

MW

GENERAL CONDITIONS

for the Supply and Erection of
Plant and Machinery for Import and Export No. 188A^(*)

Prepared under the auspices of the
UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

GENEVA, MARCH 1957

188A

1. PREAMBLE

- 1.1. These general conditions shall apply, save as varied by express agreement accepted in writing by both parties.

2. FORMATION OF CONTRACT

- 2.1. The Contract shall be deemed to have been entered into when, upon receipt of an order, the Contractor has sent an acceptance in writing within the time-limit (if any) fixed by the Purchaser.
- 2.2. If the Contractor, in drawing up his tender, has fixed a time-limit for acceptance, the Contract shall be deemed to have been entered into when the Purchaser has sent an acceptance in writing before the expiration of such time-limit, provided that there shall be no binding Contract unless the acceptance reaches the Contractor not later than one week after the expiration of such time-limit.

3. DRAWINGS AND DESCRIPTIVE DOCUMENTS

- 3.1. The weights, dimensions, capacities, prices, performance ratings and other data included in catalogues, prospectuses, circulars, advertisements, illustrated matter and price lists constitute an approximate guide. These data shall not be binding save to the extent that they are by reference expressly included in the Contract.
- 3.2. Any drawings or technical documents intended for use in the construction or erection of the Works¹⁾ or of part thereof and submitted to the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Contractor. They may not, without the Contractor's consent, be utilized by the Purchaser or copied, reproduced, transmitted or communicated to a third party. Provided, however, that the said plans and documents shall be the property of the Purchaser:
- (a) if it is expressly so agreed, or
 - (b) if they are referable to a separate preliminary development contract on which no actual construction was to be performed and in which the property of the Contractor in the said plans and documents was not reserved.
- 3.3. Any drawings or technical documents intended for use in the construction or erection of the Works or of part thereof and submitted to the Contractor by the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Purchaser. They may not, without his consent, be utilized by the Contractor or copied, reproduced, transmitted or communicated to a third party.
- 3.4. The Contractor shall, if required by the Purchaser, furnish free of charge to the Purchaser at the commencement of the Guarantee Period, as defined in Clause 23, information and drawings other than manufacturing drawings of the Works in sufficient detail to enable the Purchaser to carry out the operation and maintenance (including running repairs) of all parts of the Works and (except where under the Contract the Contractor is responsible for commissioning the Works) the commissioning thereof. Such information and drawings shall be the property of the Purchaser and the restrictions on their use set out in paragraph 2 hereof shall not apply thereto. Provided that if the Contractor so stipulates, they shall remain confidential.

4. PACKING

- 4.1. Unless otherwise specified:
- (a) prices shown in price lists and catalogues shall be deemed to apply to unpacked Plant;
 - (b) prices quoted in tenders and in the Contract shall include the cost of packing or protection required under normal transport conditions to prevent damage to or deterioration of the Plant before it reaches its destination as stated in the Contract.

(*) These Conditions may be used, at the option of the parties, as an alternative to the General Conditions for the Supply and Erection of Plant and Machinery for Import and Export prepared at Geneva, in March 1957 (No. 574 A).

The English, French and Russian texts are equally authentic.

The observations of the experts who drew up these General Conditions, together with a description of the procedure followed, are embodied in the "COM-MENTARY ON THE GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR EXPORT No. 188" (Document E/ECE/169), published by the Economic Commission for Europe. It can be obtained direct from the Sales Section of the European Office of the United Nations, Geneva, Switzerland, or through United Nations Sales Agents.

1) In these General Conditions "Plant" means all machinery, apparatus, materials and articles to be supplied by the Contractor under the Contract and "the Works" means all Plant to be supplied and work to be done by the Contractor under the Contract.

5. LOCAL LAWS AND REGULATIONS

- 5.1. The Purchaser shall, at the request of the Contractor and to the best of his ability, assist the Contractor to obtain the necessary information concerning the local laws and regulations applicable to the Works and to taxes and dues connected therewith.
- 5.2. If, by reason of any change in such laws and regulations occurring after the date of the tender, the cost of erection is increased or reduced, the amount of such increase or reduction shall be added to or deducted from the price, as the case may be.

6. WORKING CONDITIONS

- 6.1. The price shall be on the understanding that the following conditions are fulfilled, except so far as the Purchaser has informed the Contractor to the contrary:
- (a) the Works shall not be carried out in unhealthy or dangerous surroundings;
 - (b) the Contractor's employees shall be able to obtain suitable and convenient board and lodging in the neighbourhood of the site and shall have access to adequate medical services;
 - (c) such equipment, consumable stores, water and power as are specified in the Contract shall be available to the Contractor on the site in good time, and, unless otherwise agreed, free of charge to the Contractor;
 - (d) the Purchaser shall provide the Contractor (free of charge, unless otherwise agreed) with closed or guarded premises on or near the site as a protection against theft and deterioration of the Plant to be erected, of the tools and equipment required therefor, and of the clothing of the Contractor's employees;
 - (e) the Contractor shall not be required to undertake any works of construction or demolition or to take any other unusual measures to enable the Plant to be brought from the point where it has been unloaded to the point on the site where it is to be erected, unless the Contractor has agreed to deliver the Plant to the last mentioned point.
- Any departure from the conditions mentioned in this paragraph shall attract an extra charge.
- 6.2. If the circumstances resulting from such departure are such that it would be unreasonable to require the Contractor to proceed with the Works, the Contractor may, without prejudice to his rights under the Contract, refuse to do so.

