

**STANDARD TRADING TERMS AND CONDITIONS  
OF BARLOWORLD EQUIPMENT SOUTHERN AFRICA AND BARLOWORLD POWER  
Divisions of  
BARLOWORLD SOUTH AFRICA (PTY) LTD (“the Company” or “Barloworld”)**

**A. GENERAL TERMS AND CONDITIONS**

**1. THE CONDITIONS**

- 1.1 These terms and conditions contained in Part A (these “**Conditions**”) apply to any contract between Barloworld and its customers (“**Customer**”), (collectively referred to as the “**Parties**”). This includes contracts for the sale of new or used, remanufactured or rebuild equipment, remanufactured or rebuild components, machinery, plant, lubricants and/or parts, technology (hardware or software), Telemetry Devices or digital products (including any installation and/or assembly and commissioning thereof), (collectively the “**Equipment**”); sale of Technology Enabled Solutions (as more defined in clause 56) (“**TES**”); rental of Equipment; and contracts for the provision of any services, labour, maintenance and/or repair services (collectively the “**Services**”).
- 1.2 In addition, if a contract is for:
- (a) the sale of Equipment, the specific terms in Part B also apply;
  - (b) the rental of any Equipment, the specific terms in Part C also apply;
  - (c) the provision of Services, the specific terms in Part D also apply; or
  - (d) the sale of TES the specific terms in Part E also apply,
- (“**Specific Terms**”).

**2. THE CONTRACT**

- 2.1 The Customer may submit to Barloworld a purchase order for the supply or rental of Equipment, TES, Services and/or other deliverables (“**Purchase Order**”), as available from Barloworld at the relevant time, in terms of the process below:
- (a) the Customer may make a request to Barloworld to provide a written quotation and, where Barloworld provides a quotation, such quotation shall include, inter alia: (i) the quantity and type of requested deliverables and any minimum purchase requirements, if any; (ii) the specification(s); (iii) delivery terms and estimated delivery date(s); (iv) the place for delivery; (v) the price; (vi) if requested by the Customer, details of special packaging; and (vii) any special terms, conditions and limitations imposed by Barloworld and shall be subject to the Conditions and the applicable Specific Terms to the exclusion of all other terms and conditions, whether express or implied, unless Barloworld specifically agrees in writing to accept any variation thereto. Unless expressly stated otherwise in the particular quotation, all quotations which are provided by Barloworld to the Customer shall be valid for a period of 30 (thirty) days, after which period, the relevant quotation shall automatically expire;
  - (b) the Customer may, at its sole discretion within the validity period of a quotation and strictly in terms of Barloworld’s quotation only (as contemplated in clause 2.1(a) and without variation, execute and irrevocably place upon Barloworld a Purchase Order, which Purchase Order may include the Customer’s order number (if any) and otherwise reflect and be in accordance with the relevant quotation and be subject to these Conditions and the applicable Specific Terms.
- 2.2 Barloworld shall be entitled but not obliged, in its sole and absolute discretion, to:
- (a) reject the Purchase Order, without giving reasons;
  - (b) if a Purchase Order does not comply with the provisions of clause 2.1(b), provisionally accept the Purchase Order by notice in writing to the Customer (the “**Conditional Acceptance**”), provided that the provisions of clause 2.1(b) shall apply in respect of the Conditional Acceptance as if the Conditional Acceptance was a new quotation; or
  - (c) if a Purchase Order complies with the provisions of clause 2.1(b), accept the Purchase Order by notice in writing to the Customer (the “**Acceptance**”).
- 2.3 Each quotation (or, where applicable, the Conditional Acceptance) and Acceptance shall constitute a separate agreement between the Parties subject to these Conditions and the applicable Specific Terms (“**Contract**”) and shall supersede the Customer’s special or general terms and conditions (if any) incorporated by reference or expressly stated in the Purchase Order. The terms and conditions of the Customer shall not be binding on Barloworld, even if not expressly rejected.
- 2.4 Should the Customer have a trading account with Barloworld (“**Trading Account**”), such Trading Account shall be governed by the Contract .
- 2.5 A Contract shall be deemed to have been entered into, on the earlier of the following:

- (a) the issue of the Acceptance;
  - (b) when Barloworld 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);
  - (c) when the Equipment is delivered to, or collected by, the Customer;
  - (d) when Barloworld begins carrying out the Services; or
  - (e) in respect of TES, when the telemetry system and Customer's website subscription is activated, ("Commencement Date"), subject to these Conditions and the applicable Specific Terms.
- 2.6 Any specifications, illustrations, drawings, price lists, dimensions, performance figures and/or other technical data furnished by Barloworld in respect of any Contract, whether in writing or not (collectively the "Additional Information"), is furnished solely for information purposes and shall not form part of the Contract unless expressly agreed to in writing by Barloworld.
- 2.7 The Customer acknowledges that certain sales, Services and/or TES are provided and are accessible through the use of a website, computers, application program interface, mobile devices and/or software. The use of the website, computer, application program, mobile device and/or software is subject to its own terms and conditions, data governance statement, which may be amended from time to time, and the Customer undertakes to ensure that it complies at all times with the most up to date version of those terms and conditions.
- 2.8 Should there be any inconsistency between the documents forming part of the Contract, then they shall be read in the following order of precedence:
- (a) the Barloworld quotation;
  - (b) the Acceptance;
  - (c) the Hire Schedule (where applicable);
  - (d) these Conditions;
  - (e) the Specific Terms;
  - (f) the Conditional Acceptance;
  - (g) the Instructions (defined in clause 3.6(d));
  - (h) the Additional Information (if applicable);
  - (i) the Access to Information Agreement (if applicable); and
  - (j) the validly accepted End User Agreement ("EUA") and/or license agreement authorising the Customer to use the TES Software (if applicable).

### 3. **EXCLUSION AND LIMITATION OF LIABILITY (Please read carefully)**

#### General

- 3.1 **As far as permissible in law, 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:**
- (a) **the Equipment is 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) **Barloworld is not liable for any latent or patent defect in the Equipment and/or Goods;**
  - (c) **TES and Services are provided without any warranty and/or guarantee, including any implied or common law warranty; and**
  - (d) **Barloworld does not make any representations in respect of the sale or rental of the Equipment, TES, the Services, and/or the fitness of the Equipment, TES, and/or Goods or any part thereof for any particular purpose, other than as provided for in the operating and maintenance manual provided by Barloworld.**
- 3.2 **The Customer acknowledges that it has read the instructions and warnings provided to it by Barloworld as they appear in the operating and maintenance manual in respect of the hazards arising from, or associated with, the Equipment and/or its 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.**
- 3.3 **The Customer must ensure that the Equipment is only operated and maintained by suitably qualified and/or trained and licensed persons, and hereby indemnifies Barloworld, its directors, officers, employees, contractors, agents or other persons acting on behalf of Barloworld (collectively "Indemnified Parties") and holds them harmless against all claims (whether actual or alleged), demands, actions, suits, and/or proceedings, criminal liability, penalties, expenses, charges, costs (including costs on an attorney and own client scale on a full indemnity basis), liabilities, losses, damages, injury, death, damage, or loss of property of whatsoever nature from any cause of any kind whether in contract, delict, or restitution, or for breach of statutory duty or misrepresentation, or otherwise (collectively "Claims") incurred or suffered or sustained by the Indemnified Parties, which arises out of or as a result of the operator not being properly trained, qualified and/or licensed.**

