

# STANDARD TRADING TERMS AND CONDITIONS OF BARLOWORLD POWER

a division of

**BARLOWORLD SOUTH AFRICA (PTY) LIMITED and its successors and assigns**

**("Barloworld")**

## **A GENERAL TRADING TERMS AND CONDITIONS**

### **1. THE CONTRACT**

- 1.1 Unless the parties agree otherwise, these standard trading terms apply to any contract ("Contract") between Barloworld and any of its customers ("Customer/s"). This includes Contracts for the sale of new or used goods (including parts) (collectively the "Goods"), leases of Goods and Contracts for maintenance and/or repair services (collectively the "Services").
- 1.2 Part A of these terms applies to all Contracts. In addition, if a Contract is for:
  - (a) the sale of Goods, Part B also applies;
  - (b) the letting of any Goods, Part C also applies;
  - (c) the performance of Services, Part D also applies.
- 1.3 A Contract is considered to be concluded when Barloworld:
  - (a) notifies the Customer that it accepts the Customer's order for the sale or lease of any Goods or for the Services; or
  - (b) accepts payment of all or part of any amount which is or will become payable in terms of any Contract (including any advance payment or deposit); or
  - (c) when the Goods are delivered to, or collected by, the Customer or when Barloworld begins carrying out the Services.
- 1.4 The Contract consists of these Standard Trading Terms and Conditions ("T & C's"), together with the Customer's acceptance of any quotation (or purchase order issued for such quotation) through the issue by the Customer of a purchase order to Barloworld ("Acceptance"). If these T & C's and the Acceptance conflict, the T & C's prevails. If the Customer has a trading account with Barloworld ("the Trading Account"), then the application for the Trading Account and the trading account terms and conditions relating to the Trading Account (as at the date when the Customer applies for a Trading Account) will also form part of the Contract.
- 1.5 **THE CUSTOMER'S STANDARD TRADING TERMS AND CONDITIONS DO NOT APPLY TO ANY CONTRACT AND ARE HEREBY EXPRESSLY EXCLUDED FROM THE APPLICATION IN RESPECT OF THE SUBJECT MATTER HEREIN, ONLY THESE T & C'S WILL APPLY, EVEN WHERE CUSTOMERS' ATTACH AND/OR REFER TO THEIR STANDARD TRADING TERMS AND CONDITIONS TO ANY DOCUMENT SENT TO BARLOWORLD DURING THE EXISTENCE OF A CONTRACT.**
- 1.6 Any specifications, illustrations, drawings, price lists, dimensions, performance figures and/or other technical data furnished by Barloworld in respect of any Contract (collectively the "Data"), and whether in writing or not, is furnished only on the basis that it is not part of the Contract. The Customer must not rely on any of the Data for any purpose, unless and to the extent that it is expressly warranted or guaranteed in writing by Barloworld and is expressly stated by Barloworld, in writing, to form part of the Contract.
- 1.7 Time is not of the essence of the Contract.
- 1.8 Each Contract is the whole agreement between Barloworld and the Customer, and contains all the express provisions agreed by the parties, about its subject matter.
- 1.9 If a party does not enforce its rights in terms of a Contract that relaxation is not a waiver of those rights and that party may later enforce its rights as if it had never relaxed them.

1.10 No variation of a Contract will be valid or effective unless recorded in writing and signed by the Customer and a director or general manager of Barloworld or any person to whom the director or general-manager has delegated his authority.

**2. EXCLUSION AND LIMITATION OF LIABILITY\***

**\*Please read this clause carefully and initial where indicated. If you do not understand, please ask for further information/explanation until you are comfortable that you do understand the clause.**

**2.1 BARLOWORLD IS NOT LIABLE TO THE CUSTOMER FOR ANY CLAIM, LOSSES, DAMAGES, COSTS (INCLUDING COSTS ON THE ATTORNEY AND OWN CLIENT SCALE AND ON A FULL INDEMNITY BASIS) AND/OR ANY OTHER LIABILITY (COLLECTIVELY THE "CLAIM") SUFFERED OR INCURRED BY THE CUSTOMER AND CAUSED BY, OR ARISING FROM, BARLOWORLD FOLLOWING THE CUSTOMER'S INSTRUCTIONS (INCLUDING THE CUSTOMER'S DRAWINGS AND SPECIFICATIONS) GIVEN IN CONNECTION WITH ANY CONTRACT (THE "INSTRUCTION"). THE CUSTOMER IS LIABLE FOR ALL CONSEQUENCES OF ANY MANIFEST AND MATERIAL ERROR, OMISSION, DISCREPANCY OR DEFECT IN THE INSTRUCTIONS.**

**2.2 AS FAR AS IS PERMISSIBLE IN LAW, THE CUSTOMER HEREBY WAIVES ANY CLAIM IT MAY HAVE OR ACQUIRE AGAINST BARLOWORLD OR BARLOWORLD'S DIRECTORS, OFFICERS, EMPLOYEES, CONTRACTORS AND/OR AGENTS:**

**(a) FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL OR SPECIAL DAMAGES (WHICH IS DEEMED TO INCLUDE ALL LOSS OF PROFIT, LOSS OF BUSINESS, ANY LOSS OR INTERRUPTION OF PRODUCTION OR OPERATION AND ANY DEMURRAGE OR OTHER COSTS RELATED TO THE DELAY OF VESSELS), SUFFERED BY THE CUSTOMER AND WHICH ARISE FROM, OR IN CONNECTION WITH, ANY CAUSE OF ACTION, INCLUDING CONTRACT, DELICT, STRICT OR STATUTORY LIABILITY**

**(b) ARISING FROM OR IN CONNECTION WITH ANY SHORT DELIVERY OR BREAKDOWN OF THE GOODS, OR FAILURE OF THE GOODS OR THE SERVICES TO COMPLY WITH THE CONTRACT, UNLESS WITHIN 7 (SEVEN) DAYS AFTER DELIVERY OF THE GOODS (WHETHER THEY ARE SOLD OR LEASED) OR THE COMPLETION OF THE SERVICES, THE CUSTOMER NOTIFIES BARLOWORLD THEREOF, IN WRITING, PROVIDING DETAILS OF ITS COMPLAINT.**

