



## 1 INTERPRETATION

- 1.1 In these Conditions the following words will (unless the context otherwise requires) have the following meanings:  
**"Buyer"** means the person, firm or company that has offered to purchase any Good identified in the Order;  
**"Conditions"** means the standard terms and conditions of sale set out herein;  
**"Contract"** means any contract for supply of the Goods between the Buyer and MD;  
**"Goods"** means goods supplied by MD (as defined in MD'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;  
**"MD"** means MAN Diesel Australia Pty Limited and its associates. **"Order"** means an order placed by the Buyer with MD for the Goods.
- 1.2 The headings in these Conditions are for convenience only and shall not affect their interpretation.

## 2 FORMATION

- 2.1 All tenders are made and Orders are accepted by MD 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 Buyer purports to apply under any Order. 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 MD of performing the Contract then the Contract price and/or programme will be adjusted accordingly.
- 2.2 Orders from Buyer are only binding on MD after a written order acknowledgement has been issued and only on the conditions stated in the order acknowledgment.
- 2.3 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 AND NON-DELIVERY AND DELAY

- 3.1 Unless otherwise expressly agreed in writing by MD  
 - delivery times accepted by MD are given in good faith but are an estimate only; and  
 - delivery of the Goods is made „Ex Works“ in accordance with Incoterms 2000, but the delivery price is exclusive of packing, which will be charged extra.
- 3.2 MD may deliver Goods in instalments. Default by MD, howsoever caused, in respect of one or more instalments shall not entitle the Buyer to terminate the relevant Contract as a whole.
- 3.3 Where:  
 (a) the Buyer fails or refuses to accept delivery of any Goods when they are ready for delivery in accordance with the relevant Order; or  
 (b) MD agrees (at its sole discretion) to postpone delivery of the Goods at the request of the Buyer; or  
 (c) the Buyer 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 Buyer, delivery of the Goods shall be deemed to have taken place and MD may store or arrange for storage of such Goods and charge the Buyer for all related costs and expenses (including storage, insurance, reasonable costs and interest) and may sell such Goods after 28 days after such failure or refusal and deduct any monies payable to MD by the Buyer from the sale proceeds and charge the Buyer for any shortfall below the Contract price.
- 3.4 Upon delivery to the Buyer, all Goods should be examined. MD shall not be liable for any shortages in, damage to or non-delivery of Goods unless the same is notified by the Buyer to MD (together with all specific details) in writing within 10 days of the actual date of delivery. Subject to such notice being provided MD shall, if it is satisfied that any Goods have not been delivered and the cause thereof being beyond the reasonable control of MD, at its sole discretion, either arrange for delivery as soon as reasonably possible or give credit to the Buyer for such Goods and this shall be the Buyer's only remedy and in lieu of all other rights and remedies which might otherwise be available to the Buyer. 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.
- 3.5 If the contractual delivery time for the Goods or part of the Goods is delayed and this delay was caused by negligence or intention of MD and if the Buyer has suffered a loss caused by such delay, the Buyer shall be entitled to liquidated damages for delay. Such liquidated damages for delay shall amount to 0.5% of the contract price of the delayed part of the Goods concerned per each full week of delay considering a grace period of 2 (two) weeks. 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 Goods.
- 3.6 Liquidated damages shall be Buyer's sole and exclusive measure of damages and remedy against MD with respect to the failure to achieve the contractual delivery time for the Goods.

## 4 TITLE

- Unless MD has been paid in full in advance, the Goods will be considered as having delivered by MD retaining the ownership until full payment has been effected by the Buyer under all contracts between MD and the Buyer. If the Buyer does not pay when due, MD is entitled to take back the Goods without a court judgment in accordance with the applicable law.

## 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 MD, all sales are made at the prices valid at the date of MD's tender or the date of MD's order acknowledgement (as the case may be).
- 5.3 MD 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 MD prices set out in any of MD's price lists, tenders or order acknowledgement are Ex Works (Incoterms 2000) 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 Contract price.
- 5.5 Unless otherwise agreed by MD in writing, sums payable by the Buyer to MD shall fall due and be effected by the Buyer 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 MD'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.