### Exclusions

- 3.4 As far as permissible in law, none of the Indemnified Parties will be liable for any Claims and whether or not caused by the negligence of the Indemnified Parties, which may be caused to or suffered or sustained by the Customer, its directors, officers or employees (collectively "Indemnifying Parties") and/or the Indemnifying Parties contractors, agents, customers, invitees, licensees or any other third party, arising out of, incidental to or connected in any way with the Contract (or its cancellation), any Acceptance (or its cancellation), the supply of the Equipment, TES or Services or the rental of Equipment, unless such Claims are caused by the wilful conduct or gross negligence of Barloworld.
- 3.5 Notwithstanding anything to the contrary contained elsewhere in the Contract, as far as permissible in law, Barloworld shall not be liable to the Indemnifying Parties and/or the Indemnifying Parties contractors, agents, customers, invitees, licensees or any other third party in terms of, arising out of or in connection with the Contract (or its cancellation) and/or any work carried out in terms thereof or otherwise or any Acceptance (or its cancellation) for:
- (a) loss of actual or anticipated profit or revenue, loss of use or productivity, loss of production or business interruption, loss of data, loss of goodwill, loss of any contract or business, loss of opportunity, any demurrage or other costs related to the delay of vessels; or
  - (b) any kind of incidental, special, indirect or consequential loss or damage, even if Barloworld has been advised, knew or should have known of the possibilities of such loss or damage.
- 3.6 Notwithstanding anything to the contrary contained elsewhere in the Contract, as far as permissible in law, Barloworld shall not be liable to the Indemnifying Parties and/or the Indemnifying Parties contractors, agents, customers, invitees, licensees or any other third party in terms of, arising out of or in connection with the Contract (or its cancellation) and/or any work carried out in terms thereof or otherwise or any Acceptance (or its cancellation) for:
- (a) any short delivery or breakdown of the Equipment and/or Goods, or failure of the Equipment, Goods, TES or the Services, unless the Customer notifies Barloworld within 7 (seven) days, in writing, after delivery of the Equipment (whether they are sold or rented), TES and/or Goods or the completion of the Services, providing details of its complaint;
  - (b) the Customer's failure to collect the Equipment or Goods on the Delivery Date or at all;
  - (c) Barloworld's appointment of a carrier for or on behalf of the Customer and/or the carrier's breach of any of its obligations, including late delivery;
  - (d) the Customer's instructions (including the Customer's drawings and specifications) given in connection with the Contract ("Instructions"), or from Barloworld following such Instructions, and for all consequences of any error, omission, discrepancy or defect in such Instructions;
  - (e) any delay, defect, breakdown or other failure in any radio, communications, satellite, internet or cellular telecommunications networks;
  - (f) any delay, defect, breakdown, failure (including to the Customer's other programs and equipment) as a result of any defect or deficiency in the Telemetry Device;
  - (g) any failure, delay or interruption, breakdown in the Customer's, or its authorised users, use of any TES website, application program and/or software including without limitation: system and server crashes; computer malfunctions; unit or software faults; system errors; security breaches; theft; incompatibility issues; international restrictions; and
  - (h) any incorrect, lost, corrupted or undelivered data or telematics information, regardless of the cause.

### Indemnity

- 3.7 The Customer hereby indemnifies the Indemnified Parties and undertakes to keep each of them indemnified and held harmless against any Claims which may be made against any of them arising out of or in connection with:
- (a) the Contract (or its cancellation), any Acceptance (or its cancellation), the supply of the Equipment, TES or Services, the delivery of Goods, or the rental of Equipment;
  - (b) any alleged violation of any laws, including health, safety and environmental requirements, labour and social security laws and regulations by the Indemnifying Parties;
  - (c) the Customer's possession, use, on-selling of Equipment and/or Goods, or rental of the Equipment;
  - (d) the Customer or an authorised user of the Telemetry Device providing false, incomplete or inaccurate information to Barloworld; and/or
  - (e) as a result of the Customer failing to notify Barloworld of a change in the ownership of Equipment and/or Goods on which the Telemetry Device is installed.

Limitation of Liability

- 3.8 Notwithstanding anything to the contrary contained elsewhere in the Contract, as far as permissible in law the total liability of the Indemnified Parties to the Indemnifying Parties under or in connection with all Contracts and/or any work carried out in terms thereof or otherwise, howsoever arising, including, but not limited to, any liability arising out of contract, delict, statutory duty or otherwise and whether arising by way of penalties, liquidated damages, delay damages, performance liquidated damages, indemnity or otherwise, shall not exceed in aggregate the lesser of R2,000,000 (two million Rand) and:
- (a) in the case of the sale of any Equipment, the cost of replacement of the Equipment;
  - (b) in the case of the performance of Services, 6 (six) times the monthly fee payable by the Customer for the Service/s which gave rise to the claim;
  - (c) in the case of the rental of Equipment, 6 (six) times the monthly rental payable by the Customer, at the time that the claim arose; and
  - (d) in the case of the sale of TES, 6 (six) times the monthly Fee payable by the Customer for the TES which gave rise to the claim.
- 3.9 Notwithstanding the above, Barloworld shall not be liable for any Claims unless the Customer notifies Barloworld in writing within 12 (twelve) months of the earlier of the Customer becoming aware or ought reasonably to have been aware of any circumstance giving rise to a Claim against Barloworld, failing which Barloworld will be released from all liability in connection with the Claim and its subject matter.
- 3.10 The notice referred to in clause 3.9 above must contain reasonable details of the event or circumstances giving rise to the Claim (including the date on which the Claim arose), the basis upon which the Customer is making a Claim against Barloworld and, if practicable, a reasonable estimate of the total amount of the Claim.

Non-OEM attachments and Exclusions

- 3.11 If the Customer requests that parts, devices, accessories or consumables manufactured by suppliers other than Caterpillar Inc. or other original Equipment manufacturers of Equipment sold by Barloworld under this Contract ("Non-OEM Parts"), be installed in or onto the Equipment or Goods (whether by Barloworld or any third party), then Barloworld shall:
- (a) not be liable in any way whatsoever in respect of any defect in such Non-OEM Parts or any defective workmanship in relation to their installation;
  - (b) not be responsible for the maintenance of such Non-OEM Parts;
  - (c) not be liable for any damage caused to the Equipment, Goods and/or the Non-OEM Parts;
  - (d) cede any warranties applicable to such Non-OEM Parts to the Customer when the Equipment is delivered to the Customer (where the Non-OEM Parts are installed prior to delivery of the Equipment to the Customer).
- 3.12 Barloworld does not make any representations or recommendations in relation to any Non-OEM Parts or their installation.
- 3.13 The Customer acknowledges and accepts that the Indemnified Parties shall not be liable under any circumstances for any Claims (including consequential or special damages or loss of profits) which the Customer or any third party may suffer or sustain as a result of the installation, maintenance, operation of, and/or inadequate instructions and warnings in relation to, any Non-OEM Parts installed in or onto the Equipment.
- 3.14 The Customer hereby indemnifies and holds harmless the Indemnified Parties against any Claims of whatsoever nature which may be made against any of them arising out of, or connected in any way to, the manufacture, installation, maintenance and/or operation of Non-OEM Parts installed in or onto the Equipment and/or Goods and/or inadequate instructions and warnings in relation to them.

General

- 3.15 The Parties agree that the limitations and exclusions of liability set out in this clause 3 are fair and reasonable and that any liquidated damages agreed upon represent a fair, reasonable and genuine pre-estimate of any and all damage and/or losses likely to be suffered.
- 3.16 The Customer acknowledges and accepts that the provisions of clause 3 have been brought to its attention, it has read and understood these provisions and agrees to be bound by them.