**2.3 NOTWITHSTANDING ANY OTHER PROVISION OF THESE T & C'S, THE CUSTOMER'S CLAIM AGAINST BARLOWORLD FOR ANY DIRECT DAMAGES ARISING FROM ANY CAUSE WHATSOEVER, IS LIMITED TO LESSER OF ZAR 2 (TWO) MILLION OR:**

**(a) IN THE CASE OF THE SALE OF ANY GOODS, THE COST OF REPLACEMENT OF THOSE GOODS, PROVIDED THE GOODS ARE RETURNED TO BARLOWORLD IN THE SAME CONDITION IN WHICH THEY WERE DELIVERED TO THE CUSTOMER;**

**(b) IN THE CASE OF THE PERFORMANCE OF SERVICES, THE MONTHLY FEE PAYABLE BY THE CUSTOMER FOR THE SERVICE WHICH GAVE RISE TO THE CLAIM, MULTIPLIED BY 6 (SIX);**

**(c) IN THE CASE OF A LEASE OF GOODS, THE MONTHLY RENTAL PAYABLE BY THE CUSTOMER, AT THE TIME THAT THE CLAIM AROSE, FOR THE GOODS IN RESPECT OF WHICH THE CLAIM AROSE, MULTIPLIED BY 6 (SIX).**

- 2.4 **BARLOWORLD IS NOT LIABLE FOR ANY FAILURE OR DELAY IN PERFORMING ANY OF ITS OBLIGATIONS UNDER THE CONTRACT WHICH IS CAUSED BY ANY EVENT OR CIRCUMSTANCES WHICH:**
- (a) **IS BEYOND ITS REASONABLE CONTROL; OR**
  - (b) **BARLOWORLD COULD NOT REASONABLY HAVE PROVIDED AGAINST BEFORE ENTERING INTO THE CONTRACT; OR**
  - (c) **HAVING ARISEN COULD NOT REASONABLY HAVE BEEN AVOIDED OR OVERCOME BY BARLOWORLD.**
- 2.5 **THE EVENTS OR CIRCUMSTANCES DESCRIBED IN CLAUSE 2.4 INCLUDE ANY STRIKE, LOCK-OUT, SHORTAGE OF LABOUR OR MATERIALS, DELAYS IN TRANSPORT, ACCIDENTS OF ANY KIND, ANY DEFAULT OR DELAY BY ANY SUB CONTRACTOR OR SUPPLIER OF BARLOWORLD, RIOT , CIVIL COMMOTION, DISORDER, LABOUR DISPUTE, WAR, INVASION, HOSTILITIES, CIVIL WAR AND ACTS OF TERRORISM, POLITICAL OR CIVIL DISTURBANCES, THE ELEMENTS, INCLEMENT WEATHER, NATURAL CATASTROPHES SUCH AS EARTHQUAKES, HURRICANES, FLOODS OR DROUGHTS, OR ANY ACT OF ANY STATE OR GOVERNMENT OR ANY OTHER AUTHORITY.**
- 2.6 **THE CUSTOMER EXPRESSLY AGREES THAT, EXCEPT FOR ANY WRITTEN WARRANTY OR GUARANTEE WHICH IS SIGNED BY BOTH PARTIES AND WHICH BARLOWORLD EXPRESSLY AGREES IN WRITING IS PART OF THE CONTRACT, AS FAR AS IS PERMISSIBLE IN LAW:**
- (a) **THE GOODS ARE SOLD OR LET VOETSTOOTS (THAT IS AS THEY STAND WHERE THEY STAND) WITHOUT ANY WARRANTY AND/OR GUARANTEE, INCLUDING ANY IMPLIED OR COMMON LAW WARRANTY;**
  - (b) **THE SERVICES ARE PROVIDED WITHOUT ANY WARRANTY AND/OR GUARANTEE, INCLUDING ANY TACIT OR IMPLIED WARRANTY;**
  - (c) **BARLOWORLD DOES NOT MAKE ANY REPRESENTATION IN RESPECT OF THE GOODS OR THE SERVICES, AND/OR THE FITNESS OF THE GOODS AND/OR ANY PART THEREOF FOR ANY PARTICULAR PURPOSE, OTHER THAN AS PROVIDED FOR IN ANY OPERATORS AND MAINTENANCE MANUAL PROVIDED WITH THE GOODS AND/OR SERVICES;**
  - (d) **BARLOWORLD IS NOT LIABLE FOR ANY LATENT OR PATENT DEFECT IN THE GOODS.**
- 2.7 **THE CUSTOMER ACKNOWLEDGES THAT IT HAS READ THE INSTRUCTIONS AND WARNINGS PROVIDED TO IT BY BARLOWORLD AS THEY APPEAR IN THE OPERATORS AND MAINTENANCE MANUAL IN RESPECT OF THE HAZARDS ARISING FROM, OR ASSOCIATED WITH, THE GOODS AND/OR THE USE AND/OR THEIR USE AND/OR THE SERVICES AND THE CUSTOMER AGREES THAT THOSE INSTRUCTIONS AND WARNINGS ARE ADEQUATE, CLEARLY EXPRESSED IN PLAIN LANGUAGE AND EASY TO UNDERSTAND.**

