clause 4.5.
- 5 PRICE AND BINDING PERIOD OF QUOTATIONS AND TENDERS**
- 5.1 Unless otherwise agreed, quotations and tenders lapse after 30 days from their date.
  - 5.2 Unless fixed prices have been agreed in writing by MAN-ES, all sales are made at the prices valid at the date of MAN-ES's tender or the date of MAN-ES's order acknowledgement (as the case may be).
  - 5.3 MAN-ES shall neither be entitled nor obliged to implement changes in the scope of supply, before the Parties have reached an agreement regarding the corresponding adjustment of the Contract price and the delivery time.
  - 5.4 Unless otherwise agreed in writing by MAN-ES prices set out in any of MAN-ES's price lists, tenders or order acknowledgement are Ex Works (Incoterms 2010) and exclusive of any taxes, duties, fees, charges or similar and any costs of carriage, package and insurance which shall be payable in addition to the price.
  - 5.5 Unless otherwise agreed by MAN-ES in writing, sums payable by the Customer to MAN-ES shall fall due and be effected by the Customer net cash not later than 30 days after the date of the invoice. If any sum payable under the Contract is not paid when due then without prejudice to MAN-ES's other rights under these Conditions, such sum shall bear interest from the due date until payment is made in full, both before and after any judgment, at 6% per annum over the Cash Rate Target of the Reserve Bank of Australia in force on the due date of payment.
  - 5.6 MAN-ES shall be entitled, upon request, to an advance payment of 50% of the Contract price, unless another percentage rate will be agreed upon between the Parties. This advance payment shall be effected by the Customer to MAN-ES's account, or, according to the MAN-ES's choice for services to be rendered outside Germany, by delivery of an irrevocable letter of credit to be established by the Customer in the Federal Republic of Germany, and confirmed by a German first class bank acceptable to MAN-ES, at least 21 days prior to the departure of the Specialist Personnel.
  - 5.7 The set-off with counter-claims by the Customer shall only be allowed with undisputed claims or in accordance with an appropriate court judgement.
- 6 PROVISION OF SERVICES**
- 6.1 Unless otherwise expressly agreed in writing, Services rendered by MAN-ES shall be charged on a time basis in accordance with MAN-ES's general rates for personnel valid at the date of the provision of the Services. Such rates are exclusive of board, lodging and transportation and such other facilities as are to be provided by the Customer free of charge. All travelling expenses and costs of carriage of luggage, instruments and tools incurred by the Specialist Personnel