7. ERECTION ON A TIME BASIS AND LUMP SUM ERECTION

- 7.1. When erection is carried out on a time basis the following items shall be separately charged:
- (a) all travelling expenses incurred by the Contractor in respect of his employees and the transport of their equipment and personal effects (within reasonable limits) in accordance with the specified method and class of travel where these are specified in the Contract;
 - (b) the living expenses, including any appropriate allowances, of the Contractor's employees for each day's absence from their homes, including non-working days and holidays;
 - (c) the time worked, which shall be calculated by reference to the number of hours certified as worked in the time-sheets signed by the Purchaser. Overtime and work on Sundays, holidays and at night will be charged at the special rates mentioned in the Contract. Save as otherwise provided, the hourly rates cover the wear and tear and depreciation of the Contractor's tools and light equipment;
 - (d) time necessarily spent on:
 - (i) preparation and formalities incidental to the outward and homeward journeys;
 - (ii) the outward and homeward journeys;
 - (iii) daily travel morning and evening between lodgings and the site if it exceeds half an hour and there are no suitable lodgings closer to the site;
 - (iv) waiting when work is prevented by circumstances for which the Contractor is not responsible under the Contract;
 - (e) any expenses incurred by the Contractor in accordance with the Contract, in connexion with the provision of equipment by him, including where appropriate a charge for the use of the Contractor's own heavy equipment;
 - (f) any taxes or dues levied on the invoice and paid by the Contractor in the country where erection takes place.
- 7.2. When erection is carried out for a lump sum, the quoted price includes all the items above mentioned. Provided that if the erection is prolonged for any cause for which the Purchaser or any of his contractors other than the Contractor is responsible and if as a result the work of the Contractor's employees is suspended or added to, a charge will be made for any idle time, any extra work, any extra living expenses of the Contractor's employees and the cost of any extra journey.

8. INSPECTION AND TESTS OF THE PLANT

Inspection

- 8.1. If expressly agreed in the Contract, the Purchaser shall be entitled to have the quality of the materials used and the parts of the Plant, both during manufacture and when completed, inspected and checked by his authorized representatives. Such inspection and checking shall be carried out at the place of manufacture during normal working hours after agreement with the Contractor as to date and time.
- 8.2. If as a result of such inspection and checking the Purchaser shall be of the opinion that any materials or parts are defective or not in accordance with the Contract, he shall state in writing his objections and the reason therefor.

Tests

- 8.3. Tests provided for in the Contract other than taking over tests will be carried out, unless otherwise agreed, at the Contractor's works and during normal working hours. If the technical requirements of the tests are not specified in the Contract, the tests will be carried out in accordance with the general practice obtaining in the appropriate branch of the industry in the country where the Plant is manufactured.
- 8.4. The Contractor shall give to the Purchaser sufficient notice of the tests to permit the Purchaser's representatives to attend. If the Purchaser is not represented at the tests, the test report shall be communicated by the Contractor to the Purchaser and shall be accepted as accurate by the Purchaser.
- 8.5. If on any test (other than a taking-over test as provided for in Clause 21) the Plant shall be found to be defective or not in accordance with the Contract, the Contractor shall with all speed make good the defect or ensure that the Plant complies with the Contract. Thereafter, if the Purchaser so requires, the test shall be repeated.
- 8.6. Unless otherwise agreed, the Contractor shall bear all the expenses of tests carried out in his works, except the personal expenses of the Purchaser's representatives.

9. PASSING OF RISK

- 9.1. Save as provided in paragraph 10.1, the time at which the risk shall pass shall be fixed in accordance with the International Rules for the Interpretation of Trade Terms (Incoterms) of the International Chamber of Commerce in force at the date of the formation of the Contract.
- Where no indication is given in the Contract of the form of sale, the Plant shall be deemed to be sold "ex works."
- 9.2. In the case of a sale "ex works", the Contractor must give notice in writing to the Purchaser of the date on which the Purchaser must take delivery of the Plant. The notice of the Contractor must be given in sufficient time to allow the Purchaser to take such measures as are normally necessary for the purpose of taking delivery.

10. DELAYED ACCEPTANCE OF DELIVERY

- 10.1. If the Purchaser fails to accept delivery of the Plant on due date, he shall nevertheless make any payment conditional on delivery as if the Plant had been delivered. The Contractor shall arrange for the storage of the Plant at the risk and cost of the Purchaser. If required by the Purchaser, the Contractor shall insure the Plant at the cost of the Purchaser. Provided that if the delay in accepting delivery is due to one of the circumstances mentioned in Clause 25 and the Contractor is in a position to store it in his premises without prejudice to his business, the cost of storing the Plant shall not be borne by the Purchaser.
- 10.2. Unless the failure of the Purchaser is due to any of the circumstances mentioned in Clause 25, the Contractor may require the Purchaser by notice in writing to accept delivery within a reasonable time.
- If the Purchaser fails for any reason whatever to do so within such time, the Contractor shall be entitled by notice in writing to the Purchaser, and without requiring the consent of any Court, to terminate the Contract in respect of such portion of the Plant as is by reason of the failure of the Purchaser aforesaid not delivered and thereupon to recover from the purchaser any loss suffered by reason of such failure up to an amount not exceeding the sum named in paragraph A of the Appendix or, if no sum be named, that part of the price payable under the Contract which is properly attributable to such portion of the Plant.

