



1 INTERPRETATION

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

- "**Attaches**" has the same meaning as given to that term in the PPSA;
- "**Buyer**" means the person, firm or company that has offered to purchase any Goods identified in the Order, and includes any servant, agent, partner, contractor or employee of the Buyer;
- "**CGA**" means the Consumer Guarantees Act 1993;
- "**Collateral**" has the same meaning as given to that term in the PPSA;
- "**Conditions**" means the standard terms and conditions of sale set out herein;
- "**Consumer**" has the meaning given to it in section 2 of the CGA;
- "**Contract**" means any contract for supply of the Goods between the Buyer and MAN-ES;
- "**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 New Zealand Limited and includes any servant, agent, partner, related company, contractor, employee or other representative of MAN-ES;
- "**Order**" means an order placed by the Buyer with MAN-ES for the Goods.
- "**Perfect**" has the same meaning as given to that term in the PPSA;
- "**PPSA**" means the Personal Property Securities Act 1999, as amended from time to time;
- "**Purchase Money Security Interest**" 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);
- "**Verification Statement**" has the same meaning as given to that term in the PPSA; and
- "**\$**" or "**dollars**" is a reference to the lawful currency of New Zealand.

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 two 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 the 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. 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 Buyer are only binding on MAN-ES after a written Order acknowledgement 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 MAN-ES may deliver Goods in instalments. Default by MAN-ES, howsoever caused, in respect of one or more instalments shall not entitle the Buyer to terminate the relevant Contract as a whole.

3.3 Risk

The risk in the Goods passes to the Buyer on delivery to the Buyer or into custody on the Buyer's behalf, including but not limited to delivery to the Buyer's agent or carrier, provided that 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) MAN-ES 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 MAN-ES 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 MAN-ES by the Buyer from the sale proceeds and charge the Buyer for any shortfall below the Contract price.

3.4 Shortages and Non-Delivery

Upon delivery to the Buyer, all Goods should be examined. MAN-ES shall not be liable for any shortages in, damage to, or non-delivery of Goods unless the same is notified by the Buyer to MAN-ES (together with all specific details, including storage, insurance, reasonable costs and interest) in writing within 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 Buyer for such non-delivered 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 Delay

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 MAN-ES and if the Buyer has suffered a loss caused by such delay, the Buyer shall, to the exclusion of any other claims based on delays in respect 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 Goods, 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% of the Contract net price of the delayed part of the Goods.

Liquidated damages shall be the Buyer'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 Goods.

The Buyer acknowledges that:

- (a) liquidated damages under this clause 3.5 represent a genuine pre-estimate of the costs and losses likely to be incurred by the Buyer 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 and title in the Goods will remain with MAN-ES and will not pass to the Buyer until such time when the Buyer pays all monies owing to MAN-ES by the Buyer, 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 Buyer).

4.2 Covenants

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

- (a) the Buyer holds the Goods as 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 Buyer will not dispose of the Goods except with MAN-ES's prior written consent or in the ordinary course of the Buyer's business;
- (d) the Buyer 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 Buyer 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's 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 Buyer (and will pay such monies immediately on request to MAN-ES));
- (g) the Buyer 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 Buyer;
- (h) the Buyer cannot claim any lien over the Goods;
- (i) the Buyer will not create any absolute or defeasible interest in the Goods in relation to any third party, except with MAN-ES's prior written consent; and
- (j) pending payment in full for all amounts owed by the Buyer to MAN-ES on all accounts, the Buyer:
 - (i) subject to clause 4.4, must not allow any person other than MAN-ES 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 Buyer 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 Buyer's premises.

4.3 MAN-ES's Rights

If the Buyer fails to pay for any Goods within the period of credit extended by MAN-ES to the Buyer:

- (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 Buyer and the Buyer agrees that MAN-ES has an irrevocable licence to do so without incurring any liability to the Buyer or any person claiming through the Buyer; and
- (b) If required, the Buyer will assign to MAN-ES any rights of the Buyer to any outstanding money relating to the re-supply of the Goods. The Buyer 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 4.3, where the Buyer has failed to do so within seven 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

This clause 4.4 shall be only applicable for Goods located in the jurisdiction of New Zealand or where the grantor of a Security Interest is a New Zealand entity.

- (a) If MAN-ES determines that the PPSA applies, or will in the future apply to any agreement that incorporates these Conditions ("**Supply Agreement**") or the supply of any Goods, then the Buyer must promptly upon request from MAN-ES do anything (including obtaining consents, making amendments to the Supply Agreement or executing a new Supply Agreement) for the purposes of:
 - (i) ensuring that any Security Interest created under, or provided for by, the Supply Agreement:
 - (A) attaches to the collateral that is intended to be covered by that Security Interest;
 - (B) is enforceable, Perfected, maintained and otherwise effective; and
 - (C) any Security Interest created under, or provided for by, the Supply Agreement has the priority contemplated by that Supply Agreement; or
 - (D) enabling MAN-ES to prepare and register a Financing Statement or Financing Change Statement; or
 - (E) enabling MAN-ES to exercise any of its powers in connection with any Security Interest created under, or provided by, the Supply Agreement,

and provide any information requested by MAN-ES in connection with the Supply Agreement to enable it to exercise any of its powers or perform its obligations under the PPSA.