- shall be borne by the Customer. Unless otherwise agreed MAN-ES's execution of Services is subject to manual assistance being rendered by the Customer either through engine room staff or other persons made available by the Customer.
- 6.2 The taking-over of the Works by the Customer shall be deemed to have taken place at the latest, when the Customer has received MAN-ES's notice that the Work has been completed, provided that the Work is as required for taking-over according to the Contract. Minor deficiencies which do not affect the efficiency of the Work shall not prevent taking-over. The period, referred to in clause 7.1 shall start to run at the latest when the Work is ready for taking-over in accordance with this clause 6.2.
- 6.3 The Customer shall be responsible for the adherence to legal or other regulations applicable at the Site, and indemnifies MAN-ES against all direct and indirect loss suffered by MAN-ES arising from or in connection with this clause 6.3.
- 6.4 The daily working time shall be arranged by the Customer and the Specialist Personnel at the Site, and the actual working time shall be certified on work sheets by the Customer.
- 6.5 MAN-ES will present monthly accounts based on the work sheets. The final accounts shall be submitted to the Customer within a reasonable period after the completion of the Works.
- 6.6 In the event of illness during employment of the Specialist Personnel, payment of the hourly rates shall be continued for the time during which the Specialist Personnel has to remain in the country where the Site is located owing to illness. During hospitalisation in the country where the Site is located the hourly rates shall be reduced to such special rates mentioned in MAN-ES's general rates for personnel valid at the date of the provision of the Services. If it is necessary for the incapacitated Specialist Personnel to return home, the travelling costs including allowance and hourly rates for the travelling time shall be borne by the Customer.
- 6.7 For Services rendered abroad, any costs arising in connection with illness or accidents, e.g. costs of medical treatment, hospital care or similar treatment, and medicine, shall be borne by the Customer.
- 7. WARRANTY**
- 7.1 Guarantees and liabilities of MAN-ES under the Australian Consumer Law
- (a) Only in the cases where the Australian Consumer Law is applicable (*in particular (aa) because the Customer is a Consumer who acquires the goods & services as a consumer, including in business to business transactions where (i) the price is under \$ 40,000, (ii) goods are of a kind commonly acquired for personal domestic or household use or (iii) goods are a vehicle or trailer acquired for personal use in transport of goods, and (bb) because the goods are not purchased to be resold or to be used up in a manufacturing or repair process*) and the guarantees and liabilities under the Australian Consumer Law cannot be lawfully excluded, restricted or modified, **MAN-ES goods will come with guarantees that cannot be excluded under the Australian Consumer Law and therefore the Consumers/Customer are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. Consumers are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.**
- (b) Except only for clause 7.1. (a) , those rights and remedies that the Customer has in respect of the Goods under the Australian Consumer Law and similar state and territory laws applicable to Consumers in Australia and which cannot be lawfully excluded, restricted or modified (**Non-excludable Rights**):
- (aa) notwithstanding any other provision of this contract, the liability of MAN-ES to the Customer, whether arising under or in connection with the contract or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute (to the extent that it is possible to exclude such liability), in tort (for negligence or otherwise), or on any other basis in law or equity is hereby excluded; and
- (bb) MAN-ES is not liable to the Customer for any loss which the Customer suffers, incurs or is liable for in connection with the supply of the Goods under a contract, except in accordance with clause 10.
- (cc) To the extent permitted by law, MAN-ES's liability in respect of any Non-excludable Rights shall be limited at its option either to in respect of Goods, the repair or replacement of the Goods or the cost of repairing or replacing the Goods provided that such Goods are returned to MAN-ES in their delivered state at the Customer's expense if so requested by MAN-ES within twelve (12) months from the date of their delivery. MAN-ES shall especially not be responsible for offloading of cargo and/or any precondition works necessary to repair and/or rectify the defect. Clause 7.1 shall be the Customer's only remedy and in lieu of any other rights and remedies which might otherwise be available to the Customer.
- (c) If the Australian Consumer Law is applicable and the guarantees and liabilities under the Australian Consumer Law cannot be lawfully excluded, restricted or modified and MAN-ES has to guarantee for the goods & services under the Australian Consumer Law, the benefits and warranties under clause 7.2 shall not apply.
- 7.2 Australian Consumer Law does not apply.
- (a) Subject to clause 7.1 MAN-ES warrants for a period of six months from the date the Goods were delivered or the Services rendered, that such Goods and/or Services are free from substantial defects in materials or manufacture and that such Services were carried out with reasonable skill and care.