11. PAYMENT

- 11.1. Payment shall be made in the manner and at the time or times agreed by the parties.
- 11.2. Any advance payments made by the Purchaser are payments on account and do not constitute a deposit, the abandonment of which would entitle either party to terminate the Contract.
- 11.3. If delivery has been made before payment of the whole sum payable under Contract, Plant delivered shall, to the extent permitted by the law of the country where the Plant is situated after delivery, remain the property of the Contractor until such payment has been effected. If such law does not permit the Contractor to retain the property in the Plant, the Contractor shall be entitled to the benefit of such other rights in respect thereof as such law permits him to retain. The Purchaser shall give the Contractor every assistance in taking any measures required to protect the Contractor's right of property or such other rights as aforesaid.
- 11.4. A payment conditional on the fulfilment of an obligation by the Contractor shall not be due until such obligation has been fulfilled, unless the failure of the Contractor is due to an act or omission of the Purchaser.
- 11.5. If the Purchaser delays in making any payment, the Contractor may postpone the fulfilment of his own obligations until such payment is made, unless the failure of the Purchaser is due to an act or omission of the Contractor.
- 11.6. If delay by the Purchaser in making any payment is due to one of the circumstances mentioned in Clause 25, the Contractor shall not be entitled to any interest on the sum due.
- 11.7. Save as aforesaid, if the Purchaser delays in making any payment, the Contractor shall on giving to the Purchaser within a reasonable time notice in writing be entitled to the payment of interest on the sum due at the rate fixed in paragraph B of the Appendix from the date on which such sum became due. If at the end of the period fixed in paragraph C of the Appendix, the Purchaser shall still have failed to pay the sum due, the Contractor shall be entitled by notice in writing to the Purchaser, and without requiring the consent of any Court, to terminate the Contract and thereupon to recover from the Purchaser the amount of his loss up to the sum mentioned in paragraph A of the Appendix.

12. PREPARATORY WORK

- 12.1.** The Contractor shall in good time provide drawings showing the manner in which the Plant is to be affixed together with all information relating, unless otherwise agreed, only to the Works, required for preparing suitable foundations, for providing suitable access for the Plant and any necessary equipment to the point on the site where the Plant is to be erected and for making all necessary connexions to the Plant (whether such connexions are to be made by the Contractor under the Contract or not).
- 12.2.** The preparatory work shall be executed by the Purchaser in accordance with the drawings and information provided by the Contractor and mentioned in paragraph 1 hereof. It shall be completed in good time and the foundations shall be capable of taking the Plant at the proper time. Where the Purchaser is responsible for transporting the Plant, it shall be on the site in good time.
- 12.3.** Any expenses resulting from an error or omission in the drawings or information mentioned in paragraph 1 hereof which appears before taking over shall be borne by the Contractor. Any such error or omission which appears after taking over shall be deemed faulty design for purposes of Clause 23.

13. LIAISON AGENTS

- 13.1.** The Contractor and Purchaser shall each designate in writing a competent representative to be his channel of communication with the other party on the day-to-day execution of the Works on the site.
- 13.2.** Each such representative shall be present on or near the site during working hours.

14. ADDITIONAL LABOUR

- 14.1.** If the Contractor so requires in good time the Purchaser shall make available to the Contractor free of charge such skilled and unskilled labour as is provided for in the Contract and such further reasonable amount of unskilled labour as may be found to be necessary even if not provided for in the Contract.

15. SAFETY REGULATIONS

- 15.1.** The Purchaser shall notify the Contractor in full of the safety regulations which the Purchaser imposes on his own employees and the Contractor shall secure the observance by his employees of such safety regulations.
- 15.2.** If breaches of these regulations come to the notice of the Purchaser, he must inform the Contractor in writing forthwith, and may forbid persons guilty of such breaches entry to the site.
- 15.3.** The Contractor shall inform the Purchaser in full of any special dangers which the execution of the Works may entail.

16. OVERTIME

- 16.1.** Any overtime and the conditions thereof shall, within the limits of the laws and regulations of the Contractor's country and of the country where erection is carried out, be as agreed between the parties.

17. WORK OUTSIDE THE CONTRACT

- 17.1.** The Purchaser shall not be entitled to use the Contractor's employees on any work unconnected with the subject-matter of the Contract without the previous consent of the Contractor. Where the Contractor so consents, he shall not be under any liability in respect of such work, and the Purchaser shall be responsible for the safety of the Contractor's employees while employed on such work.

18. CONTRACTOR'S RIGHT OF INSPECTION

- 18.1.** Until the Works are taken over and during any work resulting from the operation of the guarantee the Contractor shall have the right at any time during the hours of work on the site to inspect the Works at his own expense. In proceeding to the site, the inspectors shall observe the regulations as to movement in force at the Purchaser's premises.

19. INSTRUCTION OF THE PURCHASER'S EMPLOYEES

- 19.1.** In appropriate cases the Contract may provide on the terms and conditions therein set out for instruction to be given by the Contractor to the Purchaser's employees who will run the Plant.