- 2.8 **THE CUSTOMER SHALL ENSURE THAT THE GOODS ARE ONLY OPERATED BY SUITABLY QUALIFIED AND/OR TRAINED PERSONNEL, AND HERBY INDEMNIFIES BARLOWORLD IN THE EVENT THAT ANY LOSS OF ANY KIND OCCURS AS A RESULT OF THE OPERATOR NOT BEING PROPERLY TRAINED IN THE OPERATION OF THE GOODS.**
- 2.9 **IN THE EVENT THAT THE CUSTOMER INSTALLS OR FITS ANY PARTS, DEVICE, ACCESSORIES OR CONSUMABLES OF MANUFACTURES OTHER THAN CATERPILLAR ("NON-OEM PARTS") IN OR ONTO THE GOODS, BARLOWORLD SHALL NOT BE HELD LIABLE IN ANY WAY WHATSOEVER IN RESPECT OF ANY DEFECT IN SUCH NON-OEM PARTS; AND SHALL NOT BE RESPONSIBLE FOR THE MAINTENANCE OF SUCH NON-OEM PARTS.**
- 2.10 **BARLOWORLD DOES NOT MAKE ANY REPRESENTATIONS OR RECOMMENDATIONS IN RELATION TO THE SUITABILITY OF ANY NON-OEM PARTS OR THEIR INSTALLATION.**
- 2.11 **WITHOUT IN ANY WAY DETRACTING FROM THE IMPORTANCE OF THE OTHER PROVISIONS OF THE CONTRACT, THE CUSTOMER ACKNOWLEDGES THAT THE PROVISIONS OF CLAUSE 2 HAVE BEEN BROUGHT TO ITS ATTENTION, IT HAS READ AND UNDERSTOOD THOSE PROVISIONS AND AGREES TO BE BOUND BY THEM.**

### **3. PERMITS, CONSENTS AND APPROVALS**

If any regulatory permit, consent or approval (collectively "Regulatory Approval") is required under any applicable law, then this Contract is of no force or effect until the Customer obtains that Regulatory Approval and provides Barloworld with written proof, satisfactory to Barloworld, that the Regulatory Approval has been obtained.

### **4. INTELLECTUAL PROPERTY**

The Customer does not, by virtue of a Contract, acquire any intellectual property which Barloworld owns or creates in the course of that Contract.

### **5. DELIVERY OF GOODS**

The Customer acknowledges that its authorised representative will be present at the handover/delivery of the Goods. To the extent that the authorised representative is not present at the handover/delivery, the Customer acknowledges that such information regarding the Goods will be given to the person collecting/receiving the Goods on its behalf, and that it is the Customer's obligation to ensure that such information is effectively communicated to all persons as it deems fit.

### **6. GENERAL PAYMENT**

- 6.1 The Customer must pay any amount payable by it in terms of a Contract:
- (a) in the currency set out in the sales quotation read together with the Acceptance;
  - (b) free of bank and other charges and without any deduction or set-off or withholding; and
  - (c) by way of electronic funds transfer into the bank account specified by Barloworld in the Acceptance.
- 6.2 Despite Barloworld giving its approval for a particular method of payment, all risk in and to a particular means of payment shall remain with the Customer. A payment by a Customer is only deemed to have been made, once the full amount of that payment is available to Barloworld as freely available funds in its nominated bank account.

## **7. TAX**

- 7.1 All amounts payable to Barloworld in terms of a Contract exclude value added tax ("VAT") and any other tax, levy, duty, excise or charge (collectively "Tax"). The Customer must pay any applicable Tax simultaneously with any payment to Barloworld in respect of which that Tax applies.
- 7.2 If any Tax is imposed by law after a Contract is concluded and the effect of that Tax is to reduce the net amount payable to Barloworld, the amounts payable to Barloworld in terms of a Contract are automatically adjusted to the extent necessary to enable Barloworld to receive the same amount which it would have received had the Tax not been imposed.

## **8. NO DISCOUNTS**

- 8.1 No amount payable by the Customer in terms of the Contract is subject to any discounts, other than those set out in the Acceptance and agreed in writing.
- 8.2 Any agreed discount:
- (a) only applies to, and is calculated on, the price of the Goods (excluding Tax) or the charge for labour applied in respect of the Services and does not apply to any other charges included in Barloworld's invoice; and
  - (b) Does not apply if Barloworld receives late payment of any part of the amount payable.

## **9. NEGOTIABLE INSTRUMENTS**

Any promissory note, bill of exchange or other negotiable instrument which the Customer delivers to Barloworld for the full amount payable will not be a variation of the debt for which it is given and the Customer hereby waives presentment, notice of dishonour and protest, where applicable.

## **10. JOINT AND SEVERAL LIABILITY**

If the Contract is concluded between Barloworld and two or more Customers, those Customers are jointly and severally liable for the full amount payable in terms of this Contract.

## **11. TRANSFER OF RIGHTS AND OBLIGATIONS**

- 11.1 The Customer may not cede (transfer its rights), delegate (transfer its obligations), assign (transfer both rights and obligations) or subcontract all or any of its rights and/or obligations in terms of a Contract, without Barloworld's prior written consent, on each occasion.
- 11.2 The Customer hereby agrees that Barloworld may cede (transfer its rights), delegate (transfer its obligations), assign (transfer both rights and obligations) or subcontract all or any of its rights and/or obligations in terms of a Contract, or appoint an agent to perform any of the Services, without the Customer's additional consent and without giving notice to the Customer.

## **12. WITHOUT PREJUDICE**

If the Customer breaches the Contract, Barloworld may, in its sole and reasonable discretion, select its preferred remedy, including a claim for damages in place of any penalty or liquidated damages which are provided for that breach in the Contract. On each occasion, Barloworld may choose its remedy without negatively affecting any of its other rights in terms of a Contract or at law.

## **13. PROTECTION OF RIGHTS**

If the Customer fails to perform any of its obligations under a Contract, Barloworld may perform that obligation (but is not obliged to do so) and recover the cost of doing so from the Customer, who must pay that amount to Barloworld on demand.