## 6 WARRANTY

- 6.1 MD warrants for a period of 6 months from the date the Goods were delivered, that such Goods shall be free from substantial defects in materials or manufacture.
- 6.2 All conditions, warranties or other terms whether express or implied, statutory or otherwise, inconsistent with Condition 6.1, are hereby expressly excluded to the fullest extent permitted by law.
- 6.3 The warranty given in Condition 6.1 will not apply:  
 (a) where the defect complained of arises from any drawing, design, specification or intellectual property right supplied by the Buyer or arises from normal wear and tear, wilful damage, the Buyer's negligence, abnormal working conditions, or misuse or alteration or repair of the Goods without MD's approval or arises from any failure to follow MD's advice (whether oral or in writing or whether relating without limit to the fabrication, operation, use or maintenance of the Goods), or misuse or alteration or repair of the Goods without MD's approval;  
 (b) if MD or its agents is not given a reasonable opportunity to safely inspect the Goods;  
 (c) if the total price for the Goods has not been paid by the due date for payment;  
 (d) if the Goods supplied by MD are mounted in a MD engine for which the Buyer has also used unoriginal parts (i.e. parts which have not been supplied through MD or through a MD licensee), in which case MD does not assume any liability for any damage which may arise.
- 6.4 The obligations of MD under the Contract are limited such that in the event of a breach by MD of the warranty in Condition 6.1 or any defect in any Goods MD shall only be obliged (and shall have no further liability in contract, negligence or otherwise for any defect in quality of the Goods) at its option either to:  
 (a) credit the Contract price (if already paid) attributable to the faulty Goods; or  
 (b) repair, rectify or replace the faulty Goods provided that such Goods are returned to MD in their delivered state at the Buyer's expense if so requested by MD within 12 months from the date of their delivery. MD shall especially not be responsible for offloading of cargo and/or any precondition works necessary to repair and/or rectify the defect. Condition 6.4 shall be the Buyer's only remedy and in lieu of any other rights and remedies which might otherwise be available to the Buyer.
- 6.5 Any replacement Goods will be warranted on the terms set out in this Conditions 6.

## 7 FORCE MAJEURE

- 7.1 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 MD if a sub-supplier of MD is affected by such event and/or in case the Party concerned is already in default.

7.2 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.

## 8 INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY

8.1 The Buyer 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 the Goods, or any plans, descriptions, blue-prints, designs, technical information, software, documents, drawings and/or specifications relating thereto supplied by or on behalf of MD to the Buyer in connection with the delivery of the Goods, unless otherwise expressly agreed by MD in writing. If the Buyer shall in any way acquire any such rights then the Buyer shall immediately inform MD and shall forthwith take such steps as may be required by MD to assign such rights or vest such title in MD.

8.2 MD shall have the right to apply any trademarks, trade names and/or service marks to the Goods. The Buyer acknowledges that no rights are granted to the Buyer by the use by the Buyer of such trademarks, trade names and/or service marks. The Buyer shall not deface, remove or obliterate any trademarks, trade names or logos applied by MD on or in relation to the Goods.

8.3 The Buyer shall keep confidential and not use, without the prior written consent of MD, all or any information including without limit, those supplied by MD to the Buyer or disclosed to or obtained by the Buyer 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 Buyer, or disclosure of the same is required by law or by any other governmental or other regulatory body.

8.4 In the event that MD bases the production of the Goods on its own specifications, MD 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 MD has manufactured the Goods in accordance with drawings, models or other equivalent descriptions or information provided by the Buyer. As far as MD is not liable pursuant to this Conditions 8.4, the Buyer shall release MD from all third-party claims. In case an infringement of such third parties' IPRs appears to emerge, the Parties will enter into negotiations with due consideration of such situation and jointly agree on the consequences.