- (b) The warranty given in clause 7.2 (a) will not apply:
- (aa) where the defect complained of arises from any drawing, design, specification or intellectual property right supplied by the Customer or arises from normal wear and tear, wilful damage, the Customer's negligence, abnormal working conditions, or misuse or alteration or repair of the Goods without MAN-ES's approval or arises from any failure to follow MAN-ES's advice (whether oral or in writing or whether relating without limit to the fabrication, operation, use or maintenance of the Goods);
- (bb) if MAN-ES or its agent is not given a reasonable opportunity to safely inspect the Work;
- (cc) if the total price for the Goods or Services has not been paid by the due date for payment;
- (dd) if the damage was caused by the Customer's personnel;
- (ee) if the Goods supplied by MAN-ES are mounted in a MAN-ES engine for which the Customer has also used unoriginal parts (i.e. parts which have not been supplied through MAN-ES or through an MAN-ES licensee), in which case MAN-ES does not assume any liability for any damage which may arise.
- (c) Subject to clause 7.1, MAN-ES makes no other express or implied warranties or guarantees and he obligations of MAN-ES under the Contract are limited such that in the event of a breach by MAN-ES of the warranty in clause 7.2 or any defect in any Goods or Services MAN-ES shall only be obliged (and shall have no further liability in contract, negligence or otherwise for any defect in quality of the Goods and/or Services) at its option either to
- (aa) credit the price (if already paid) attributable to the faulty Goods or Services, or
- (bb) repair, rectify or replace the faulty Goods or Services provided that such Goods are returned to MAN-ES in their delivered state at the Customer's expense if so requested by MAN-ES within twelve (12) months from the date of their delivery. MAN-ES shall especially not be responsible for offloading of cargo and/or any precondition works necessary to repair and/or rectify the defect. 7.3. Any replacement Goods will be warranted on the terms set out in this clause 7.
- 8 FORCE MAJEURE**
- 8.1 In case of Act of God, labour disputes, civil commotion, governmental or official actions, war, acts of terror or any other event which was unforeseeable or outside the reasonable control of the Party affected, the Parties shall be temporarily relieved from their obligations during the period of time such events continue and to the extent their liabilities are affected. The afore-stated shall also be applicable to MAN-ES if a sub-supplier of MAN-ES is affected by such event and/or in case the Party concerned is already in default.
- 8.2 The Parties are committed to give each other the necessary information which may reasonably be expected without delay, and to adjust their obligations in good faith to the changed circumstances.
- 9 INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY**
- 9.1 The Customer shall not, under any circumstances acquire any right in or to any of the IPRs (including, without limitation, copyright) subsisting in, resulting from or relating to Work, or any plans, descriptions, blue-prints, designs, technical information, software, documents, drawings and/or specifications relating thereto either (a) supplied by or on behalf of MAN-ES to the Customer in connection with Work, or (b) resulting from the Work, unless otherwise expressly agreed by MAN-ES in writing. If the Customer shall in any way acquire any such rights then the Customer shall immediately inform MAN-ES and shall forthwith take such steps as may be required by MAN-ES to assign such rights or vest such title in MAN-ES.
- 9.2 MAN-ES shall have the right to apply any trademarks, trade names and/or service marks to the Goods. The Customer acknowledges that no rights are granted to the Customer by the use by the Customer of such trademarks, trade names and/or service marks. The Customer shall not deface, remove or obliterate any trademarks, trade names or logos applied by MAN-ES on or in relation to the Goods.
- 9.3 The Customer shall keep confidential and not use, without the prior written consent of MAN-ES, all or any information including without limit, those supplied by MAN-ES to the Customer or disclosed to or obtained by the Customer pursuant to or as a result of the Contract, and shall not divulge the same to any third party except to the extent that any such information is or becomes public through no fault of the Customer, or disclosure of the same is required by law or by any other governmental or other regulatory body.
- 9.4 In the event that MAN-ES bases the production of the Goods on its own specifications, MAN-ES shall under the exclusion of any further liability warrant that such Goods do not interfere with IPRs published in USA and/or by the European Patent Office. This shall not apply, if MAN-ES has manufactured the Goods in accordance with drawings, models or other equivalent descriptions or information provided by the Customer. As far as MAN-ES is not liable pursuant to this clause 9.4, the Customer shall release MAN-ES from all third-party claims. If MAN-ES receives notice of an infringement of a third party's IPRs, the Customer shall take all action and render all assistance requested by MAN-ES in connection with the infringement