**4. ANTI-CORRUPTION AND SANCTIONS**

- 4.1 The Customer agrees to comply with all relevant and applicable anti-bribery and anti-corruption laws in its dealings with Barloworld.

- 4.2 To the extent permissible by the applicable laws, the Customer will protect, defend, indemnify and hold harmless the Indemnified Parties against any Claims, of any governmental authority or any third party as a result of 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.

## 5. GENERAL PAYMENT

- 5.1 Unless otherwise agreed by the Parties in the Special Terms, the Customer must pay the full amount owing in terms of the Trading Account to Barloworld without deduction within 30 (thirty) days from date of statement.
- 5.2 The Customer shall pay any amount payable by it in terms of the Contract:
- (a) in the currency set out in the quotation, read together with the Acceptance (where applicable);
  - (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 invoice/statement.
- 5.3 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 the Customer is only considered to have been made, once the full amount of that payment is available to Barloworld as freely available funds in its nominated bank account.
- 5.4 Barloworld shall be entitled, at its discretion, to allocate any monies received from the Customer either to the Customer's liability in terms of the Contract or any other liability of the Customer arising out of any cause whatsoever. The Customer shall, after having been advised of such allocation by Barloworld, discharge any shortfall in the other payments due by it arising as a result of the allocation.

## 6. EXCHANGE RATE FLUCTUATIONS

- 6.1 Where any amount payable under a Contract is based on an exchange rate, that exchange rate shall be set out in the quotation.
- 6.2 The Customer agrees to bear the risk in any variation in the exchange rate of the South African Rand against the applicable foreign currency in accordance with the terms set out in the quotation, from the date of quotation until the date of payment, and Barloworld shall be entitled to increase or reduce the amount due by the Customer in respect of the Contract accordingly.

## 7. CUSTOMER'S FINANCIAL OBLIGATIONS

- 7.1 The Customer acknowledges that it understands its financial obligations in terms of the Contract and agrees to the breakdown of these financial obligations as set out in the quotation and confirmed in the Acceptance.
- 7.2 The Customer warrants that it has the power and capacity and has obtained all necessary authorisations and consents to enter into, and perform its obligations under, the Contract and such other agreements and arrangements referred to in the Contract, and that it enters into the Contract voluntarily.

## 8. TAX

- 8.1 All amounts payable to Barloworld in terms of the 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 in respect of which that Tax applies.
- 8.2 If any Tax is charged after the 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 the Contract shall be considered to be adjusted to the extent necessary to enable Barloworld to receive the same amount which it would have received had the Tax not been charged.
- 8.3 The Customer shall make all payments without any withholding tax deduction, unless a withholding tax deduction is required by applicable law.
- 8.4 The Customer shall promptly upon becoming aware that it must make a withholding tax deduction (or that there is any change in the rate or the basis of a withholding tax deduction) notify Barloworld accordingly. If a withholding tax deduction is required by applicable law to be made by the Customer from any payment to Barloworld, it shall, subject to clause 8.2, make that withholding tax deduction and any payment required in connection with that withholding tax deduction within the time allowed and in the minimum amount required by applicable law. The Customer shall, as soon as reasonably possible, provide Barloworld with an original withholding tax certificate (or equivalent) and a certified copy of the receipt issued by the relevant Tax authority evidencing that the relevant withholding tax deduction has been made or that any appropriate payment has been made to the relevant Tax authority.

## 9. NO DISCOUNTS

- 9.1 No amount payable by the Customer in terms of the Contract is subject to any discounts, unless agreed in writing by Barloworld.
- 9.2 Any agreed discount:
- (a) only applies to, and is calculated on, the price of the Equipment (excluding Tax) or the charge for labour applied in respect of the Services and/or TES 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.

## 10. OVERDUE PAYMENTS

- 10.1 If the Customer fails to pay any amount payable to Barloworld (whether under the Contract or otherwise) by the due date for payment, then all amounts owing to Barloworld by the Customer, from any cause whatsoever, will become immediately payable and Barloworld may:
- (a) charge interest on such amount, as far as permissible in law, at the greater of:
    - (i) 2% (two per cent) above the annual prime lending rate, published, from time to time by the bankers of Barloworld ("**Prime Rate**"), as certified by any manager or accountant of that bank (whose appointment or authority need not be proved) whose certification as to the Prime Rate at any time shall, in the absence of manifest error, be final and binding on the Parties, 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; or
    - (ii) the maximum rate of interest permissible under the applicable law;
  - (b) withhold delivery of any Equipment sold or rented and not yet delivered to the Customer in terms of any Contract or any Goods held by Barloworld, and the Customer will be liable for any storage and other holding costs incurred by Barloworld in this regard;
  - (c) stop/deactivate the Equipment and thereby render the Equipment incapable of operation;
  - (d) withhold or immediately suspend the performance of any Services and/or TES to the Customer;
  - (e) suspend the performance of any of its obligations to the Customer in terms of the Contract and any other contract with the Customer;
  - (f) restrict and/or stop access to any TES Telemetry Device, website, application program and/or software; and/or
  - (g) immediately terminate and/or suspend the Trading Account and/or any other trading facilities granted to the Customer, whether under the Contract or not.

## 11. DELIVERY

- 11.1 Time is not of the essence of the Contract.
- 11.2 Unless agreed otherwise by the Parties in writing, delivery of all Equipment shall be EXW (Barloworld Premises set out in Barloworld's quotation issued to the Customer) Incoterms© 2010 (as such term is defined in the International Rules for the Interpretation of Trade Terms of the International Chamber of Commerce) (the "**Delivery Address**").
- 11.3 In the case of:
- (a) a sale of Equipment, the Customer shall collect the Equipment from the Delivery Address within 5 (five) days from the date on which Barloworld notifies the Customer in writing that such items are available for collection;
  - (b) the rental of Equipment, the Customer shall collect the Equipment on the hire start date as specified in Barloworld's hire schedule ("**the Hire Schedule**") or, if the Hire Schedule is silent, as notified by Barloworld to the Customer in writing;
- (the "**Delivery Date**").
- 11.4 The Customer must arrange the loading of the Equipment and/or Goods at, and transportation of the Equipment and/or Goods from, the Delivery Address.
- 11.5 Barloworld is not obliged to provide any Equipment, Services, TES and/or return any Goods to the Customer until:
- (a) the Price, together with the applicable interest, is paid in full for the sale of the Equipment;
  - (b) a deposit, if applicable, is paid in full for the rental of the Equipment;
  - (c) the Fee is paid in full for the Services (where the Fees are required to be paid in advance); or
  - (d) the Fee and/or deposit, if applicable, together with the applicable interest, is paid in full for the TES.
- 11.6 Delivery is completed when the Equipment and/or Goods is made available to the Customer for collection, on the Delivery Date at the Delivery Address and before loading commences ("**Delivery**"). The Customer shall take delivery of the Equipment on the Delivery Date. If the Customer fails to do so, then:

- (a) with effect from 16:30 pm on the Delivery Date, all risk of loss of, or damage to or caused by, the Equipment and/or Goods passes from Barloworld to the Customer; and
  - (b) the Customer shall pay Barloworld, on demand, the full Price or rental, as applicable, and all reasonable costs (including storage costs) which Barloworld incurs as a result of that failure; and
  - (c) Barloworld may sell and or rent the Equipment and/or Goods to a third party if the Customer fails to pay the amounts set out in clause 11.6(b) above within 14 (fourteen) days after demand.
- 11.7 The Customer acknowledges that its authorised representative will be present at the Delivery Address on the Delivery Date. To the extent that an authorised representative is not present at the Delivery Address on the Delivery Date, the Customer acknowledges that all information applicable to the Equipment and handover material will be given to and signed by the person authorised to collect the Equipment on its behalf, and that it is the Customer's obligation to ensure that such information is effectively communicated to all relevant persons, as necessary.
- 11.8 Acceptance of Delivery by such representative shall constitute *prima facie* proof that the Customer has examined the Equipment and has found it to be in good condition, complete and in accordance with the specifications of the operating and maintenance manuals provided by Barloworld. If required by Barloworld, the Customer's duly authorised representative will sign a receipt confirming such acceptance.
- 11.9 Barloworld shall have the right to make any changes to the Delivery of Equipment and/or Goods and or provision of Services and access to TES which are necessary to comply with any applicable law or safety requirement, or, which do not materially affect the nature or quality of the Equipment and/or Goods, TES and/or Services, and Barloworld shall notify the Customer in any such event.
- 11.10 Barloworld may, at the Customer's request, appoint a carrier on behalf of the Customer, to transport the Equipment and/or 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 shall be deemed to be the Customer's agent;
  - (c) the Equipment and/or Goods is loaded and transported at the Customer's risk; and
  - (d) the Customer is responsible for paying the carrier any amounts due, including relevant insurance cost.
- 11.11 Despite any other provision of the Contract, Barloworld's obligation to deliver the Equipment is subject to the following conditions:
- (a) where Barloworld manufactures the Equipment 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 Equipment or any part thereof is purchased by Barloworld, the timeous receipt by Barloworld from its suppliers of the Equipment or any components thereof; and
  - (c) the timeous receipt by Barloworld of any Instructions.

## 12. PERMITS, CONSENTS AND APPROVALS

- 12.1 If any permit, consent or approval, including regulatory approval, (collectively "**Approval**") is required under any applicable law for, or in connection with, the receipt by the Customer of the Services, TES and/or the Equipment, then Barloworld shall not be obliged to provide the Services, TES and/or the Equipment in terms of the Contract until the Customer obtains that Approval and provides Barloworld with written proof, satisfactory to Barloworld, that the Approval has been obtained.
- 12.2 The Customer shall be responsible to ensure that the required Approval is maintained and retained. In the event that, for any reason whatsoever, the Approval is withdrawn, becomes invalid, is no longer available, and is in any way amended or the Equipment and/or Goods are moved to a destination requiring new Approval, then the Customer must obtain the new Approval. Until such time as the Customer provides Barloworld with written proof, satisfactory to Barloworld, that the Approval has been obtained Barloworld shall be entitled in its sole discretion to suspend, alternatively cancel any Acceptance, with no liability on Barloworld towards the Customer.

## 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. BREACH AND TERMINATION

- 14.1 Notwithstanding anything to the contrary contained in the Contract, Barloworld may terminate the Contract for convenience by giving the Customer not less than 14 (fourteen) days' prior written notice.
- 14.2 Unless otherwise provided by Barloworld, the Contract shall automatically terminate if:

- (a) where the Customer is a natural person, s/he applies for any debt review proceedings or dies, with effect from the date on which s/he dies or the date on which the application is issued; or
- (b) where the Customer is a juristic person, it is placed under business rescue, either provisionally or finally by a court or passes a resolution to go into voluntary business rescue; with effect from the date on which the application is issued at court or the resolution is passed, whichever is applicable.

14.3 Without limiting its other rights or remedies, Barloworld shall be entitled forthwith to cancel the Contract (and any other Contract it may have with the Customer) and/or to claim immediate payment and/or performance by the Customer of all of the Customer's obligations whether or not the due date for payment and/or performance shall have arrived, by giving written notice to the Customer, if the Customer:

- (a) breaches any warranty given by it in these Conditions;
- (b) breaches any term or condition of the Contract and such breach cannot be remedied or if such breach can be remedied it fails to remedy that breach within 5 (five) days after receipt of a written notice from Barloworld to do so; or
- (c) being a natural person, publishes a notice of the voluntary surrender of his estate, or has any application or other proceedings brought against him in terms of which he is sequestrated or placed under curatorship or the whole or a major portion of his assets is alienated or encumbered;
- (d) being a partnership, is dissolved; or
- (e) being a juristic person,
  - (i) it is, (or admits inability) or becomes unable to pay its debts as they fall due, or it is (or admits to being) insolvent, or files any application or action for relief under any insolvency, reorganisation or moratorium law with the object of it being wound up, liquidated, or placed under curatorship, receivership, administrative receivership or administration, as applicable in its jurisdiction, whether provisionally or finally and whether compulsory or voluntary;
  - (ii) any proceedings are started or steps are taken or instituted against it (but excluding any such steps or proceedings which are frivolous or have no prospect of success), for a liquidation order or provisional liquidation order to be made in relation to it or for its winding-up, dissolution or reorganisation or for the appointment of a judicial manager, trustee, liquidator or similar officer in relation to it or its assets; and/or
  - (iii) it is unable (or admits inability) to pay its debts generally as they fall due, or it is (or admits to being), otherwise insolvent or stops or suspends payment of all or a material part of its debts or convenes a meeting or takes any steps for the purposes of making any arrangement, compromise or composition for the benefit of its creditors or agrees or declares a moratorium or reorganisation in respect of its debts; and/or
  - (iv) any receiver, administrative receiver, administrator, compulsory manager, judicial custodian, liquidator or business rescue practitioner or the like is lawfully appointed in respect of it or any material part of its assets or revenues or it requests any such appointment;
  - (v) suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;
- (f) repeatedly breaches any of the terms of the Contract in such a manner as to reasonably justify Barloworld's opinion that the Customer's conduct is inconsistent with it having the intention or ability to give effect to the terms of the Contract.

14.4 Without limiting the rights or remedies of Barloworld, on termination or cancellation of the Contract for any reason:

- (a) the Customer shall immediately pay to Barloworld:
  - (i) all of Barloworld's outstanding unpaid invoices and interest and, in respect of Equipment delivered or TES and/or Services supplied, but which have not yet been invoiced, Barloworld shall submit an invoice, which shall be payable by the Customer immediately on receipt;
  - (ii) the cost of any materials, parts, Equipment or Services ordered which cannot be reasonably avoided or cancelled;
  - (iii) the costs or losses incurred by Barloworld as a result of the cancellation of third party contracts related to the Contract, including any cancellation fees;
  - (iv) any demobilisation cost applicable under the Contract, resulting from the termination or cancellation;
- (b) the Customer shall return all of Barloworld's materials or Equipment which have not been paid for in full by the Customer. If the Customer fails to do so, then Barloworld may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose whatsoever;
- (c) Barloworld shall have the right to set-off any amount due in terms of a Contract or any other agreement with the Customer, against any deposit or advance payment paid to Barloworld by the Customer in terms of this Contract and the Customer shall forfeit any deposit or advance payment made to Barloworld prior to the date of termination of the Contract, in the event that the Contract is cancelled pursuant to clause 14.3;



- (d) the accrued rights and remedies of Barloworld as at termination and/or cancellation shall not be affected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination.

14.5 For the purposes of exercising its rights under clause 14.4(b):

- (a) the Customer irrevocably and in *rem suam* authorises and appoints Barloworld with full power of substitution to sign all and any document/s in the Customer's name or on the Customer's behalf, and to do all such things as may be necessary or desirable, to enable Barloworld to give effect to or to enforce its rights under clause 14.4(b);
- (b) grants Barloworld and its agent, an irrevocable right to enter the Customer's premises where the Equipment may be located and take possession of and remove the Equipment without being responsible for any damage caused or without obtaining any court order. All costs and expenses incurred by Barloworld as a result of this action shall form part of the Customer's indebtedness to Barloworld under the Contract and shall bear interest as contemplated in the Contract.