## **14. OVERDUE PAYMENTS**

If the Customer fails to pay any amount which is due, owing and payable to Barloworld (whether owing under the Contract or otherwise) by the due date for payment then, until that amount is paid in full, together with any applicable interest:

- 14.1 all amounts owing to Barloworld by the Customer, from any cause, will become immediately due, owing and payable if Barloworld notifies the Customer to that effect, in writing; and

- 14.2 Barloworld may charge interest on any amount which is not paid timeously at 2% (two percent) above the annual prime lending rate published, from time to time, by The Standard Bank of South Africa Limited, calculated daily with effect from the date that amount falls due until the date on which it is paid in full, both days included, and compounded monthly in arrears; and
- 14.3 Barloworld may withhold delivery of any Goods sold and not yet delivered to the Customer and the Customer will be liable for any storage and other holding costs incurred by Barloworld in this regard; and/or
- 14.4 Barloworld may refuse to make Goods which the Customer wishes to lease available to the Customer and the Customer will be liable for any storage and other holding costs incurred by Barloworld in this regard; and/or
- 14.5 withhold or immediately suspend the performance of any Services ordered by the Customer; and
- 14.6 suspend the performance of any of its obligations to the Customer in terms of the Contract and any other contract with the Customer; and
- 14.7 immediately terminate the Trading Account and/or any other trading facilities granted to the Customer, whether under the Contract or not.

## **15. CANCELLATION**

Barloworld may cancel the Contract with immediate effect by giving written notice to the Customer, if the Customer:

- 15.1 materially breaches the Contract and fails to remedy that breach within 5(five) days of the date of a written notice from Barloworld to do so; or
- 15.2 being an individual, dies or is provisionally or finally sequestrated or surrenders his estate; or
- 15.3 being a partnership, is dissolved; or
- 15.4 being a juristic person, is wound-up, liquidated, deregistered or places under judicial management or business rescue, whether provisionally or finally and whether voluntarily or compulsorily, or passes a resolution providing for any such event; or compromises or attempts to compromise with, or defers or attempts to defer payment of debts owing by it to its creditors generally, or alienates or encumbers the whole or a major portion of its assets.

## **16. COSTS ARISING FROM A BREACH**

The Customer is liable for all reasonable and necessary legal costs incurred by Barloworld because of a material breach of the Contract by the Customer, on the attorney and own client scale and on a full indemnity basis, including any tracing fees and collection commission.

## **17. JURISDICTION**

The Customer hereby consents and submits to the jurisdiction of all South African High Courts and South African Courts of Appeal in respect of any process arising out of, or in connection with, a Contract.

## **18. NOTICES AND ADDRESSES FOR SERVICE**

- 18.1 Unless otherwise specified, any notice in terms of a Contract must be:
  - (a) in writing to be effective; and
  - (b) sent by hand or telefax to the Customer at its physical address or telefax number set out in the Customer's order; or
  - (c) Sent by hand to Barloworld at 180 Katherine Street, Sandton, marked for the attention of: The Group Legal Advisor.
- 18.2 Any notice or communication shall:
  - (a) if delivered by hand on a business day, be deemed to have been received on the date of delivery and if delivered on any other day, be deemed to have been received on the next business day thereafter, provided it was delivered to the responsible person during ordinary business hours; and
  - (b) If delivered by telefax, be deemed to have been received on the 1<sup>st</sup> business day following the date of transmission.

- 18.3 Either party may change its physical address or telefax number, provided that such changes will only take effect upon receipt, or deemed receipt, of notice given to the other party thereof and of the new address or telefax number.
- 18.4 Any written notice or communication which has actually been received by a party is sufficient notice even if it has not been sent in the manner, or to the address, provided for in this clause 18.

## **19. INDEMNITY**

The Customer hereby indemnifies and hold harmless Barloworld and Barloworld's directors, officers, employees, contractors and/or agents against any claims, damages, losses, penalties or criminal liability, cost and expenses howsoever arising or incurred from the breach by the Customer of any sanctions laws, economic or trade restrictions or export controls regulations (collectively "Sanctions") whatsoever applied and/or imposed by the European Union and/or the United Kingdom and/or the United States of America or any international governmental organization or relevant authority, as may be amended from time to time, to the extent that such Sanctions are in force at the time this Contract was entered into or come into force during Barloworld's performance under the Contract and relates to the performance thereof.

## **20. GENERAL AND INTERPRETATION**

- 20.1 These Standard Trading T & C's and all Contracts are exclusively governed by, and interpreted according to, the laws of the Republic of South Africa, except to the extent to which the laws of another country compulsorily apply.
- 20.2 A reference to the singular includes the plural and vice versa and a reference to any particular gender includes the other gender and the neuter.
- 20.3 In this Contract, unless the context clearly indicates a contrary intention:
- (a) "day" means a calendar day, from 00:00 to 24:00;
  - (b) "business day" means any day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
  - (c) "month" means a month calculated from a particular day in one month to the day before the day numerically corresponding to it in the following month;
  - (d) "calendar month" means one of the 12 named months of the year from the 1st to the last day of such month;
  - (e) "Year" means a period of 365 consecutive days, and for the purposes of this Contract, leap years shall be ignored.
- 20.4 If any notice period prescribed in this Contract expires on a day which is not a business day, it will be deemed to have expired on the next business day thereafter.
- 20.5 Any notice period will be calculated by excluding the first day and including the last day thereof.
- 20.6 A reference to any law means that law as it applies on the date a Contract is concluded and as that law is amended or replaced from time to time thereafter.
- 20.7 All headings in these T & C'S are inserted for convenience only and must not be taken into account when interpreting the Contract.
- 20.8 Words or expressions defined in any particular clause in a Contract must bear the meaning so assigned to them throughout the Contract unless the context indicates otherwise.
- 20.9 Where an expression has been defined in these T & C'S and that definition contains a provision conferring a right or imposing an obligation on any party, then notwithstanding that it is contained only in a definition, effect must be given to that provision as if it were a substantive provision.
- 20.10 The *eiusdem generis* rule does not apply so that whenever specific words of a particular class are used in conjunction with general words then the specific words must not limit the scope of the general words. If any provision is followed by the word "including" and specific examples, such examples must not be construed so as to limit the general ambit of the provision concerned.

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## **B SPECIFIC TERMS APPLYING TO THE SALE OF GOODS**

## **21. EXPORTING THE GOODS**

If, within 2(two) years after the date of delivery to the Customer of any Goods under a Contract, those Goods are exported beyond the borders of the country in which they were delivered, the Customer must pay to Barloworld on demand, an additional amount equal to 10% of the purchase price of those Goods, less the amount of any Tax which was payable thereon.

