

# LINDE HEAVY TRUCK DIVISION LTD - TERMS AND CONDITIONS OF SALE

## 1. Definitions

In these Conditions:

'the Company' means Linde Heavy Truck Division Ltd

'the Purchaser' means the Company, firm or individual who has bought, or agreed to buy the Goods.

'the Quotation' means the quotation addressed to the Purchaser by the Company.

The expression 'export contract' means a contract for the sale of goods where the goods are consigned outside the United Kingdom.

'the Goods' means any item of goods or services of whatsoever nature which is to be sold by the Company to the Purchaser.

The expression 'liability whatsoever' shall include, without prejudice to the generality of the expression, liability in tort and in contract, including liability for consequential loss (including loss of revenue or profit) or damage of any kind howsoever caused or arising.

The expressions 'Ex Works' and 'FOB' shall have the meanings given them by the ICC incoterms from time to time save where such meanings are inconsistent with the terms thereof.

## 2. General

(a) The Quotation does not constitute an offer to supply and no contract exists unless and until there has been an acceptance by the Company in writing of an order placed (orally or in writing) by the Purchaser.

(b) The acceptance of the Purchaser's order whether or not based on a Quotation from the Company shall, unless otherwise specifically agreed by the Company in writing, be deemed to be subject to the terms and conditions herein contained which these terms and conditions shall apply to the exclusion of any other provisions contained in any other document issued by the Purchaser and, in particular, but without prejudice to the generality of the foregoing contained in any order sent by the Purchaser.

(c) (i) Unless otherwise stated in writing all descriptions, specifications, drawings and particulars of weights and dimensions submitted by the Company or otherwise contained in the Company's catalogues, brochures, price lists and other published matter, are approximate only and none of these form part of any contract or give rise to any independent or collateral liability upon the part of the Company being intended merely to present a general idea of the Goods as described therein.

(ii) None of the above-mentioned documents whether issued before or after the formation of a contract, shall be copied, reproduced or communicated to persons unconnected with the purchase of the Goods without the Company's consent in writing.

(d) Any deviations in the Goods delivered from the particulars of the Goods stated in the contract will not be a ground for rejecting the Goods and treating the contract as repudiated.

## 3. Price

(a) Unless otherwise stated in the price for the Goods in respect of contracts for delivery within the United Kingdom and Overseas is Ex Works excluding freight, insurance, carriage and packing charges, specialist equipment, VAT and all applicable taxes and duties the cost of which shall be determined as at the date of the Company's invoice and shall be payable by the Purchaser.

(b) The cost of any special packaging shall be determined at the date of the invoice and shall be payable by the Purchaser.

(c) The Purchaser shall not be entitled to make any deduction from the price of the Goods in respect of any set-off or counterclaim unless both the validity and the amount thereof have been expressly admitted by the Company in writing.

(d) The Company shall be entitled to adjust the price of the Goods whether before or after acceptance of the Goods in the event of any increase howsoever arising in the cost to the Company of supplying the Goods.

## 4. Payment

(a) The Purchaser shall, except where other payment arrangements are specifically agreed in writing, make full payment in £ sterling for the Goods not later than 30 days from the date of the invoice relating thereto or, if earlier, on the day upon which a receiver of the Purchaser's undertaking is appointed or upon which any act is done or even occurs which is related to the insolvency of the Purchaser. If payment for the Goods is not made when due the Company may charge interest thereon until payment after as well as before judgement at the rate of four per cent per annum above the base rate of National Westminster Bank plc from time to time in force and interest shall be compounded at monthly intervals from the due date of payment for the Goods until payment. Time of payment shall be of the essence.

(b) Any failure to pay the price or any part thereof and other moneys payable by the Purchaser hereunder when due will also entitle the Company to refuse to make delivery of any further consignment of Goods under this contract or goods under any other contract and without incurring any liability whatsoever to the Purchaser for any delay.

(c) In addition to any lien to which the Company may otherwise be entitled, the Company shall, in the event of the Purchaser being insolvent or failing to pay the purchase price due under this or any other contract with the Company (including any contract treated as a separate contract by virtue of Condition 7(f) hereof), be entitled to a general lien on all goods of the Purchaser in the Company's possession for the unpaid price of the Goods sold and delivered to the Purchaser by the Company under this or any other contract.

## 5. Transfer of Property

(a) All the property in the Goods shall, notwithstanding delivery of the Goods to the Purchaser, remain in the Company until the Purchaser has made full payment for the Goods.

(b) So long as the property in the Goods remains in the Company the Purchaser shall keep the Goods free from any lien or from any charge or similar encumbrance.

(c) So long as the property in the Goods remains in the Company and full payment for the Goods shall not have been made, whether or not payment shall have become due to the Company shall (unless restricted from doing so by the Insolvency Act 1976 or some other rule of law), have the right to retake possession of the Goods and for that purpose, with or without notice to the Purchaser, to enter any premises occupied by the Purchaser in which the Goods may be. Such retaking of possession shall not relieve the Purchaser from its obligation to purchase the Goods by paying the full price thereof and shall not prejudice any rights of the Company including any right it may have to accept a repudiation by the Purchaser of the contract relating to the Goods.