20. TIME FOR COMPLETION

- 20.1.** Unless otherwise agreed the completion period shall run from the latest of the following dates:
- (a) the date of the formation of the Contract as defined in Clause 2;
 - (b) the date on which the Contractor receives notice of the issue of a valid import licence where such is necessary for the execution of the Contract;
 - (c) the date of the receipt by the Contractor of such payment in advance of manufacture as is stipulated in the Contract.

20.2. Should delay in completion be caused by any of the circumstances mentioned in Clause 25 or by an act or omission of the Purchaser and whether such cause occur before or after the time or extended time for completion, there shall be granted subject to the provisions of paragraph 5 hereof such extension of the completion period as is reasonable having regard to all the circumstances of the case.

20.3. If a fixed time for completion is provided for in the Contract, and the Contractor fails to complete the Works within such time or any extension thereof granted under paragraph 2 hereof, the Purchaser shall be entitled, on giving to the Contractor within a reasonable time notice in writing, to claim a reduction of the price payable under the Contract, unless it can be reasonably concluded from the circumstances of the particular case that the Purchaser has suffered no loss. Such reduction shall equal the percentage named in paragraph D of the Appendix of that part of the price payable under the Contract which is properly attributable to such portion of the Works as cannot in consequence of the said failure be put to the use intended for each complete week of delay commencing on the due date of completion but shall not exceed the maximum percentage named in paragraph E of the Appendix. Such reduction shall be allowed when a payment becomes due on or after completion. Save as provided in paragraph 5 hereof, such reduction of price shall be to the exclusion of any other remedy of the Purchaser in respect of the Contractor's failure to complete as aforesaid.

20.4. If the time for completion mentioned in the Contract is an estimate only, either party may after the expiration of two thirds of such estimated time require the other party in writing to agree a fixed time.

Where no time for completion is mentioned in the Contract, this course shall be open to either party after the expiration of nine months from the formation of the Contract.

If in either case the parties fail to agree, either party may have recourse to arbitration, in accordance with the provisions of Clause 28, to determine a reasonable time for completion and the time so determined shall be deemed to be the fixed time for completion provided for in the Contract and paragraph 5 hereof shall apply accordingly.

20.5. If any portion of the Works in respect of which the Purchaser has become entitled to the maximum reduction provided for by paragraph 3 hereof, or in respect of which he would have been so entitled had he given the notice referred to therein, remains uncompleted, the Purchaser may by notice in writing to the Contractor require him to complete and by such last mentioned notice fix a final time for completion which shall be reasonable taking into account such delay as has already occurred. If for any cause other than one for which the Purchaser or some other Contractor employed by him is responsible, the Contractor fails to complete within such time, the Purchaser shall be entitled by notice in writing to the Contractor, and without requiring the consent of any Court, to terminate the Contract in respect of such portion of the Works and thereupon to recover from the Contractor any loss suffered by the Purchaser by reason of the failure of the Contractor as aforesaid up to an amount not exceeding the sum named in paragraph F of the Appendix, or, if no sum be named, that part of the price payable under the Contract which is properly attributable to such portion of the Works as could not in consequence of the Contractor's failure be put to the use intended.

21. TAKING-OVER TESTS

21.1. Unless otherwise agreed, taking-over tests shall be carried out. If such tests are to be carried out, the Contractor shall notify the Purchaser in writing when the Works will be ready, and such notification shall be in sufficient time to enable the Purchaser to make any necessary arrangements. The tests shall take place in the presence of both parties. The technical requirements shall be as specified in the Contract or, if not so specified, in accordance with the general practice existing in the appropriate branch of the industry in the country where the Plant is manufactured.

21.2. If as a result of such tests the Works are found to be defective or not in accordance with the Contract, the Contractor shall with all speed and at his own expense make good the defect or ensure that the Works comply with the contract, and thereafter, if the Purchaser so requires, the test shall be repeated at the expense of the Contractor.

21.3. Subject to the provisions of paragraph 2 hereof the Purchaser shall free of charge provide any power, lubricants, water, fuel and materials of all kinds reasonably required for final adjustments and for taking-over tests. He shall also install free of charge any apparatus necessary for the above mentioned operations.

22. TAKING OVER

22.1. As soon as the Works have been completed in accordance with the Contract and have passed all the taking-over tests to be made on completion of erection, the Purchaser shall be deemed to have taken over the Works and the Guarantee Period shall start to run. The Purchaser shall thereupon issue to the Contractor a certificate, called a "Taking-over Certificate", in which he shall certify the date on which the Works have been completed and have passed the tests.

22.2. If the Purchaser is unwilling to have the taking-over tests carried out, the Works shall be deemed to have been taken over and the Guarantee Period shall start to run on a written notice to that effect being given by the Contractor.

22.3. If by reason of difficulties encountered by the Purchaser (whether or not covered by Clause 25) it becomes impossible to proceed to the taking-over tests, these shall be postponed for a period not exceeding six months, or such other period as the parties agree, and the following provisions shall apply:

- (a) The Purchaser shall make payments as if the taking over had taken place, provided that, in the case of a difficulty due to any of the circumstances falling within paragraph 25.1, the Purchaser shall not unless otherwise agreed, be required to pay at the due time of taking over the cost of uncompleted work or, before the expiration of the Guarantee Period fixed in accordance with sub-paragraph (d) hereof, any sum retained by way of guarantee.
- (b) At the appropriate time, the Purchaser shall give notice in writing to the Contractor stating the earliest date on which the tests can be carried out and requesting him to fix a new date for the tests. Such new date shall be within the period stated in paragraph G of the Appendix after the date mentioned in such notice.
- (c) The Contractor may, at the cost of the Purchaser, examine the Works before making the tests and make good any defect or deterioration therein that may have developed, or loss thereof that may have occurred, after the date when the Works were first ready for testing in accordance with the Contract.
- (d) The Guarantee Period shall run from the date when the postponed tests have been successfully carried out.