## 15. COSTS ARISING FROM A BREACH

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

## 16. NON-DISCLOSURE AND INTELLECTUAL PROPERTY

- 16.1 For purposes of this Contract, "**Intellectual Property**" means rights in and to patents, inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, know-how, and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
- 16.2 All right, title and interest in and to the Intellectual Property owned by either Barloworld or the Original Equipment Manufacturer ("**OEM**") pertaining to the Equipment, TES and/or the provision of Services shall vest respectively in either Barloworld or the OEM, as the case may be, and all benefits arising from the use of the Intellectual Property shall inure exclusively for the benefit of Barloworld and/or the OEM, respectively. The Customer acknowledges that it has no rights in or to the Intellectual Property.
- 16.3 The Customer shall not make any representation or do any act which may be taken to indicate that it has any right, title or interest in or ownership or use of the Intellectual Property.
- 16.4 The Customer undertakes not to do or permit to be done any act which may impair or prejudice the right, title or interest of Barloworld and/or the OEM in and to the Intellectual Property.
- 16.5 The Customer shall promptly notify Barloworld of any conduct by any party which constitutes, or which potentially constitutes, an infringement of any of the Intellectual Property rights and which comes to the notice of the Customer.
- 16.6 If the Customer becomes aware that any other person alleges that the Equipment, TES and/or provision of the Services infringes any rights of another party or that the Intellectual Property is otherwise threatened or likely to be adversely affected, the Customer shall immediately give written notice thereof to Barloworld and shall make no comment or admission to any third party in respect thereof.
- 16.7 Barloworld shall conduct all proceedings relating to the Intellectual Property and shall in its sole discretion decide what legal action, if any, to take in respect of any infringement or alleged infringement of the Intellectual Property or passing-off or any other claim or counterclaim brought or threatened in respect of the use or registration of the Intellectual Property, and the Customer undertakes to provide such assistance as Barloworld may require in connection with any such action.
- 16.8 All written or verbal information supplied by Barloworld to the Customer regarding Intellectual Property, products, services, developments, inventions, processes and procedures, product specifications, plans, customers, pricing and all other data (including the Additional Information) whether of a financial, technical, technological, labour related, marketing, administrative or accounting nature ("**Confidential Information**") shall be treated as confidential and shall not be disclosed to third parties without Barloworld's prior written consent. Such information shall be exclusively used for the performance of the Contract.

## 17. USE OF CUSTOMER'S PERSONAL INFORMATION

- 17.1 Barloworld processes and manages Personal Information in accordance with the Protection of Personal Information Act No. 4 of 2013 and Barloworld's Privacy Statement, the current version of which may be accessed from the Company website (<https://www.barloworld-equipment.com/legal/privacy-statement/>). The Privacy Statement may be changed from time to time, and any updated versions will be published on the Company website.

- 17.2 The Customer warrants and guarantees that all information supplied to Barloworld by the Customer in the Purchase Order and/or application for a Trading Account (if applicable) and in terms of the Contract is true and correct.
- 17.3 The Customer agrees to inform Barloworld immediately should there be any changes of whatsoever nature in any of its information, including its physical address, previously supplied to Barloworld.
- 17.4 In handling any personal information of the Customer, Barloworld will comply with the relevant data protection laws applicable in the country where Barloworld trades, is registered and/or incorporated ("**Country**").
- 17.5 As and when necessary, the Customer undertakes to obtain the consent of all natural and/or juristic persons to whom the personal information relates and herewith consents to Barloworld collecting, holding, using, disseminating, destroying, disclosing and processing such personal information supplied to Barloworld as follows:
- (a) to either credit grantors and/or credit bureaux and/or banks and/or other financial institutions in order to ascertain information relating to the Customer's creditworthiness (before acceptance of the Purchase Order) and for fraud prevention purposes in order to process any payment necessary for and relative to the Contract. The Customer is aware that a credit bureau(x) may provide a credit profile and/or a credit score for the Customer and the Customer may contact that credit bureau(x) to obtain a copy of its credit records and to correct any inaccurate information in those records. The Customer waives any claim it may have against Barloworld relating to any mistaken or inaccurate information disclosed to the credit bureau(x);
  - (b) to attorneys and/or debt collection agencies in the event that the Customer is in breach of the Contract;
  - (c) transferring the personal information across the borders of the Country;
  - (d) to Barloworld's agents or principals, including:
    - (i) the relevant OEM and/or any of its affiliates or related parties;
    - (ii) consultants;
    - (iii) service providers or suppliers;but only to the extent necessary for the purposes of the Contract;
  - (e) to the relevant OEM and/or any of its affiliates or related parties for the purpose of conducting research on improving Barloworld's Equipment, TES and Services offered to the Customer in terms of the Contract;
  - (f) for purpose of Barloworld publishing a directory containing the name, address, details and contact numbers of its Customers;
  - (g) generally for the purposes of:
    - (i) servicing and/or performing warranty work in respect of the Equipment;
    - (ii) providing equipment management services;
    - (iii) internal research by Barloworld to improve its offerings to customers;
    - (iv) accounting, billing and other internal administrative purposes; and
    - (v) identifying and informing the Customer of products and services that may be of interest to it from Barloworld or selected third parties.
- 17.6 Where personal information of the Customer is used or disclosed, Barloworld shall take such steps as may be reasonable in the circumstances to ensure that the information is relevant to the purpose for which it is to be used or disclosed.
- 17.7 Furthermore, the Customer accepts that the personal information of all of Barloworld's customers may in appropriate circumstances reside outside of the Country, and it hereby agrees that Barloworld shall be entitled to transfer the Customer's personal information to such locations outside of the Country, and use the Customer's personal information in such locations as described above.
- 17.8 Barloworld will not disclose the Customer's personal information to any other person or institution other than as stated under clause 17.4 and 17.5, or if Barloworld is compelled to do so in terms of law and/or a court of law. Barloworld hereby undertakes that it will only disclose such information as is required in terms of any law and or a court of law.

## 18. **TELEMETRY DEVICES**

- 18.1 The Equipment and/or Goods may be fitted or retro-fitted with on-board telemetry devices ("**Telemetry Devices**") by Barloworld or the relevant OEM, or any of its affiliates, for the purposes of transmitting to Barloworld and the OEM certain data relating to the Equipment and/or Goods, including but not limited to (i) serial and model numbers of the Equipment and/or Goods; (ii) location of the Equipment and/or Goods; and (iii) operational data such as fault codes, emissions, service meter hours, utilisation, software and hardware version numbers (collectively referred to as the "**Telematics Information**").
- 18.2 Unless specified otherwise in writing by the Customer, the Customer agrees, acknowledges and consents to the activation of the Telemetry Devices and the processing of the Telematics Information by Barloworld and/or the OEM for the following purposes:
- (a) improving service delivery to the Customer;
  - (b) continuous improvement of the Equipment;
  - (c) market research; and

(d) advising the Customer of new Equipment and/or related services.

- 18.3 To the extent that the Telematics Information may also constitute the Customer's personal information, the provisions of clause 17 will also apply in respect of the use, disclosure and processing of such information.
- 18.4 In processing the Telematics Information, Barloworld and the OEM shall take all reasonable steps to protect the Customer's privacy and shall ensure that the Telematics Information is used solely for the foregoing intended purposes.