(d) The Purchaser may, provided the Purchaser has not become insolvent or had a receiver of its undertaking or any part thereof appointed, sell the Goods, whether or not component parts of other goods, to a third party notwithstanding that the property therein remains with the Company provided that the sale so made by the Purchaser is in the ordinary course of its business, is at full market value and takes place before the Company has sought to retake possession of the Goods in accordance with Condition 5(c) above.

(e) Any resale of the Goods, or a sale of other goods of which the Goods may be component parts, by the Purchaser before the Company has received full payment for the Goods shall be made by the Purchaser as fiduciary and the Purchaser shall pay the proceeds of such resale or sale into a separate account designated with the name of the Company which shall account to the Purchaser for any amount by which the proceeds so received exceed the aggregate amount due to the Company from the Purchaser. The Company shall be entitled to trace the proceeds of sale in accordance with the principles in *Re Hallett's Estate* (1880) 13 Ch. D.696.

(f) Unless prevented by any rule of law from so doing the Company may apply any payment

received from the Purchaser in or towards the satisfaction of any sum due in respect of the Goods or any item of the Goods whether or not the Purchaser required the payment to be applied in or towards the satisfaction of some other sums due to the Company.

(g) The Company may maintain an action for the price of the Goods sold notwithstanding the property to them may not have passed to the Purchaser.

(h) So long as the property in the Goods remains in the Company the Purchaser shall notify the Company of any circumstances that might give rise to the taking (whether lawful or otherwise) of the Goods by another person or the actual or attempted taking thereof.

## 6. Risk and Insurance

(a) The Goods shall be at the Purchaser's risk from the occurrence at the earliest point of time, of any of the following events:

(i) the physical delivery of the Goods to the Purchaser at the Company's Works.

(ii) the physical delivery of the Goods to the Purchaser's carrier or to an independent carrier for the purpose transmission to the Purchaser or his nominee, or

(iii) the physical delivery of the Goods to the Purchaser's place of business by the Company.

(b) Notwithstanding the risk in the Goods has passed to the Purchaser, the Company may effect insurance of the Goods in its own name and in their full value, or such value as the Company may decide, against all usual risks and the costs of such insurance shall be determined as at the date of and included in the invoice. All insurance moneys received shall be applied towards replacement or repair of the Goods.

## 7. Delivery

(a) Unless otherwise stated in writing the date for the delivery shall run from the date on which acceptance of the order for goods is communicated to the Purchaser.

(b) Delivery and the Purchaser's acceptance of the Goods shall be deemed to have taken place at the earliest point in time at which any of the events specified in Condition 6(a) above takes place. Signature of any delivery note by any agent, employee or representative of the Purchaser or by any independent carrier shall be proof of the delivery and the Purchaser's acceptance of the Goods.

(c) Without prejudice to any rights of the Company hereunder, if the Purchaser shall fail to give on or before the agreed date of delivery all instructions reasonably required by the Company or fail to provide all necessary documents, licences, consents and authorities (which the Purchaser is obliged under these terms and conditions or by law to obtain) for forwarding the Goods or shall otherwise cause or request delay in delivery, the Purchaser shall pay to the Company all storage costs incurred arising from such delay.

(d) Unless otherwise stated in writing the Company shall be entitled to make partial deliveries or deliveries by instalments and to determine the route and manner of delivery of the Goods and shall for the purposes of Section 32(2) of the Sale of Goods Act 1979 be deemed to have the Purchaser's authority to make such contract with any carrier as to the Company may seem reasonable. If the route involves sea transit the Company shall not be obliged to give the Purchaser the notice specified in Section 32(3) of the Sale of Goods Act 1979.

(e) If the Company is prevented from making delivery of the Goods or any part thereof on the agreed date of delivery or from installing the Goods or any part thereof on the agreed date of installation by any cause whatsoever outside its control, it shall be under no liability whatsoever to the Purchaser and shall be entitled at its option either to cancel the contract or to extend the time or times for delivery or installation by a period at least equivalent to that during which such delivery or installation has been prevented.

(f) Where delivery of the Goods is made in instalments each instalment shall be construed as constituting a separate agreement to which all the provisions if these conditions shall (with any necessary alterations) apply.

(g) Time shall not be of the essence for delivery.

## 8. Guarantee

The Company guarantees the Goods supplied by it against only defective materials and defective workmanship from the date of delivery (see Condition 7(b) above) for a period of six months or one thousand working hours (whichever is the less) except for original equipment sold in the UK, in which case the corresponding period shall be twelve months or two thousand working hours (whichever is the less) provided the Purchaser notifies the Company in writing of any alleged defect within ten working days of its discovery. Under this guarantee the Company will on the Purchaser returning the Goods carriage paid to such place as the Company shall direct (and Section 35 of the Sale of Goods Act 1979 shall not apply), make good any such defect by repair or replacement if, in the opinion of the Company, the defect constitutes a breach of this guarantee. No claim will be met by the Company under this guarantee arising out of fair wear and tear or if the Goods have been incorrectly fitted, misused, subjected to neglect or abnormal conditions or used with a lubricant of an unsuitable specification or have been involved in any accident or any attempt to repair, replace or modify them has been made without the prior sanction of the Company or if they have been in any way dealt with contrary to any instructions issued by the Company. This guarantee is conditional upon:

(a) the Purchaser carrying out all daily and weekly maintenance as specified in the appropriate operating instructions, handbook or manual for the goods in question, and

(b) the Company or its authorised distributor providing periodical maintenance during the guarantee period.