- (e) If the Purchaser so requires, the Contractor shall, subject to the provisions of the Contract in respect of the passing of risk, protect and preserve the Works until the tests are carried out or for one month from the time when the Works were first ready for testing in accordance with the Contract, whichever is the shorter period. The Contractor shall be entitled to recover from the Purchaser the costs of any measures actually taken by the Contractor to protect and preserve the Works. Unless otherwise agreed, the liability of the Contractor for protecting and preserving the Works shall cease on the expiry of such month. If by reason of other commitments the Contractor is unable to leave his employees on the site, he shall give the Purchaser any directions required to enable the Purchaser to make satisfactory arrangements for protecting and preserving the Works.
- (f) If at the end of six months or such other period as the parties may have agreed the tests have not taken place the provisions of paragraph 22.2 shall apply unless the provisions of Clause 25 are applicable.

23. GUARANTEE

- 23.1.** Subject as herein after set out, the Contractor undertakes to remedy any defect resulting from faulty design, materials or workmanship.
- 23.2.** This liability is limited to defects which appear during the period (called "the Guarantee Period") specified in paragraph H of the Appendix and commencing on taking over.
- 23.3.** In respect of such parts (whether of the Contractor's own manufacture or not) of the Works as are expressly mentioned in the Contract, the Guarantee Period shall be such other period (if any) as is specified in respect of each of such parts.
- 23.4.** The daily use of the works and the amount by which the Guarantee Period shall be reduced if the Works are used more intensively are stated in paragraph J of the Appendix.
- 23.5.** A fresh Guarantee Period equal to that stated in paragraph H of the Appendix shall apply, under the same terms and conditions as those applicable to the original Works, to parts supplied in replacement of the defective parts or to parts renewed in pursuance of this Clause. This provision shall not apply to the remaining parts of the Works, the Guarantee Period of which shall be extended only by a period equal to the period during which the Works are out of action as a result of a defect covered by this Clause.
- 23.6.** In order to be able to avail himself of his rights under this Clause the Purchaser shall notify the Contractor in writing, without delay of any defects that have appeared and shall give him every opportunity of inspecting and remedying them.
- 23.7.** On receipt of such notification the Contractor shall remedy the defect forthwith and, save as mentioned in paragraph 8 hereof, at his own expense. Save where the nature of the defect is such that it is appropriate to effect repairs on site, the Purchaser shall return to the Contractor any part in which a defect covered by this clause has appeared, for repair or replacement by the Contractor, and in such case the delivery to the Purchaser of such part properly repaired or a part in replacement thereof shall be deemed to be a fulfilment by the Contractor of his obligations under this paragraph in respect of such defective part.
- 23.8.** Unless otherwise agreed, the Purchaser shall bear the cost and risk of transport of defective parts and of repaired parts or parts supplied in replacement of such defective parts between the place where the Works are situated and one of the following points:
- (i) the Contractor's works if the Contract is "ex works" or F. O. R.;
 - (ii) the port from which the Contractor dispatched the Plant if the Contract is F. O. B., F. A. S., C. I. F., or C. & F.;
 - (iii) in all other cases the frontier of the country from which the Contractor dispatched the Plant.
- 23.9.** Where, in pursuance of paragraph 7 hereof, repairs are required to be effected on site, the incidence of any travelling or living expenses of the Contractor's employees and the costs and risks of transporting any necessary material or equipment shall be settled, in default of agreement between the parties, in such manner as the arbitrator shall determine to be fair and reasonable.
- 23.10.** Defective parts replaced in accordance with this Clause shall be placed at the disposal of the Contractor.
- 23.11.** If the Contractor refuses to fulfil his obligations under this Clause or fails to proceed with due diligence after being required so to do, the Purchaser may proceed to do the necessary work at the Contractor's risk and expense, provided that he does so in a reasonable manner.
- 23.12.** The Contractor's liability does not apply to defects arising out of materials provided, or out of a design stipulated, by the Purchaser.
- 23.13.** The Contractor's liability shall apply only to defects that appear under the conditions of operation provided for by the Contract and under proper use. It does not cover defects due to causes arising after taking over. In particular it does not cover defects arising from the Purchaser's faulty maintenance or from alterations carried out without the Contractor's consent in writing, or from repairs carried out improperly by the Purchaser, nor does it cover normal deterioration.
- 23.14.** After taking over and save as in this Clause expressed, the Contractor shall be under no liability even in respect of defects due to causes existing before taking over. It is expressly agreed that the Purchaser shall have no claim in respect of personal injury or of damage to property not the subject matter of the Contract arising after taking over nor for loss of profit unless it is shown from the circumstances of the case that the Contractor has been guilty of gross misconduct.
- 23.15.** "Gross misconduct" does not comprise any and every lack of proper care or skill, but means an act or omission on the part of the Contractor implying either a failure to pay due regard to serious consequences which a conscientious Contractor would normally foresee as likely to ensue, or a deliberate disregard of any consequences of such act or omission.