## **22. PRICE**

- 22.1 Subject to clauses 7.2 of the general terms and 22.3 below, the price of the Goods (the "Price") is the price set out in the most recent quotation delivered by Barloworld to the Customer (the "Quoted Price").
- 22.2 Barloworld will provide a quotation to the Customer on request.
- 22.3 If any of Barloworld's costs in respect of a Contract increase after it provides the Customer with the Quoted Price, Barloworld may adjust the Quoted Price to take account of those increases. In these circumstances, before invoicing the Customer for the Goods, Barloworld will notify the Customer of the new Price. If the Customer does not agree to pay the new Price, it may cancel the Contract by giving written notice to Barloworld to that effect within 7 (seven) days of receiving Barloworld's notice of the Price change. If the Customer does not cancel the Contract, Barloworld will invoice the Customer for the Goods at the new Price, adjusted to account for any increase in its costs.

## **23. PAYMENT**

- 23.1 If the Customer has a Trading Account, the Customer must pay the Price in accordance with the terms and conditions governing that Trading Account.
- 23.2 If the Customer does not have a Trading Account or if Barloworld has not made available to the Customer a copy of the terms and conditions governing that Trading Account, the Customer must pay the Price on presentation of Barloworld's invoice and before taking delivery of the Goods.
- 23.3 Part deliveries will be invoiced separately and must be paid for separately.

## **24. SUPPLY TERMS AND DELIVERY**

- 24.1 Unless agreed otherwise by the parties in writing, all Goods are sold Ex Works, from Barloworld's premises, the address of which is set out in the Customer's Purchase Order (the "Delivery Address").
- 24.2 Delivery is completed when the Goods are made available to the Customer at the Delivery Address and before loading commences.
- 24.3 Barloworld will notify the Customer of the date on which it will tender delivery of the Goods (the "Delivery Date"). Barloworld is not obliged to tender delivery of any Goods to the Customer until the Price (together with the applicable interest) is paid in full.
- 24.4 The Customer must take delivery of the Goods on the Delivery Date. If the Customer fails to do so, then:
  - (a) with effect from 00:00 on the Delivery Date, all risk of loss of, or damage to, or caused by, the Goods passes from Barloworld to the Customer; and
  - (b) The Customer must pay to Barloworld, on demand, the full Price and all reasonable costs which Barloworld incurs as a result of that failure, including the cost of storing the Goods pending delivery.
- 24.5 Unless otherwise agreed by the parties in writing, if within 14 days after the Delivery Date, the Customer fails to pay the amounts set out in clause 24.4(b); Barloworld may sell the Goods to someone else and set off the proceeds against the amount payable by the Customer.
- 24.6 In the event the Customer purchases any Goods which are agreed to be used and/or remanufactured, the Customer agrees that it will not, in the absence of other evidence, assert that the Goods in questions are in fact new.
- 24.7 The Customer hereby:
  - (a) waives any Claim it may have, or acquire, against Barloworld in respect of, or arising from, its failure to take delivery of the Goods on the Delivery Date or at all; and
  - (b) Indemnifies Barloworld against any Claim which Barloworld may suffer and which arises from, or in connection with, the Customer's failure to collect the Goods on the Delivery Date or at all.
- 24.8 The Customer must arrange the loading of the Goods at, and transportation of the Goods from, the Delivery Address.



- 24.9 Barloworld may, at the Customer's request, appoint a carrier on behalf of the Customer, to transport the Goods for the Customer to the destination specified by the Customer. If it does so, then:
- (a) Barloworld is hereby authorised by the Customer to appoint a carrier on such terms and conditions as Barloworld deems fit;
  - (b) the carrier appointed by Barloworld is the Customer's agent;
  - (c) the Goods are loaded and transported at the Customer's risk;
  - (d) the Customer is responsible for paying the carrier;
  - (e) the Customer hereby waives any Claim it may have, or acquire, against Barloworld arising from, or in connection with, Barloworld's appointment of the carrier; and
  - (f) The Customer hereby indemnifies Barloworld against any Claim which Barloworld may suffer and which arises from, or in connection with, the appointment of the carrier and/or the carrier's breach of any of its obligations, including late delivery.
- 24.10 Despite any other provision of the Contract, Barloworld's obligation to deliver the Goods is subject to the following conditions:
- (a) where Barloworld manufactures the Goods or any part thereof, Barloworld's ability to timeously source, from suppliers who are reasonably and commercially acceptable to it, all required materials and supplies;
  - (b) where the Goods or any part thereof are purchased by Barloworld, the timeous receipt by Barloworld from its suppliers of the Goods or any components thereof; and
  - (c) The timeous receipt by Barloworld of any Instructions.
- 24.11 If delivery is to be made in instalments, the provisions of this clause 24 apply to each instalment delivery.
- 24.12 To the extent permissible in law, in the event that the Customer purchases any Goods which are agreed to be used and/or remanufactured, the Customer agrees that it will not –
- (a) in the absence of other evidence, assert that the Goods in question are in fact new;
  - (b) to the extent that the Goods are indicated as “used”, “remade” or “remanufactured” on any and invoice, proposal, quotation, agreement or other transaction document, assert that it is entitled to any warranties additional to the warranties given by Barloworld in writing as provided for in these T & Cs; and
  - (c) claim any loss or damage of any nature caused through labelling or warnings being missing from such used Goods where it was aware of the labelling or warnings being missing or where Barloworld advised it of such missing labelling or warnings and the Customer did not have the labelling or warnings affixed to the Goods.

## **25. OWNERSHIP**

Despite delivery of any Goods to the Customer, the Customer does not acquire ownership of, or any other right in and to the Goods, until Barloworld has received the full Price, together with any other amount which is payable to Barloworld for, or in connection with, those Goods

## **26. RISK**

Notwithstanding clause 25, all risk of loss of, or damage to, or caused by, the Goods passes to the Customer when the Goods are delivered to the Customer, unless otherwise specified in clause 24.