## 19. FORCE MAJEURE

- 19.1 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 circumstance which:
- (a) is beyond its reasonable control; or
  - (b) it could not reasonably have provided for/against before entering into the Contract; or
  - (c) having arisen, could not reasonably have been avoided or overcome by Barloworld.
- 19.2 The events or circumstances described in clause 19.1 will include, but not be limited to, any strike, lock-out, shortage of labour or materials, power failures, delays in transport, accidents of any kind, any default or delay by any sub-contractor or supplier of Barloworld, insurrection, riot, robbery, sabotage, blockade, embargo, coup, economic crisis, international restrictions, any order of an international authority or court, any requirements of any authority or other competent local authority, foreign exchange restrictions, interruption in electricity supply, fire or explosion, revolt, civil commotion, state or government or any other authority, 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, unforeseen physical conditions (whether man made or natural) or any act of any state or government or any other authority.

## 20. GOVERNING LAW

- 20.1 The laws of the country where Barloworld is incorporated/registered shall apply to the conclusion, implementation, interpretation and/or enforcement of the Contract.

## 21. DISPUTE RESOLUTION

- 21.1 In the event of any dispute arising out of or in relation with these Terms and Conditions ("**Dispute**"), either Party shall deliver a written notice of dispute to the other Party.
- 21.2 The Parties shall, within 14 (fourteen) calendar days of delivery of the notice of dispute or such longer period of time as the Parties may agree to in writing, first endeavour to resolve the Dispute by way of good faith negotiations between their respective duly authorised managers or other designated senior officials ("**Senior Officials**").
- 21.3 If the Dispute is resolved by the Senior Officials, the terms of their resolution shall be recorded in writing and shall be final and binding on the Parties upon signature by the Parties' duly authorized representatives.
- 21.4 If for any reason, including lack of co-operation by any Party, a Dispute is not resolved in terms of clause 21.2 above within 14 (fourteen) calendar days of delivery of the notice of Dispute or such longer period of time as the Parties may agree to in writing, the Dispute shall be referred to arbitration.
- 21.5 The Parties shall in good faith attempt to agree on the appointment of a single Arbitrator who shall be a suitably qualified Senior Counsel if the dispute is of a legal nature, alternatively, a suitably qualified Senior Chartered Accountant if the dispute is of an accounting / financial nature, both of whom shall be of no less than 12 (twelve) years standing. Failing agreement within 5 (five) calendar days after the expiry of the period referred to in clause 21.4 above, either Party shall deliver a notice of request for the appointment of a single Arbitrator to the Chairman of the Arbitration Foundation of Southern Africa ("**AFSA**").
- 21.6 The arbitration shall be conducted in terms of the AFSA Rules. The Arbitrator's award shall be made as expeditiously as possible, and in any event, no later than 90 (ninety) calendar days after conclusion of the arbitration and the Arbitrator shall provide the Parties with a copy of the written award with reasons.
- 21.7 The Arbitrator's award in respect of any claims that are below R5 (five) million shall be final and binding.
- 21.8 The Arbitrator's award in respect of any claims that are R5 (five) million and above shall be subject to appeal on 14 (fourteen) calendar days' written notice from the date of the award.
- 21.9 The notice of appeal shall be delivered by either Party to the other and to the Chairman of the AFSA. The appeal tribunal shall consist of three arbitrators who shall be retired judges or suitably qualified Senior Counsel of no less than 12 (twelve) years standing if the dispute is of a legal nature, alternatively, three suitably qualified Senior Chartered Accountants of no less than 12 (twelve) years standing if the dispute is of an accounting nature. Each Party shall elect on arbitrator and the two appointed arbitrators shall appoint the third who shall be the Chairman of the Appeal Tribunal. Should the two appointed arbitrators fail to agree the appointment of the third arbitrator within 5 (five) calendar days of their appointment, then the Chairman of AFSA shall appoint the third arbitrator.
- 21.10 The arbitration shall be conducted in the English language.
- 21.11 The place of the arbitration shall be Johannesburg, South Africa.

- 21.12 The Parties shall share equally in the cost of the arbitration or the appeal until an award on the issue of costs is made by the Arbitrator or the Appeal Tribunal.
- 21.13 The parties shall have a right to approach a court of competent jurisdiction in order to have the Arbitrator's award made an order of court.
- 21.14 The provisions of this clause:
- (a) constitute an irrevocable consent by the Parties to the proceedings contemplated in terms hereof and neither Party shall be entitled to withdraw from the provisions of this clause or claim at any such proceedings that it is not bound by this clause or such proceedings; and
  - (b) exclude any claim for payment of a liquidated amount or outstanding debt in respect of which either party shall be entitled to directly approach a court of competent jurisdiction without following the procedure set out above.
  - (c) are severable from the rest of these Terms and Conditions and shall remain in effect despite the termination, cancellation, invalidity or alleged invalidity of these terms and conditions for any reason whatsoever.

## **22. URGENT RELIEF**

- 22.1 Save for the provisions of clause 22.2 and 22.3 below, the Parties acknowledge and agree to strictly resolve any Dispute arising out of or in relation to these Terms and Conditions through negotiation or arbitration as set out above and without recourse to the Courts.
- 22.2 A Party seeking urgent relief may do so in a Court of competent jurisdiction where grounds for urgency exist.
- 22.3 Should a Party have a claim against another Party for a liquidated amount or an amount which arises from a liquid document, such Party shall be entitled to institute action in a Court of law (without following the arbitration process outlined above), notwithstanding the fact that the other Party may dispute such claim or the urgency for any relief sought on an urgent basis.

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

- 23.1 Unless otherwise specified, any notice or other communication to be given to any of the Parties in terms of these Conditions and/or the Contract shall be valid and effective only if it is given in writing, provided that any notice given by electronic mail shall be regarded for this purpose as having been given in writing.
- 23.2 Any notice or communication shall:
- (a) if delivered by hand on a business day for:
    - (i) the Customer, at its address specified for it in the quotation or the Acceptance; and
    - (ii) Barloworld, to the address specified by Barloworld in the quotation marked for the attention of the 'Legal Department',which shall 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 a responsible person during ordinary business hours who acknowledged receipt in writing;
  - (b) if sent by registered post in a correctly addressed envelope to the address specified for it in the quotation or the Purchase Order shall be deemed to have been received (unless the contrary is proved) within 14 (fourteen) days from the date it was posted; and
  - (c) not be considered as a valid form of service for the commencement of any formal legal and/or dispute process if sent by electronic mail or any other method of electronic service of notices.
- 23.3 Either Party may by written notice to the other Party change its address or electronic mail for the purposes of this clause 23 to any other address (other than a post office box number) provided that the change shall become effective on the 7th (seventh) day after the receipt of the notice
- 23.4 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 23.

## **24. INDUCEMENT**

- 24.1 The Customer acknowledges and confirms that neither the Customer nor Barloworld's directors, officers, employees or agents offered or promised any form of reward to the Customer or any of its employees, officers or agents in order to secure the Contract.
- 24.2 The Customer shall immediately notify Barloworld, in terms of Barloworld's whistleblowing policy which can be found at the following website <https://www.barloworld.com/pdf/sustainability/global-whistling-policy.pdf> or such an address made available at [www.barloworld.com](http://www.barloworld.com), from time to time, if any of the Customer or Barloworld's directors, officers, employees or agents solicits any payment or any other item of value, whether for the employee or for another party, outside of the normal compensation payable under the Contract.

**25. JOINT AND SEVERAL LIABILITY**

If the Contract is between Barloworld and two or more Customers; then the liability of those Customers under the Contract shall be joint and several.