24. LIABILITY FOR PERSONAL INJURY AND DAMAGE TO PROPERTY

- 24.1.** In the event of personal injury or damage to property occurring before all the Works have been taken over, the liabilities shall be apportioned as follows:
- (a) (i) The Contractor shall at his own expense make good any loss or damage to the Plant or Works occurring before the risk therein has passed and arising from any cause whatsoever other than an act or omission of the Purchaser;
 - (ii) the Contractor shall at his own expense make good any loss or damage to the Plant or Works occurring after the risk therein has passed, if such loss or damage is caused by an act or omission of the Contractor;

- (iii) if any portion of the Plant or Works is lost or damaged from a cause for which the Contractor is not responsible by virtue of sub-paragraphs (a) (i) or (a) (ii) hereof, the loss or damage shall, if required by the Purchaser, be made good by the Contractor at the expense of the Purchaser.
- (b) In respect of damage to the Purchaser's property other than the Works, the Contractor shall indemnify the Purchaser to the extent that such damage was caused by the Contractor, or by the failure of equipment or tools provided by the Contractor for the purpose of the erection, if the circumstances show that the Contractor failed to use proper skill and care.
- (c) (i) In respect of personal injury, the respective liabilities of the Purchaser and of the Contractor towards the injured person shall be governed by the law of the country where the injury occurred;
- (ii) if the injured person brings a claim against the Purchaser, the Contractor shall indemnify the Purchaser against such claim to the extent that the injury was due to any of the causes mentioned in sub-paragraph (b) hereof;
- (iii) if the injured person brings a claim against the Contractor, the Purchaser shall, to the extent permitted by the law of the country where the injury occurred, indemnify the Contractor against such claim save to the extent that, by the operation of sub-paragraph (c) (ii) hereof, the Contractor would have been liable to indemnify the Purchaser had the claim been brought against the Purchaser.
- (d) In respect of damage to property of third parties, the provisions of sub-paragraph (c) hereof shall apply mutatis mutandis.
- (e) The provisions of this paragraph shall apply to the acts or omissions of the respective servants of the parties as they apply to the acts or omissions of the parties themselves. Provided always that as respects acts or omissions of the additional labour provided by the Purchaser in accordance with paragraph 14. 1. the Contractor shall be liable for the consequences of such orders and instructions as have been incorrectly given, inadequately expressed or given to a person not purporting to possess the necessary qualifications.

24.2. In order to avail himself of his rights under sub-paragraphs (c) and (d) of paragraph 24. 1 the party against whom a claim is made must notify the other of such claim and must permit the other, if the other so wishes, to conduct all negotiations for the settlement of such claim and to act in his stead or, to the extent permitted by the law of the country where the action is brought, to join in such litigation.

24.3. Any limitation of the indemnities payable by either party by virtue of this clause shall be as stated in paragraph I of the Appendix.

24.4. The provisions of this Clause shall apply equally while the Contractor is on the site in fulfilment of an obligation under Clause 23.

25. RELIEFS

25.1. The following shall be considered as cases of relief if they intervene after the formation of the Contract and impede its performance: industrial disputes and any other circumstances (e. g. fire, mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of the parties.

25.2. The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.

25.3. The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in Clauses 10, 11, 20 and 22. Save as provided in paragraphs 10. 2, 11. 7 and 20. 5, if, by reason of any of the said circumstances, the performance of the Contract within a reasonable time becomes impossible, either party shall be entitled to terminate the Contract by notice in writing to the other party without requiring the consent of any Court.

25.4. If the Contract is terminated in accordance with paragraph 3 hereof, the division of the expenses incurred in respect of the Contract shall be determined by agreement between the parties.

25.5. In default of agreement it shall be determined by the arbitrator which party has been prevented from performing his obligations and that party shall refund to the other the amount of the said expenses incurred by the other less any amount to be credited in accordance with paragraph 7 hereof, or, where the amount to be so credited exceeds the amount of such expenses, shall be entitled to recover the excess.

If the arbitrator determines that both parties have been prevented from performing their obligations, he shall apportion the said expenses between the parties in such manner as to him seems fair and reasonable, having regard to all the circumstances of the case.

25.6. For the purposes of this Clause "expenses" means actual out-of-pocket expenses reasonably incurred after both parties shall have mitigated their losses as far as possible. Provided that as respects Plant delivered to the Purchaser the Contractor's expenses shall be deemed to be that part of the price payable under the Contract which is properly attributable thereto, due account being taken of any work done in the erection of such Plant.

25.7. There shall be credited to the Purchaser against the Contractor's expenses all sums paid or payable under the Contract by the Purchaser to the Contractor.

There shall be credited to the Contractor against the Purchaser's expenses that part of the price payable under the Contract which is properly attributable to Plant delivered to the Purchaser or, in the case of an incomplete unit, the value of such Plant having regard to its incomplete state. In either case due account shall be taken of any work done in the erection of such Plant.

26. LIMITATION OF DAMAGES

26.1. Where either party is liable in damages to the other, these shall not exceed the damage which the party in default could reasonably have foreseen at the time of the formation of the Contract.

26.2. The party who sets up a breach of Contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages.

27. RIGHTS AT TERMINATION

27.1. Termination of the Contract, from whatever cause arising, shall be without prejudice to the rights of the parties accrued under the Contract up to the time of termination.