notice, at the Buyer's cost.

## 10 LIMITATION OF LIABILITY

- 10.1 There shall be no claims that are not provided for in this Contract. Save as expressly stated herein all warranties, terms and conditions whether express or implied by statute, common law usage trade custom or otherwise are hereby expressly excluded to the fullest extent permitted by law. Therefore to the extent to which MAN-ES is entitled to do so under statute, common law usage trade custom or otherwise, MAN-ES shall in no event be liable to the Customer, by way of indemnity or by reason of any breach of contract or statutory duty or in tort or otherwise, for any and all claims, losses, damages such as but not limited to (i) any loss of use of any Part (or all) of the works or the Products, (ii) any loss of hire, business contracts, revenues or anticipated savings, (iii) damage to the Customer's reputation or goodwill, (iv) any loss resulting from any claim made by any third party, (v) loss of production, loss of profit, (vi) default under any business contracts and/or for any indirect or consequential loss or damage which may be suffered by the Customer in connection with the Contract.
- 10.2 Without prejudice to Conditions 3.5, 3.6, 7 and 10.1 and subject to any right that a Consumer may have under the Australian Consumer Law MAN-ES's total liability for each Order in contract, tort, law or otherwise shall be limited to the value of that Order.

## 11 STATUTE OF LIMITATIONS

To the extent permitted by law and without prejudice to clause 10, the limitation period applicable to any claims of the Customer against MAN-ES, besides warranty claims to which clause 7 applies, shall be limited to 24 months after delivery of the Goods or Services to the Buyer.

## 12 TERMINATION

- 12.1 If the Customer fails to make any payment when due or to perform any of its other obligations on time, MAN-ES shall be entitled to suspend its performance of the Contract until the failure is remedied; and regardless of whether MAN-ES elects to suspend performance:
- the time for performance of the Contract by MAN-ES shall be automatically extended accordingly; and
  - any cost (including financial costs and storage, demurrage or other charges) thereby incurred by MAN-ES shall be paid by the Customer.
- 12.2 Without prejudice to any of its other rights MAN-ES may immediately terminate the Contract if any of the following occurs or is likely to occur:
- suspension under clause 12.1 continues for more than 120 days;
  - the Customer is in breach of any of its obligations under the Contract which, if capable of remedy, the Customer has not remedied within 30 days of receiving written notice from MAN-ES; or
  - the Customer is wound up or becomes insolvent or has a receiver or administrative receiver appointed or any equivalent or analogous event occurs in any other jurisdiction or the Customer ceases or threatens to cease to carry on business or otherwise is unable to pay its debts when they fall due.
- 12.3 Upon termination, howsoever arising, MAN-ES shall be entitled forthwith to cease any further work under the Contract without any liability to the Customer. Without prejudice to MAN-ES's other remedies under the Contract, within 14 days of such a notice of termination, howsoever arising, the Customer shall pay to MAN-ES:
- the outstanding balance of the Contract price of the Work which has been delivered or performed, and
  - the costs incurred or committed by MAN-ES up to the date of notice of termination in performing such work which is not yet completed plus a reasonable margin to be agreed between the Parties which shall not be less than 15% of the Contract price, and
  - the costs reasonably incurred by MAN-ES as a result of the termination.
- 12.4 Termination, expiry or completion of the Contract or any part of it, shall not affect or prejudice the provisions of clauses 9, 10, 12, 13 and 14.

## 13 CUSTOMER'S OBLIGATIONS

- 13.1 The Customer shall provide the Specialist Personnel with assistance in obtaining official entry, exit or working permits required in the country where the Services are to be carried out and ensure that they have free access to the Site.
- 13.2 The Customer shall provide the Specialist Personnel with unobstructed and safe access to the Site to enable them to perform the Work in accordance with the Contract.
- 13.3 The Customer shall be responsible for ensuring the health and safety of the Specialist Personnel whilst on the Site. The Customer shall take appropriate measures to protect the Specialist Personnel from risks associated with lone working, working in confined spaces and with substances hazardous to health. When MAN-ES is to carry out the Work on the Site, the Customer shall make available and bear the costs of an adequate number of fitters, local transport, lifting gear, towing, dockage, supply of electricity and similar supplies.
- 13.4 MAN-ES may, at its sole discretion, refuse to perform the Services in conditions or surroundings that it considers may be prejudicial to the health and/or safety of its Specialist Personnel and/or where the Customer is in breach of this clause 12 and MAN-ES shall not be liable under the Contract for any delay in or failure of delivery in such event.
- 13.5 The Customer shall assume all responsibility for all acts or omissions of the Customer's personnel in connection with these Conditions and MAN-ES shall have

no liability with respect thereto.