Should these Conditions apply to a consumer transaction this Guarantee shall not affect the statutory rights of the Purchaser. In Condition 9 below and in this Condition 'consumer transaction' and 'statutory rights' shall bear the meanings they have in the Consumer Transactions (Restrictions on Statements) Order 1976 (as amended).

## 9. Exclusion of Liability

(a) The purchaser is relying on its own skill and judgement in relation to the Goods supplied under this contract and the Company accepts no liability whatsoever for any knowledge it or its servants or agents may possess as to the purpose for which the Goods are supplied.

(b) Save as expressly provided in Condition 8 above and save for the Company's liability for death or personal injury to the Purchaser resulting from the Company's negligence under any contract which does not fall within the provisions of Section 26 of the Unfair Contract Terms Act 1977 the Company shall be under no liability whatsoever to the Purchaser for:

(i) any defect in, failure of, or unsuitability for any purpose of the Goods or any part thereof whether the same be due to any act, omission, negligence or wilful default of the Company or its servants or agents, or to faulty design, workmanship or materials or any other cause whatsoever and all conditions, warranties or other terms, whether expressed or implied, statutory or otherwise, inconsistent with the provisions of this Condition, are hereby expressly excluded, or

(ii) any deviations in the Goods from the particulars of the Goods stated in the contract save that where the Company consider, in absolute discretion, that any such deviations are material it will replace the Goods with goods that comply with the particulars stated in the contract.

(c) Unless otherwise stated in writing, any statements, recommendations and advice given by the Company or the Company's servants or agents to the Purchaser or its servants or agents as to any matter relating to the Goods are given without responsibility and shall not give rise to any liability whatsoever on the part of the Company and the Purchaser hereby represents and warrants to the Company that no representation has been made to it by or on behalf of the Company that has in any way induced the Purchaser to enter into the contract with the Company.

(d) Should these Conditions apply to a consumer transaction the Purchaser's statutory rights shall not be affected by this Condition 9.

(e) The Purchaser undertakes that it will comply and will procure that its employees and every other person working with, on or near, or using any goods supplied by the Company comply in full with the instructions and recommendations made in the relevant operating instructions handbooks or manuals which are provided by the manufacturers with such goods and/or that they will comply with all other instructions, whether written or verbal, given by the Company or the manufacturer in connection with the use or operation of the Goods.

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## 10. Indemnity

The Purchaser shall keep the Company indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature, including, without prejudice to the generality of the foregoing, claims for death, personal injury, damage to property and consequential loss (including loss of profit or loss of use or goodwill), which may be made against the Company by any third party or which the revenue of the Company may sustain, pay or incur in relation to any third party claim or demand arising out of or in connection with the manufacture, installation, sale or use of the Goods, or of other goods of which the Goods are a component part, and which is caused in whole or in part by any act or omission of the Purchaser.

## 11. Export Contracts

In the case of export contracts all import duties, charges and assessments shall be paid by the Purchaser and the obtaining of any necessary export and import licences in respect of the Goods shall be the sole responsibility of the Purchaser and the Company shall be under no liability whatsoever to the Purchaser in respect of goods exported without the necessary export and import licences.

## 12. Industrial Property Rights

In the event of any claim being made or action being brought or threatened in respect of infringement of patents, copyright, design rights, trade marks, trade names, registered designs or any other industrial property rights in respect of the Goods the Purchaser will make no admissions in respect thereof and will notify the Company thereof forthwith and the Company shall be entitled to conduct all negotiations and take all necessary proceedings to dispute the same in its own name and the name of the Purchaser and the conduct of all proceedings and negotiations shall be completely in the discretion of the Company. In such an event the Purchaser will execute all such documents and do all such things and render all such assistance to the Company as may be necessary the Company shall require and the Purchaser shall indemnify the Company against all costs, expenses, loss or damage incurred by the Company in respect of any claim being made or action brought if any such claim is made or action brought or threatened as a result of work done in relation to the Goods by the Company in accordance with the Purchaser's specifications or by the use to which the Goods are put by the Purchaser.

## 13. Sub - contracts

The Company reserves the right to sub - contract the performance of the contract or any part thereof.

## 14. Assignments

The purchaser shall not assign or transfer or purport to assign or transfer any contract to which these Conditions apply or the benefit thereof to any other person whatsoever without the written consent of the Company.

## 15. Proper Law

All contracts made between the Company and the Purchaser shall be governed by, and construed in all respects in accordance with English law.