28. ARBITRATION AND LAW APPLICABLE

28.1. Any dispute arising out of the Contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules.

28.2. Unless otherwise agreed, the Contract shall, so far as is permissible under the law of the country where the Works are carried out, be governed by the law of the Contractor's country.

28.3. If the parties expressly so agree, but not otherwise, the arbitrators shall, in giving their ruling, act as amiables compositeurs.



APPENDIX

(To be completed by parties to the Contract)

	Clause	value of object of supply
A. Maximum amount recoverable on termination by Contractor for failure to take delivery or make payment.	10. 2. & 11. 7.	<u> </u> (in the agreed currency)
B. Rate of interest on overdue payments	11. 7.	<u>10</u> per cent per annum
C. Period of delay in payment authorizing termination by Contractor	11. 7.	<u>2</u> months
D. Percentage to be deducted for each week's delay	20. 3.	<u>0,5</u> %
E. Maximum percentage which the deductions above may not exceed.	20. 3.	<u>5</u> %
F. Maximum amount recoverable for non-completion	20. 5.	<u> </u> (in the agreed currency)
G. Maximum postponement of taking-over tests by Contractor	22. 3.	<u>2</u> weeks
H. Guarantee Period for original Works and parts replaced or renewed	23. 2. & 23. 5.	<u>12</u> months
I. Maximum indemnities for personal injury or damage.	24. 3.	<u>5.000.000</u> (in the agreed currency)
J. (1) Daily use of Plant	23. 4.	<u>15</u> hours / day
(2) Reduction of Guarantee Period for more intensive use.	23. 4.	proportional

SUPPLEMENTARY CLAUSE PRICE REVISION

Should any change occur in the cost of the relevant materials and/or wages during the period of execution of the contract, the agreed prices shall be subject to revision on the basis of the following formula:

$$P_1 = \frac{P_0}{100} \left(a + b \frac{M_1}{M_0} + c \frac{S_1}{S_0} \right)$$

where:

P_1 = final price for invoicing

P_0 = initial price of goods, as stipulated in the contract and as prevailing at the date of _____ (1)

M_1 = mean (2) of the prices (or price indices) for (type of materials concerned) _____
over the period _____ (3)

M_0 = prices (or price indices) for the same materials at the date stipulated above for P_0 .

S_1 = mean (2) of the wages (including social charges) or relevant indices (4) in respect of _____
(specify categories of labour and social charges) over the period _____ (3)

S_0 = wages (including social charges) or relevant indices (4) in respect of the same categories at the date stipulated above for P_0 .

a, b, c, represent the contractually agreed percentage of the individual elements of the initial price, which add up to 100.

$$(a + b + c = 100)$$

a = fixed proportion = _____

b = percentage proportion of materials = _____

c = percentage proportion of wages (including social charges) = _____

Where necessary, b (and if need be, c) can be broken down into as many partial percentages (b_1, b_2, b_3, \dots) as there are variables taken into account ($b_1 + b_2 + b_3 + \dots + b_n = b$).

DOCUMENTATION For the purpose of determining the values of materials and wages, the parties agree to use the following documents as sources of reference:

1. Materials: prices (or price indices) _____ (type of materials)
published by _____ under the headings _____

2. Wages: wages (including related social charges) (or relevant indices)
published by _____ under the headings _____ (5)

Rules for applying the Clause. In the case of partial deliveries which are invoiced separately, the final price shall be calculated separately for each such delivery.

Period of application of the Clause. The revision clause shall cover the delivery period fixed in the contract, together with any extension thereof granted under Clause 20. 2, but shall in no case apply after the date on which the work is completed.

Tolerances. Prices shall not be revised unless the application of the formula produces a plus or minus variation of _____ (6)

Saving Clause. If the parties wish the revision formula to be adjusted or replaced by a more accurate method of calculation when the plus or minus variation exceeds a certain percentage, they shall expressly so agree.

- (1) It is recommended that the parties should, as far as possible, adopt as the initial price the price prevailing at the date of the contract and not at an earlier date. This is normally the contract price less cost of packing, transport and insurance.
- (2) Arithmetical or weighted.
- (3) Specify the datum period, which may be defined as part or the whole of the delivery period.
- (4) If legal social charges are covered by the index, they need not be taken into account again.
- (5) Indices relating specifically to the engineering and electrical industries should be used as far as possible.
- (6) State the percentage plus or minus variation which must be exceeded before the formula is applied.

ANNEX

attached to the ECE General Conditions for the Supply and Erection of Plant and Machinery for Import and Export by the German Capital Goods Industry *)

The provisions hereinafter enumerated contain the data provided for in the "Appendix" of the General Conditions for Supply and Erection as well as other supplementary stipulations between the Parties to the Contract.

In the case of diverging interpretations of the German and the English texts, the German text shall prevail.

1. Ad Art. 1

All stipulations of the Parties to the Contract must be made in writing in order to be valid.

2. Ad Art. 3

The data referred to in art. 3 para 1 shall not be binding except where it is expressly so stipulated in the Contract.

4. Ad Art. 9

If the Contractor, in the case of a sale "ex works", and upon request by the Purchaser, undertakes to send the Plant to its destination, the risk shall pass to the Purchaser upon delivery to the first carrier, provided that this date is prior to the date indicated in art. 9 para 2.