**26. TRANSFER OF RIGHTS AND OBLIGATIONS**

- 26.1 The Customer may not cede (transfer its rights), delegate (transfer its obligations), assign (transfer its 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.
- 26.2 The Customer hereby agrees that Barloworld may cede (transfer its rights), delegate (transfer its obligations), assign (transfer its 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.

**27. GENERAL AND INTERPRETATION**

- 27.1 The Parties agree that each Party, its employees, agents or subcontractors shall remain independent from the other Party and that nothing in the Contract shall be deemed to constitute a partnership, joint venture, agency relationship or otherwise between the Parties.
- 27.2 References to "writing" or "written" includes any hand-written, typewritten, facsimile or e-mail communications.
- 27.3 No indulgence granted by either Party to the other shall constitute a waiver of any of that Party's rights under the Contract; accordingly, that Party shall not be precluded, as a consequence of having granted such indulgence, from exercising any rights against the other Party which may have arisen in the past or which may arise in the future.
- 27.4 The failure by either Party to enforce any provision of the Contract shall not affect in any way that Party's right to require performance of the provision at any time in the future, nor shall the waiver of any subsequent breach nullify the effectiveness of the provision itself.
- 27.5 No variation or termination of the Contract will be valid or effective unless recorded in writing and signed by the Customer and duly authorised signatories of Barloworld.
- 27.6 The provisions in clauses 3 shall, by way of *stipulatio alteri*, constitute a contract for the benefit of each Indemnified Party which shall be capable of acceptance at any time by any such Indemnified Party by written notice to that effect to the Customer. Prior to acceptance, the benefit of the stipulation may not be withdrawn by the Customer without the written consent of Barloworld.
- 27.7 Termination and/or cancellation of the Contract for any cause shall not release a Party from any liability which at the time of termination and/or cancellation has already accrued to such Party or which thereafter may accrue in respect of any act or omission prior to such termination and/or cancellation.
- 27.8 No remedy conferred by the Contract is intended to be exclusive of any other remedy which is otherwise available at law, by statute or otherwise. Each remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter existing at law, by statute or otherwise. The election of any one or more remedy by either Party shall not constitute a waiver by such Party of the right to pursue any other remedy.
- 27.9 All clauses in the Contract should be read, as far as possible, in conformity with the applicable law. To the extent that this is not possible, any void, illegal or unenforceable provision of the Contract which is not material to its efficacy as a whole may be severed and the remaining provisions of the Contract will remain of full force and effect and the Parties shall endeavour in good faith to agree an alternative provision to the void, illegal or unenforceable provision. Any provision of the Contract held to be void, invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held void, invalid or unenforceable.
- 27.10 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.
- 27.11 In the 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 Country;
  - (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 (twelve) named months of the year from the 1<sup>st</sup> to the last day of such month;
  - (e) "**year**" means a period of 365 (three hundred and sixty five) consecutive days.
- 27.12 If any notice period prescribed in the Contract expires on a day which is not a business day, it will be deemed to have expired on the next business day thereafter.
- 27.13 Any notice period will be calculated by excluding the 1<sup>st</sup> (first) day and including the last day thereof.

- 27.14 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.
- 27.15 All headings in the Contract are inserted for convenience only and must not be taken into account when interpreting the Contract.
- 27.16 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.
- 27.17 Where an expression has been defined in the Contract 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.
- 27.18 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.
- 27.19 No provision in the Contract will be interpreted for or against either Party because that party or its legal counsel drafted such provision and the *contra proferentem* rule of construction shall have no application to the construction, interpretation or adjudication of these Conditions.
- 27.20 The termination and/or cancellation of a Contract does not affect those of its provisions which expressly provide that they will operate after termination, or which must continue to have effect after termination and/or cancellation, or which must by implication continue to have effect after termination and/or cancellation.

## **B. SPECIFIC TERMS APPLYING TO THE SALE OF EQUIPMENT**

### **28. SALE OF EQUIPMENT**

- 28.1 The Customer agrees to purchase and Barloworld agrees to sell the Equipment on the terms and conditions specified in a Contract.

### **29. PURCHASE PRICE**

- 29.1 Subject to clauses 8.2 and 27.2, the purchase price of the Equipment (the “**Price**”) is the price set out in the latest quotation delivered by Barloworld to the Customer.
- 29.2 Notwithstanding anything to the contrary contained in the Contract, the Price does not include, and Barloworld shall be entitled to be reimbursed by the Customer for, the following:
- (a) any cost incurred by Barloworld as a result of a change to the delivery terms;
  - (b) any escalations or increases by third party suppliers, including without limitation, the OEM;
  - (c) any cost incurred by Barloworld as a result of a change in applicable law (comprising (i) the enactment of any new law, (ii) the modification or repeal of any law, (iii) the commencement of any law which was not in full force and effect at the Commencement Date (except to the extent that such law was enacted prior to the Commencement Date with an intended start date after the Commencement Date and such law takes effect without material amendment) and/or (iv) a change in the interpretation or application of a law by judicial or other authority having the authority to interpret or apply such law);
  - (d) all taxes, levies, duties (including import and customs duties) royalties, penalties, charges, fines, interest, withholding taxes and imposts, or any similar charges, duties, penalties or levies which may be imposed on Barloworld as a result of the Contract (other than those which are expressly Barloworld’s responsibility in accordance with the relevant delivery terms);
  - (e) any cost arising as a result of any variation to an Acceptance;
  - (f) any cost incurred by Barloworld as a result of any delay caused by any third party contracted by the Customer to provide any service and/or goods which may have an impact upon the delivery, installation or commissioning by Barloworld of the Equipment;
  - (g) any cost incurred by Barloworld as a result of improper or defective performance by such third party; and/or
  - (h) any costs incurred by Barloworld as a result of the happening of an event for which Barloworld could not have reasonably anticipated at the date of the Contract and which impacts Barloworld’s ability to perform the Contract.

### **30. PAYMENT**

- 30.1 Barloworld shall issue an invoice to the Customer in respect of any Acceptance before or at the time of Delivery. Such invoice will be paid by the Customer:
- (a) where the Customer has a Trading Account with Barloworld, within 30 (thirty) days from date of statement;  
or

- (b) where the Customer does not have a Trading Account, on presentation of Barloworld's invoice and before Delivery; or
  - (c) as otherwise agreed to with the Customer in writing.
- 30.2 Unless expressly agreed otherwise, all invoices shall be made payable in the currency set out in the invoice.
- 30.3 Should Barloworld agree to delivery in part, the deliveries will be invoiced separately and must be paid for separately.
- 31. EXPORTING THE EQUIPMENT**
- 31.1 The Customer undertakes not to transport any Equipment beyond the borders of the country in which they were delivered, without the prior written consent of Barloworld.
- 31.2 If, within 2 (two) years after the date of delivery of any Equipment under a Contract, that Equipment is exported beyond the borders of the country in which they were delivered, then the Customer shall pay to Barloworld on demand, as liquidated damages (or a penalty), an amount equal to 10% (ten per cent) of the purchase price of the Equipment, less the amount of any Tax which was payable thereon.
- 32. RISK**
- Subject to clause 11, all risk of loss of, or damage to, or caused by, the Equipment purchased by the Customer shall pass to the Customer on Delivery or on expiry of the 5 (five) day period referred to in clause 11.3, whichever is earlier.
- 33. OWNERSHIP**
- Despite delivery of any Equipment to the Customer, the Customer does not acquire ownership of, or any other right in and to the Equipment, until Barloworld has received the full Price, together with any other amount (including Tax) which is payable to Barloworld for, or in connection with, that Equipment.
- 34. REPAIR OF EQUIPMENT UNDER WARRANTY**
- Where Equipment is sold under warranty by a supplier for whom Barloworld is a repair agent and Barloworld repairs or replaces that Equipment, 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.
- 35. RETURN**
- 35.1 Subject to clause 35.2, the Customer shall be entitled to return any part to Barloworld within 14 (fourteen) days after the Delivery Date, for credit or exchange, provided that:
  - (a) the part must be unopened in its original packaging in a resalable condition;
  - (b) a restocking fee of 15% (fifteen per cent) of the price for the part will be charged to the Customer by Barloworld, unless the part was incorrectly supplied by Barloworld;
  - (c) no lubricants, electrical parts, specially built hoses or dry charged batteries filled with acid will be accepted by Barloworld for returns, unless incorrectly supplied by Barloworld;
  - (d) the Customer will not be entitled to a credit on emergency and/or airfreight surcharges, unless the part was incorrectly supplied by Barloworld;
  - (e) the Customer will be liable for all transport costs, unless the part was incorrectly supplied by Barloworld.
- 35.2 Notwithstanding the above, parts classified as "Non-Returnable" shall not be refundable by Barloworld to the Customer.