## **27. REPAIR OF GOODS UNDER WARRANTY**

Where Goods are sold under warranty by a supplier for whom Barloworld is a repair agent and Barloworld repairs or replaces those Goods, upon completion by Barloworld of the repair or replacement, the Customer must, on request, sign written confirmation that Barloworld has effected that repair or replacement so as to enable Barloworld to recover payment for its work from the supplier.

**28. DURATION**

- 28.1 The Contract will commence and terminate on the commencement and termination dates respectively set out in the Acceptance or a signed rental schedule ("Rental Schedule"). If no such dates are specified, then the Contract will commence when the Goods are delivered to the Customer and will terminate when the Customer returns the Goods to Barloworld's premises, the address of which is set out in the Rental Schedule ("Barloworld Premises"). The applicable terms and conditions set out in the Contract will apply to each Rental Schedule accepted by the Customer.
- 28.2 Barloworld will notify the Customer of the date on which and the place where the Goods must be collected.
- 28.3 By the termination date specified in respect of the Contract, the Customer must return the Goods to the premises specified by Barloworld in the Acceptance/Rental Schedule ("Barloworld's Premises"). If there is no termination date stipulated in the Acceptance/Rental Schedule or if any minimum period set out in the Acceptance/Rental Schedule has expired, either party may stipulate the date by which the Goods must be returned to Barloworld by giving the other party at least 1 business days' notice (such notice may be given telephonically, provided that it may only be given on a business day and must be confirmed by the other party in writing by 16:00 on the business day on which it is given).

**29. RENTAL AND OTHER CHARGES**

- 29.1 Subject to any minimum charge set out in the Acceptance/Rental Schedule and clauses 29.2 and 29.3, the rental for the Goods (the "Rental") is the amount per day or per hour set out in Barloworld's quotation specified in the Acceptance/Rental Schedule.
- 29.2 This clause does not apply to mechanical failures of the Goods which are caused by the unlawful and wilful or negligent act or omission by the Customer, its directors, officers, employees, contractors and/or agents. The use of the Goods other than as recommended by Barloworld, is deemed to be an unlawful and wilful or negligent act or omission by the Customer. If the Customer cannot use the Goods because of a mechanical failure thereof then, except for any minimum charge payable, the Customer is not obliged to pay the Rental or a pro rata portion thereof applicable to the period commencing when it notified Barloworld in writing that it could not use the Goods and ending when it resumes use thereof.
- 29.3 The Rental will be adjusted at the intervals, and by the amount specified in the Acceptance/Rental Schedule. Where the Acceptance/Rental Schedule does not specify the intervals at which the Rental will be adjusted, it will be adjusted on the anniversary of the commencement date of the Contract each year. Where the Acceptance/Rental Schedule does not specify the amount by which the Rental is to be escalated, it will be increased by an amount equal to 10% of the Rental payable immediately before the escalation is applied. All escalations of the Rental are compounded.
- 29.4 Barloworld provides the Goods to the Customer with a full tank of fuel, where applicable. If the Customer does not fill the fuel tank as required in terms of clause 31.27, after the Goods are returned to Barloworld, Barloworld will fill the tank of the Goods and charge the Customer for that fuel at Barloworld's ruling price for that fuel at that time.
- 29.5 If Barloworld agrees in writing to deliver the Goods to the Customer's nominated premises, the Customer must pay all costs of, and relating to, that delivery and will bear all risk in and to the Goods while in transit.

**30. PAYMENT**

- 30.1 The Customer must pay the deposit set out in the Acceptance/Rental Schedule on the date set out in the Acceptance/Rental Schedule. Barloworld is not obliged to make the Goods available for collection by the Customer unless and until the deposit is paid.
- 30.2 The Customer must pay the Rental in respect of the Goods at the intervals specified in the Acceptance/Rental Schedule. If no intervals are specified, the Customer must pay the rental to Barloworld by the last day of each calendar month.

**31. THE CUSTOMER'S OBLIGATIONS**

The Customer must:

- 31.1 before collecting the Goods:

- (a) advise Barloworld in writing of the address where the Goods will be used and stored (and every time that address changes, the Customer must notify Barloworld in writing of the new address where the Goods will be used or stored);
  - (b) if the Customer leases the premises at which the Good will be used or stored, inform the lessor of those premises (the "Lessor"), by written notice, that Barloworld owns the Goods and that the Goods will not be subject to any lien or hypothec in favour of the Lessor;
  - (c) obtain written proof of receipt by the Lessor of the notice referred to in clause (b) and provide Barloworld with a copy of that proof upon receiving it; and
  - (d) satisfy Barloworld that it has arranged suitable transport for the transportation of the Goods.
- 31.2 immediately advise Barloworld of any change to the Lessor and proceed in terms of clauses 31.1(a), 31.1(b) and 31.1(c) in respect of each new Lessor;
  - 31.3 not allow the Goods to be subject to any claims by third parties or to be attached by any person, including the Lessor, and immediately notify Barloworld of any attempt to attach the Goods;
  - 31.4 collect the Goods on the date specified in the Acceptance/Rental Schedule and from Barloworld's Premises and retain the Goods under its control at all times;
  - 31.5 within 48 (forty eight) hours after collecting the Goods or becoming aware of a defect, notify Barloworld, in writing, that the Goods are defective and specify the defects, failing which the Goods will be deemed to have been received or maintained by the Customer in good working order;
  - 31.6 allow Barloworld, or its agent, to inspect the Goods, from time to time;
  - 31.7 comply with all law applicable to the possession and operation of the Goods;
  - 31.8 not allow the Goods to be used to commit a crime or for an illegal purpose or in a manner which may render any claim under any insurance policy in respect of the Goods, invalid;
  - 31.9 read all operating and safety instructions provided with the Goods, including any instructions issued by Barloworld, from time to time, and contact Barloworld if, after reading the instructions, the Customer is still unsure about how to use the Goods safely;
  - 31.10 use the Goods only for the purpose for which they were designed and in accordance with the instructions referred to in clause 31.9;
  - 31.11 bear all responsibility arising from or in connection with the operation of the Goods, including where they are operated by an operator provided by Barloworld;
  - 31.12 where Barloworld supplies an operator to operate the Goods, issue clear and appropriate instructions to that operator in respect of the use of the Goods;
  - 31.13 where Barloworld does not supply and operator, ensure that the operator employed to operate the Goods is suitably trained;
  - 31.14 in respect of Goods which are transported/driven from one location to another, pay an additional amount equal to twice the hourly Rental for each hour of the period during which the Goods are transported/driven from one location to another which exceeds the period equal to 10% of the total hours for which the Customer operates the Goods (so if, for example, the hourly Rental for the Goods is R100, the Customer operates the Goods for a total of 10 hours and they are transported for 3 hours, the Customer must pay  $R200 \times 2 \text{ hours} = R400$ );
  - 31.15 carry out the routine maintenance checks of the Goods as are recommended by the manufacturer thereof or requested by Barloworld, including, as a minimum, ensuring that, at all times, there is sufficient water in the radiator and sufficient distilled water in the battery and that the engine, hydraulic and transmission oil levels are those specified by the manufacturer of the Goods;
  - 31.16 once a day, inspect the hour meter on the Goods ("the Meter") to confirm that the Meter is working and immediately notify Barloworld if the Meter stops working or is faulty;
  - 31.17 not modify or tamper with the Meter;
  - 31.18 immediately upon becoming aware thereof, notify Barloworld of any loss of, or damage to, the Goods or the occurrence of any other event which may give rise to a claim under any insurance policy covering the Goods;
  - 31.19 repair or replace, to Barloworld's satisfaction, any tubes or tyres which are damaged or defective for any reason, including accident, intentional damage or wear and tear;
  - 31.20 repair and replace all ground engaging tools forming part of the Goods and which are damaged or defective for any reason, including accident, intentional damage or wear and tear;
  - 31.21 store the Goods in appropriate facilities and in accordance with Barloworld's instructions in that regard;

- 31.22 immediately and by the quickest available means, report to Barloworld any breakdown of, or repair required to, the Goods;
- 31.23 except as specifically provided in these T & C'S, not carry out any repairs to, or replace any parts of, the Goods, without Barloworld's prior written consent;
- 31.24 within 1 day of being asked to do so, give Barloworld and/or its nominated representatives access to the Goods;
- 31.25 not cede, assign, delegate, encumber, alienate or transfer any of its rights or obligations in respect of the Goods to any other person, without the prior written consent of Barloworld;
- 31.26 return to Barloworld all keys, manuals, accessories and other items which were delivered to the Customer together with the Goods;
- 31.27 return the Goods to Barloworld with a full fuel tank.

## **32. BARLOWORLD'S OBLIGATIONS**

- 32.1 Subject to clauses 31.19 and 31.20, Barloworld must, within a reasonable time and at its cost, repair or replace any of the Goods which break down or require repair.
- 32.2 Without prejudice to Barloworld's other rights under this agreement or at law, if the Goods have to be repaired or replaced, directly or indirectly because of any act or omission of the Customer, its directors, officers, employees, contractors, agents and/or any other person under its direction or control, as an alternative to damages, the Customer must pay to Barloworld, on demand, all costs of and associated with that repair or replacement, together with rental for the period during which the Goods were being repaired or replaced.

## **33. RISK**

From the date on which the Goods are collected from Barloworld's Premises until the date on which the Goods are returned to Barloworld's Premises (both days included), the Customer bears all risk of loss of, or damage to, or caused by, the Goods.

## **34. INSURANCE**

- 34.1 With effect from the date on which the Goods are collected in terms of clause 31.4 until the Goods are returned to Barloworld, both days included, the Customer must insure the Goods and any ancillary or related equipment supplied by Barloworld for their full replacement value as advised by Barloworld, with an insurer, and on terms and conditions, acceptable to Barloworld.
- 34.2 On request, the Customer must provide Barloworld with a copy of the insurance policy taken out by it in terms of clause 34.1 and written proof, acceptable to Barloworld, that all premiums in respect of that policy are paid by the due dates for payment or an underwriter's certificate confirming that the required insurance cover is in place and that all premiums in respect thereof have been paid.
- 34.3 The Customer must comply with the terms and conditions of any insurance policy taken out by it in terms of this clause 34, including paying all premiums when due. If the Customer does not comply with its obligations in terms of this clause 34, Barloworld may do so and Barloworld may recover from the Customer all costs of doing so.
- 34.4 Any insurance cover taken out by the Customer in terms of this clause 34, does not relieve the Customer of any of its obligations in terms of this Contract or in any way limit Barloworld's claims against the Customer.

## **35. INDEMNITY**

To the extent permissible in law, the Customer hereby indemnifies Barloworld and Barloworld's directors, officers, employees, contractors and/or agents against any Claim which may be brought against it or any of them arising from or in connection with:

- 35.1 the Customer's failure to comply with the law in respect of the possession and/or operation of the Goods;
- 35.2 the Customer's use of the Goods;
- 35.3 the acts or omissions of an operator supplied by Barloworld to the Customer, as contemplated in clause 31.11; and/or
- 35.4 any loss or damage caused to the Customer, its employees, contractors or agents, or to any property of the Customer or such persons, as a result of the Customer not providing training to users of the Goods in the future, any training which Barloworld offers the Customer and which the Customer declines and the

Customer allowing an operator that is not suitably trained and/or qualified, as contemplated in 31.13 above, to operate the Goods.