## 9 LIMITATION OF LIABILITY

9.1 Nothing in these Conditions shall exclude or limit the liability of MD for death or personal injury or damage to other property than the Goods, caused by MD's negligence or fraudulent misrepresentation.

9.2 A liability for compensation does, in general, only exist in case MD was at fault when causing the damage.

9.3 MD shall not be liable to the Buyer in contract, tort, law or otherwise howsoever and whatever the cause thereof, (i) for any loss of profit, hire, business contracts, revenues or anticipated savings, financial or economic loss, loss of opportunity or (ii) for damage to the Buyer's reputation or goodwill, or (iii) for any loss resulting from any claim made by any third party, or (iv) for any special, indirect or consequential loss or damage of any nature whatsoever and none of these shall be included in any direct damage claim.

9.4 Without prejudice to Conditions 9.2 and 9.3 MD's total liability for each Order in contract, tort, law or otherwise shall be limited to the value of that Order.

## 10 STATUTE OF LIMITATIONS

The statute of limitations applicable to any other claims of each Party against the other besides warranty claims, to which Conditions 6.1 above shall apply, shall be 24 months after delivery of the Goods to the Buyer.

## 11 TERMINATION

11.1 If the Buyer fails to make any payment when due or to perform any of its other obligations on time, MD shall be entitled to suspend its performance of the Contract until the failure is remedied; and regardless of whether MD elects to suspend performance:

- (a) the time for performance of the Contract by MD shall be automatically extended accordingly; and
- (b) any cost (including financial costs and storage, demurrage or other charges) thereby incurred by MD shall be paid by the Buyer.

11.2 Without prejudice to any of its other rights MD may immediately terminate the Contract if any of the following occurs or is likely to occur:

- (a) suspension under Condition 10.1 continues for more than 120 days;
- (b) the Buyer is in breach of any of its obligations under the Contract which, if capable of remedy, the Buyer has not remedied within 30 days of receiving written notice from MD; or

(c) the Buyer 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 Buyer ceases or threatens to cease to carry on business or otherwise is unable to pay its debts when they fall due.

11.3 Upon termination, howsoever arising, MD shall be entitled forthwith to suspend any further delivery of Goods under the Contract without any liability to the Buyer. Without prejudice to MD's other remedies under the Contract, within 14 days of such a notice of termination, howsoever arising, the Buyer shall pay to MD:

- (a) the outstanding balance of the Contract price of the Goods which have been delivered, and
- (b) the costs incurred or committed by MD up to the date of notice of termination in performing such delivery of Goods 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
- (c) the costs reasonably incurred by MD as a result of the termination.

11.4 Termination, expiry or completion of the Contract or any part of it, shall not affect or prejudice the provisions of Condition 8, 9, 11, 12 and 13.

## 12 BUYER'S OBLIGATIONS

12.1 The Buyer shall collect the Goods announced as ready for dispatch in time according to the agreed delivery times.

12.2 The Buyer shall pay the Contract price when due according to Condition 5.5 above.

12.3 The Buyer shall assume all responsibility for all acts or omissions of the Buyer's personnel and MD shall have no liability with respect thereto.

12.4 The Buyer shall specify a firm delivery address for the ordered Goods at least within 3 weeks after receipt of MD's written confirmation of the date of readiness for dispatch. In case Buyer fails to do so, MD is entitled to sell the Goods selected for delivery to the Buyer to a third party and to set forth a new delivery time to be forwarded to the Buyer for information. In such case the Buyer is not entitled to claim liquidated damages according to Condition 3.5.

## 13 GENERAL

13.1 MD and the Buyer 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.

13.2 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.

13.3 The Contract and these Conditions shall be construed in accordance with and governed in all aspects by the laws of New South Wales, Australia, however, excluding the rules of conflicts of law. The Convention of the United Nations of 11.4.1980 on Contracts for the International Sale of Goods shall apply, even if the preconditions of its Art. 1 (1) are not fulfilled.

13.4 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.