- 13.6 The Customer shall provide all tools, test equipment and test facilities unless specifically stated otherwise in the Contract. Where MAN-ES does supply tools, the Customer shall give all necessary assistance with the customs formalities required for the import and re-export of MAN-ES's tools and equipment free of all customs and taxes.
- 13.7 The Customer shall to the best of its ability assist MAN-ES in obtaining all necessary information concerning such local laws and regulations as are applicable to MAN-ES's performance of the Services.
- 13.8 The Customer shall specify a firm delivery address for the ordered Goods at least within 3 weeks after receipt of MAN-ES's written confirmation of the date of readiness for dispatch. In case Customer fails to do so, MAN-ES is entitled to sell the Goods selected for delivery to the Customer to a third party and to set forth a new delivery time to be forwarded to the Customer for information. In such case the Customer is not entitled to claim liquidated damages according to clause 3.6.
- 13.9 On MAN-ES's request the Customer shall undertake to arrange suitable accommodation for the Specialist Personnel and to assist in procuring food for the Specialist Personnel. The provision of board and lodging for the Specialist Personnel shall be at the Customer's expense.
- 13.10 If suitable accommodation cannot be obtained in the neighbourhood of the Site, the time for travelling between the lodgings and the Site will be charged as working time whenever the distance is greater than 3 km. In the event of the Specialist Personnel using public transport, the costs incurred thereby shall be borne by the Customer. The same shall apply to the transportation of equipment and other utilities necessary to perform the Services.

## 14 GENERAL

- 14.1 MAN-ES and the Customer shall only be entitled to assign or sub-contract any of its rights or the obligations under the Contract with the prior written consent of the other Party.
- 14.2 If any term, clause, condition or part of these Conditions is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from these Conditions and shall be ineffective without, as far as is possible, modifying any other provision or part of these Conditions and this shall not affect any other provisions of the Contract which shall remain in full force and effect. The Parties are committed to replace the invalid provision by another - with respect to the commercial effect - equivalent provision, in so far as this is possible.
- 14.3 The Contract and these Conditions shall be construed in accordance with and governed in all aspects by the laws of New South Wales, Australia, excluding the rules of conflicts of law. The application of the Convention of the United Nations of 11.4.1980 on Contracts for the International Sale of Goods ("CISG") shall be excluded.
- 14.4 All disputes arising out of or in connection with the Contract and these Conditions, including any question regarding their existence, validity or termination, shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris (ICC), by three arbitrators, appointed under such rules. The arbitration proceedings shall take place in Sydney, Australia. The procedural law of this place shall apply where the Rules are silent. Each Party shall nominate one arbitrator for confirmation by the competent authority under said rules. Both arbitrators shall agree on the third arbitrator within 30 days. Should the two arbitrators fail, within the above time-limit, to reach agreement on the third arbitrator, he shall be appointed by the ICC. The language to be used in the arbitration proceeding shall be English.

## 15 INDEMNITY

The Customer indemnifies and holds MAN-ES harmless against:

- all liabilities, direct loss, damages, costs or expenses incurred or suffered by MAN-ES; and
- all actions, proceedings, claims or demands made against MAN-ES; as a direct or indirect result of any action by the Customer or arising under or in connection with these Conditions, or the supply of Goods or Services by MAN-ES.

## 16 WAIVER

Failure by MAN-ES to enforce any of these Conditions shall not be construed as a waiver of any of MAN-ES's rights hereunder or a waiver of a continuing breach.

## 17 ACCEPTANCE

- 17.1 Acceptance by the Customer of these Conditions as amended by MAN-ES from time to time may be by any one of the following ways:
- by signing and returning to MAN-ES a copy of these Conditions or an order confirmation with reference to these Conditions;
  - by performing an act that is done with the intention of adopting or accepting these Conditions after receiving these Conditions, including but not limited to continuing to order Goods or Services; or
  - by oral acceptance.
- 17.2 Failure to accept these Conditions within seven (7) days of receipt by the Customer of these Conditions may result in the immediate withdrawal of MAN-ES's offer to supply Goods or services.