- (b) Each of MAN-ES and the Buyer agree not to disclose any information of the kind referred to in section 177(1) of the PPSA that is not publicly available other than to the extent that MAN-ES is required by section 117(1) of the PPSA to do so.

- (c) The Buyer agrees that:
 - (i) the Buyer may not object to any MAN-ES proposal under section 121 of the PPSA;
 - (ii) the Buyer has no rights in respect of any removal of any PPSA personal property which has become an accession under sections 125, 126 and 127 and 131 of the PPSA;
 - (iii) the Buyer has no rights to reinstate this document following a default under sections 133 and 134 of the PPSA; and
 - (iv) despite the Buyer 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 Buyer shall be applied in the following order:
 - (A) first, to satisfy any obligations owed by the Buyer 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) The Buyer 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 129 of the PPSA;
 - (ii) a notice of MAN-ES's proposal to take the collateral in satisfaction of the secured obligations under section 120(2);
 - (iii) a notice of MAN-ES's proposal to dispose of any PPSA personal property under section 114(1)(a) of the PPSA;
 - (iv) a statement of account under section 116 of the PPSA; and
 - (v) 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 4.4 shall be done by the Buyer at its own expense. The Buyer agrees to reimburse the costs of MAN-ES in connection with any action taken by MAN-ES under or in connection with this clause 4.4.

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 Contract price.
- 5.5 Unless otherwise agreed by MAN-ES in writing, sums payable by the Buyer to MAN-ES 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 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 Official Cash Rate of the Reserve Bank of New Zealand in force on the due date of payment.

6 WARRANTY

- 6.1 Guarantees and liabilities of MAN-ES under the CGA
 - (a) The parties acknowledge and agree that if the Buyer acquires Goods and/or Services under a Contract for the purposes of a business or the Buyer is not a 'consumer' for the purposes of the CGA, then except as expressly set out in these Conditions, the provisions of the CGA do not apply to MAN-ES's supply of Goods and/or Services to the Buyer. Nothing in these Conditions is intended to have the effect of contracting out of the provisions of the CGA except to the extent permitted by the CGA, and where the CGA applies these Conditions and the relevant Contract are modified to the extent necessary to give effect to that intention.
 - (b) Only in the cases where the CGA applies (*including because the Buyer is a "consumer" as that term is defined in the CGA*) and the guarantees and liabilities under the CGA cannot be lawfully excluded, restricted or modified under clause 6.1(a), MAN-ES Goods will come with the guarantees that cannot be excluded under the CGA and where the Goods do not comply with those guarantees, the Buyer is entitled to:



- (i) at MAN-ES's option, to have the Goods repaired or replaced or, where MAN-ES cannot reasonably be expected to repair the Goods, a refund of any money paid or other consideration provided by the Buyer for the Goods; or
- (ii) in the case of a failure of substantial character, at the Buyer's option, a refund for the Goods or to receive Goods of the same type and of similar value to the Goods,

and in either case, any reasonably foreseeable losses arising as a result of the failure.

- (c) Except for those rights and remedies that the Buyer has in respect of the Goods and/or Services under the CGA which cannot be lawfully excluded, restricted or modified under clause 6.1(a) ("**Non-excludable Rights**") to the extent permitted by law:
 - (i) notwithstanding any other provision of a Contract or, these Conditions, liability of MAN-ES to the Buyer, whether arising under or in connection with the relevant 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;
 - (ii) MAN-ES is not liable to the Buyer for any loss which the Buyer suffers, incurs or is liable for in connection with the supply of the Goods under a Contract, except in accordance with clause 9; and
 - (iii) in respect of a breach of any Non-excludable Rights MAN-ES shall meet its obligations under the CGA as described in clause 6.1(b). 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 6.1 shall be the Buyer's only remedy and in lieu of any other rights and remedies which might otherwise be available to the Buyer.
- (d) If the CGA applies and the guarantees and liabilities under the CGA and cannot be lawfully excluded, restricted or modified under clause 6.1(a) and accordingly MAN-ES has to provide statutory guarantees for the Goods and Services under the CGA, the express benefits set out and warranties under clause 6.2 shall not apply.