## **D SPECIFIC TERMS APPLYING TO SERVICES**

### **36. QUOTATIONS**

- 36.1 Upon request, Barloworld will prepare a quotation for the Customer in respect of the required Services. That quotation sets out an estimate of the fee payable for the Services and, to the extent allowable in law, it is not binding on Barloworld.
- 36.2 If Barloworld deems it necessary to strip and/or dismantle the Goods in respect of which Services are to be performed in order to prepare a quotation for the Customer, then to the extent allowable in law:
- (a) Barloworld may dismantle the Goods to the extent which Barloworld deems necessary in order to prepare the quotation;
  - (b) the Customer must pay, in advance, a fee to Barloworld for dismantling the Equipment, which fee is determined in accordance with Barloworld's usual rates for such Services current on the date when the Goods are dismantled and will be provided to the Customer before dismantling the Goods; and
  - (c) if the Customer does not accept Barloworld's quotation, Barloworld is not obliged to re-assemble the Goods and, if the Goods have been dismantled at Barloworld's Premises, the Customer must within 7 (seven) days of rejecting the quotation remove the Goods from Barloworld's Premises in its dismantled condition.
- 35.3 The Customer acknowledges that issuing of the purchase order in response to Barloworld's quotation is deemed as acceptance of the quotation.

### **37. FEE**

- 37.1 The fee for performing the Services (the "Fee") is the fee set out in the quotation provided by Barloworld and accepted by the Customer via the issue of purchase order ("Acceptance"). If the Acceptance does not include a fee, then the fee calculated by applying Barloworld's standard rate and/or charge for the Services applicable at the date when the Services are performed, plus Barloworld's standard price for any parts supplied in the course of providing the Services (the "Parts") will be applicable to such Services.
- 37.2 Barloworld's standard rates and/or charges and the standard prices for Parts are available to the Customer on request.
- 37.3 If, the quotation sets out a Fee for the Services and thereafter Barloworld's costs of providing those Services and/or the cost of any Parts increase, Barloworld may increase the Fee to account for the increase in its costs or, if the amount of that increase is unknown and/or cannot be calculated, by an amount equal to a reasonable estimate of that increase.
- 37.4 If the Customer disputes any increase in the Fee in terms of clause 37.3, the Customer must immediately pay the undisputed portion of the Fee and the disputed portion will be determined by Barloworld's auditors (acting as experts and not as arbitrators) and their decision will be final and binding on the parties.
- 37.5 If a member, director, officer, employee, contractor and/or agent of the Customer consents in writing to any additional Services which are not recorded in the Acceptance, that person is deemed to be authorised to agree to the performance of such additional Services and the Fee is deemed to be adjusted to include a fee therefore, calculated by applying Barloworld's current standard rates and/or charges for such Services.

### **38. PAYMENT**

- 38.1 The Customer must pay to Barloworld the Fee set out in the invoice on presentation of Barloworld's invoice.
- 38.2 Performance of the Services in phases will be invoiced separately and must be paid for separately.

### **39. PERFORMANCE OF THE SERVICES**

- 39.1 Barloworld will carry out the Services within a reasonable time after accepting the Customer's order, in any event within the period as stipulated in the Acceptance and Barloworld will endeavour to notify the Customer of any delays.
- 39.2 Barloworld will notify the Customer of the date on which it will commence the Services.
- 39.3 The Services will be provided at the address specified in the Acceptance and if no address is specified, at the address requested in writing by the Customer ("the Customer's Premises"). If the Services will be provided at Barloworld's Premises, then the Customer, at the Customer's cost:
- (a) must deliver the Goods, unloaded at the place designated by Barloworld at Barloworld's Premises on the date requested by Barloworld;
  - (b) will continue to bear all risk of loss of, or damage to, or caused by, the Equipment whilst it is at Barloworld's Premises;
  - (c) must promptly on the completion of the Services, collect the Equipment from Barloworld's Premises and if the Customer fails to do so, the Customer must pay to Barloworld, on demand, any costs incurred by Barloworld arising from or in connection with that delay (including any storage, carriage and insurance costs);
  - (d) hereby waives any Claim which the Customer may have, or acquire, against Barloworld in respect of, or arising from, its failure to take delivery of the Equipment on the completion of the Services or at all;
  - (e) hereby indemnifies Barloworld against any Claim which Barloworld may suffer and which arises from, or in connection with, the Customer's failure to collect the Equipment on completion of the Services or at all; and
  - (f) is responsible for loading and securing the Equipment on its carrier's vehicle for transportation from Barloworld's Premises.
- 39.4 Barloworld may, at the Customer's request, appoint a carrier, on behalf of the Customer, to transport the Equipment for the Customer to a destination specified by the Customer. If Barloworld does so, then:
- (a) Barloworld is hereby authorised by the Customer to appoint a carrier on such terms and conditions as Barloworld deems fit;
  - (b) the carrier appointed by Barloworld is the Customer's agent;
  - (c) the Equipment is loaded and transported at the Customer's risk;
  - (d) the Customer is responsible for paying the carrier;
  - (e) the Customer hereby waives any Claim it may have, or acquire, against Barloworld in respect of, or arising from, Barloworld's appointment of the carrier, on the Customer's behalf;
  - (f) the Customer hereby indemnifies Barloworld against any Claim which Barloworld may suffer and which arises from, or in connection with, the appointment of the carrier and/or the carrier's breach of its obligations or failure to perform at all.
- 39.5 Where the Services are provided anywhere other than Barloworld's Premises, then the Customer must:
- (a) ensure that the Equipment is made available to Barloworld at that place on the dates and at the times requested by Barloworld;
  - (b) provide all utilities, facilities and tools at that place as Barloworld, its employees and/or its sub-contractor may require to perform the Services, including lifting equipment which is in good order and condition and which may be operated safely.
- 39.6 Despite any other provision of the Contract, Barloworld's obligation to provide the Services is subject to the following conditions:
- (a) Barloworld's ability to timeously source from suppliers reasonably and commercially acceptable to Barloworld, all materials, supplies or Parts required for, or in connection with, the Services;
  - (b) the timeous receipt by Barloworld of any Instructions.

On completion of the Services, Barloworld shall conduct an inspection on the Goods to ensure that the Services have been correctly carried out. If the Customer claims that the Services were not properly performed, it must notify Barloworld, in writing, within 3 (three) days of the handover of the Goods in question, after which Barloworld shall not be liable for any costs for any remedial services rendered.