If the Purchaser, in the case of a sale "ex works", fails to take delivery of the Plant on the ground of one of the circumstances referred to in art. 25, the risk shall pass to the Purchaser not later than at the date this circumstance appears.

4. Ad Art. 10

The maximum amount of damages provided for under art. 10 para 2, Appendix para A, shall be 25% of the price payable under the Contract, which is properly attributable to the particular portion of the Plant. The Purchaser shall be entitled to prove that fewer damage has occurred to the Contractor.

5. Ad Art. 11

The Contractor shall be entitled to refuse performance if, due to a circumstance that originated after the formation of the Contract, he has reason to fear that he may not receive the performance of the Purchaser completely and in time (art. 11 para 5).

The rate of interest (art. 11 para 7, Appendix para B) shall be 8 percentage points above the rate of the main refinancing facility of the European Central Bank in force on the due date of payment. The additional period shall be fixed at one month (art. 11 para 7, Appendix para C); the maximum amount of damages (art. 11 para 7, Appendix para A) shall be 25% of the price payable under the Contract, which is properly attributable to the particular portion of the Plant. The Purchaser shall be entitled to prove that fewer damage has occurred to the Contractor.

6. Ad Art. 20

It shall be a further prerequisite of the beginning of the period of completion (art. 20 para 1) that agreement must be reached with respect to all technical questions which at the time the Contract was entered into the Parties had decided to settle by subsequent negotiations, and that any official authorization which may be required for the fulfilment of the obligations of the Contractor must have been issued.

The price reduction (art. 20 para 3, Appendix paras D and E) shall amount to 0.5% for each complete week but shall not exceed a total of 5%.

In the case of art. 20 para 5 (Appendix para F) the Parties should come to an amicable agreement. The amount of damages shall correspond with the circumstances of the particular case; it shall keep within the limits of 5 and 25% of the price payable under the Contract, which is properly attributable to the portion of the Works which for delay of completion could not be properly used; any further damage will only be compensated in the case of intent, gross negligence or negligent breach of a condition that goes to the root of the Contract ("Wesentliche Vertragspflicht") according to Clause 13 of this Annex.

7. Ad Art. 21

Taking-over tests (art. 21 para 1) shall not be carried out except where it is expressly so stipulated in the Contract.

8. Ad Art. 22

The time for postponement to be agreed to by the Parties in accordance with art. 22 para 3 sentence 1, shall not exceed 3 months.

The time as provided in art. 22 para 3b (Appendix para G) shall not exceed 3 weeks and shall keep within the limits of the period of 3 months as stipulated in the preceding paragraph.

The time fixed by the Purchaser from which taking-over tests can be carried out must be chosen in such a way as to permit the Contractor to comply with the above terms.

9. Ad Art. 23

The Purchaser shall inform the Contractor what protective devices he requires against dangers originating from the use of the Plant or the Works. They shall be delivered at the Purchaser's own expense if both Parties have agreed on the kind and the scope of the protective devices to be delivered. Failure to deliver other protective devices shall not be deemed to be a defect (art. 23 para 1).

The Guarantee Period (art. 23 para 2, Appendix para H) shall be 12 months, provided that no other Guarantee Period has been expressly agreed upon in the Contract.

The daily use of the Works (art. 23 para 4, Appendix para J) shall be fixed at 8 hours; if the Works are used more intensively the Guarantee Period shall be reduced accordingly.

The fresh Guarantee Period (art. 23 para 5, Appendix para H) is fixed at 0 months.

Neither shall the Contractor be liable with respect to manufactured goods supplied by the Purchaser (art. 23 para 12).

Unless otherwise agreed, all claims of the Purchaser based on defects shall expire 12 months after assertion of the defectiveness, except where they have been recognized by the Contractor or where the Purchaser has brought an action or instituted arbitration proceedings prior to the expiry of the time-limit (art. 23 para 13).

For all other cases, Clause 13 of this Annex shall apply accordingly (art. 23, No. 14).

10. Ad Art. 24

The maximum damages for damage to property shall not exceed 25% of the total price of delivery payable under the Contract (art. 24 para 3, Appendix para I). Damages for property shall in total not exceed the amount of Euro 100,000. For all other cases, Clause 13 of this Annex shall apply accordingly.

11. concerning Art. 26

Delete art. 26 para 1.

12. Ad Art. 28

The Contract shall be governed by German law (art. 28 para 2).

13. Exclusion of other claims lodged by the Purchaser

All further claims lodged by the Purchaser, above all claims to make good any loss or damage from whatever cause arising, including damage not occurring to the Plant or Works themselves, shall be excluded, whatever legal ground may be underlying such claims.

The said exclusion of liability shall not apply in case of intent or gross negligence on the part of owner or his executives, in the case of negligence causing damage to life, body or health, nor in cases of negligent breach of a condition which goes to the root of the Contract ("Wesentliche Vertragspflichten").

In cases of negligent breach of a condition which goes to the root of the Contract ("Wesentliche Vertragspflichten") the Contractor shall be liable only – except in cases of intent or gross negligence on the part of the owner or his executives – for reasonably foreseeable damage which is intrinsic to the Contract.

Nor does the said exclusion apply in cases of strict liability, under the Product Liability Act (Produkthaftungsgesetz), for defects of the Product causing death or personal injury, or damage to items of property that are used privately. Furthermore, the said exclusion of liability shall not apply in the case of damage due to fraudulent concealment or despite specific guarantees.

*) April 2002