6.2 Express warranty

- (a) Subject to clause 6.1 MAN-ES warrants for a period of six months from the date the Goods were delivered, that such Goods shall be free from substantial defects in materials or manufacture.
- (b) The warranty given in clause 6.2 (a) will not apply:
 - (i) 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 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), or misuse or alteration or repair of the Goods without MAN-ES's approval;
 - (ii) if MAN-ES or its agents is not given a reasonable opportunity to safely inspect the Goods;
 - (iii) if the total price for the Goods has not been paid by the due date for payment; or
 - (iv) if the Goods supplied by MAN-ES are mounted in a MAN-ES engine for which the Buyer has also used unoriginal parts (i.e. parts which have not been supplied through MAN-ES or through a MAN-ES licensee), in which case MAN-ES does not assume any liability for any damage which may arise.
- (c) Subject to clause 6.1, MAN-ES makes no other express or implied warranties or guarantees in respect of the Goods or Services and the obligations of MAN-ES under a Contract are limited such that in the event of a breach by MAN-ES of the warranty in clause 6.2 MAN-ES shall only be obliged (and shall have no further liability in contract, negligence or otherwise such breach) at its option either to:
 - (i) credit the price (if already paid) attributable to the faulty Goods or Services; or
 - (ii) repair, rectify or replace the faulty Goods or Services.

provided that any such Goods are returned to MAN-ES in their delivered state at the Buyer's expense if so requested by MAN-ES within 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.

- 6.3 Except as otherwise set out in a Contract or these Conditions, and subject always to clause 6.1(a), all terms, conditions, warranties and representations expressed or implied by statute (including the Sale of Goods Act 1908), by

common law or otherwise are expressly excluded to the fullest extent permitted by law.

- 6.4 Any replacement Goods will be warranted on the terms set out in this clause 6.

7 FORCE MAJEURE

- 7.1 In case of Act of God, labour disputes, civil commotion, governmental or official actions, war, acts of terror, accidents 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.
- 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 MAN-ES to the Buyer in connection with the delivery of the Goods, unless otherwise expressly agreed by MAN-ES in writing. If the Buyer shall in any way acquire any such rights then the Buyer 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.
- 8.2 MAN-ES 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 MAN-ES on or in relation to the Goods.
- 8.3 The Buyer 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 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 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 Buyer. As far as MAN-ES is not liable pursuant to this clause 8.4, the Buyer shall indemnify MAN-ES from all third-party claims. If MAN-ES receives notice of an infringement of a third party's IPRs, the Buyer shall take all action and render all assistance requested by MAN-ES in connection with the infringement notice, at the Buyer's cost.

9 LIMITATION OF LIABILITY

- 9.1 There shall be no claims that are not provided for in this Contract. To the extent to which MAN-ES is entitled to do so under statute, common law usage trade custom or otherwise, and subject always to clause 6.1, MAN-ES shall in no event be liable to the Buyer, 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 Goods, (ii) any loss of hire, business contracts, revenues or anticipated savings, (iii) damage to the Buyer'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 Buyer in connection with the Contract.
- 9.2 Without prejudice to Conditions 3.4, 3.5, 6 and 9.1 and subject to any right that a Consumer may have under the CGA as contemplated by clauses 6.1(a) and (b), MAN-ES's total liability for each Order in contract, tort, law or otherwise shall be limited to the value of that Order.

10 LIMITATION OF ACTIONS

To the extent permitted by law and subject to clause 6.1, and without prejudice to the operation of clause 9, the limitation period applicable to any claims of the Buyer against MAN-ES, besides warranty claims to which clause 6 applies, shall be limited to 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, 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:
 - (a) the time for performance of the Contract by MAN-ES shall be automatically extended accordingly; and
 - (b) any cost (including financial costs and storage, demurrage or other charges) thereby incurred by MAN-ES shall be paid by the Buyer.
- 11.2 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:



- (a) suspension under clause 11.1 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 MAN-ES; 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, MAN-ES shall be entitled forthwith to cease any further delivery of Goods under the Contract without any liability to the Buyer. Without prejudice to MAN-ES's other remedies under the Contract, within 14 days of such a notice of termination, howsoever arising, the Buyer shall pay to MAN-ES:
- (a) the outstanding balance of the Contract price of the Goods which have been delivered; and
 - (b) the costs reasonably incurred by MAN-ES 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 clauses 4.4, 6, 7, 8, 9, 10, 11, 12 and 13.

12 BUYER'S OBLIGATIONS

- 12.1 The Buyer shall assume all responsibility for all acts or omissions of the Buyer's personnel in connection with these Conditions and MAN-ES shall have no liability with respect thereto.
- 12.2 The Buyer 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 Buyer fails to do so, MAN-ES 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 clause 3.5.

13 GENERAL

- 13.1 MAN-ES 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 Zealand, 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.

- 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 Auckland, New Zealand. The procedural law of this place shall apply where the said 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.

14 INDEMNITY

The Buyer indemnifies and holds MAN-ES harmless against:

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

15 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.

16 ACCEPTANCE

- 16.1 Acceptance by the Buyer of these Conditions as amended by MAN-ES from time to time may be by any one of the following ways:
- (a) by signing and returning to MAN-ES a copy of these Conditions or an order confirmation with reference to these Conditions;
 - (b) 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
 - (c) by oral acceptance.
- 16.2 Failure to accept these Conditions within seven days of receipt of these Conditions by the Buyer may result in the immediate withdrawal of MAN-ES's offer to supply Goods and/or Services.