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**C. SPECIFIC TERMS APPLYING TO THE RENTAL OF EQUIPMENT**

- 36. RENTAL OF EQUIPMENT**
- 36.1 The Customer agrees to hire and Barloworld agrees to rent the Equipment specified in the Hire Schedule on the terms and conditions specified in the Contract.
- 37. DURATION**
- Each Hire Schedule shall commence on the date specified in that Hire Schedule. If no such date is specified, then the Hire Schedule shall commence on the date on which the Equipment is made available to the Customer at Barloworld's premises as set out in the Hire Schedule ("**Barloworld's Premises**") and shall endure for a minimum period specified in the Hire Schedule ("**Rental Period**").
- 38. RENTAL AND DEPOSIT AND/OR GUARANTEE**
- 38.1 The rental payable by the Customer for the Equipment shall be the amount calculated using the rate set out in the Hire Schedule multiplied by either the hourly, daily, weekly or monthly usage as set out in the Hire Schedule (the "**Rental**").

- 38.2 Where applicable, the Rental shall exclude any Ground Engaging Tools (“GET”). An additional fitting charge will apply if GET is fitted by Barloworld. Alternatively, the Customer can supply its own OEM approved GET which will be at its own risk and for its own account.
- 38.3 If Barloworld agrees in writing to deliver the Equipment to the Customer's nominated premises, the Customer shall also be liable for the costs of, and relating to, that delivery and will bear all risk in and to the Equipment while in transit and the provisions of clause 11.10, shall apply *mutatis mutandis*.
- 38.4 The Equipment Maintenance Management Systems (“EMMS”) which Barloworld uses to log working hours of the Equipment will be *prima facie* proof of the hours the Equipment has worked.
- 38.5 Barloworld may at any time, at its sole discretion, require the Customer to pay a deposit or deliver a guarantee, as approved by Barloworld, as security for unpaid Rentals and/or any other Claims which Barloworld may have against the Customer in terms of or arising from the Contract. Barloworld shall not be obliged to make the Equipment available for collection at Barloworld's Premises by the Customer unless and until the deposit has been paid and/or, where applicable, an approved guarantee has been provided to Barloworld.
- 38.6 The deposit or guarantee shall be retained by Barloworld until the Equipment is returned to Barloworld's Premises by the Customer and all of the Customer's obligations to Barloworld (both actual and contingent) arising from or in connection with the Contract and/or Hire Schedule have been discharged in full. For the avoidance of doubt, the deposit shall not be used to pay the Rental due in terms of the Hire Schedule.
- 38.7 Barloworld may at any time and in its sole discretion, apply the deposit or guarantee to the payment of any amounts to which Barloworld is entitled to under the Contract and/or the specific Hire Schedule.
- 38.8 The deposit shall not bear interest.
- 38.9 Barloworld may from time to time and in its sole discretion require the Customer to –
- (a) increase the amount of the deposit or guarantee (as the case may be) to take account of any increase in the monthly Rental; or
  - (b) reinstate the deposit or guarantee to its original amount or the amount contemplated in clause 36.9(a) (as the case may be), if any portion of the deposit or guarantee is applied to discharge a Customer obligation in terms of clause 38.7 above.

#### **39. PAYMENT**

- 39.1 The Customer shall pay the Rental and Tax in respect of the Equipment to Barloworld without deduction, set-off, counterclaim or withholding taxes within 30 (thirty) days from the date of statement into the account specified by Barloworld.
- 39.2 The Customer shall also be liable for the costs of the collection and return of the Equipment to and from Barloworld's Premises.

#### **40. ADJUSTMENT OF RENTAL**

- 40.1 Barloworld may at its own discretion review the rental rate twice a year, and any adjustment to the Rental shall be applicable from the 1st of March of each year, or at any time as may be communicated to the Customer.
- 40.2 Following the adjustment of the rental rate in terms of clause 40.1, Barloworld shall confirm and notify the Customer of the new Rental.

#### **41. MAINTENANCE**

- 41.1 The Contract shall be subject to all preventative and corrective maintenance and repair services on the Equipment being carried out as per the specifications of the OEM.
- 41.2 The Customer shall, if so required by Barloworld at its sole discretion, enter into and pay for a separate maintenance contract with Barloworld in respect of the Equipment, it being agreed by the Customer that any failure on the part of Barloworld to perform in terms of the said maintenance contract shall in no way affect the Customer's obligations under the Contract.
- 41.3 The Customer grants Barloworld and its agents an irrevocable right to enter the site where the Equipment is used and/or stored (“Site”) or, where the Site is not owned by the Customer, shall procure that the owner of the Site grants Barloworld and its agents an irrevocable right to enter the Site, at all reasonable times (but at any time in the case of an emergency) to view and inspect the condition of the Equipment and to provide the maintenance.
- 41.4 The Customer shall be obliged to notify the Hire Desk of Barloworld immediately in writing of any defects or deficiencies in the Equipment, or any breakdowns. In such event the Customer shall cease using the Equipment forthwith, failing which the Customer shall be liable for all loss or damage, including consequential loss or damage, sustained by Barloworld arising out of such continued use of the Equipment.
- 41.5 If the Customer is unable to use the Equipment because of a mechanical failure, then it shall forthwith notify the Hire Desk of Barloworld in writing and, except for any minimum charge payable, the Customer shall not be obliged to pay



the pro rata portion of the Rental applicable to the period commencing on the date on which Barloworld receives the written notification and ending on the date on which the Customer resumes use thereof. This clause does not apply to mechanical failures of the Equipment which are caused by the acts or omissions of the Customer, its directors, officers, employees, contractors and/or agents. The use of the Equipment by the Customer other than as recommended by Barloworld and/or the OEM is deemed to be unlawful or negligent and the cost of repair or replacement of the Equipment will be for the account of the Customer.

41.6 If Barloworld in its sole discretion determines that repairs are necessary because:

- (a) of the failure of the Customer to observe its obligations under the Contract; or
- (b) the Equipment or any part thereof being damaged by a third party or as a result of any other occurrence; or
- (c) the Equipment or any part thereof being damaged as a direct result of abnormal wear and tear arising out of abnormal, unreasonable and improper use of the Equipment by the Customer,

then the Customer shall be obliged to pay to Barloworld the cost of those repairs, determined at Barloworld's standard rates and charges for the material supplied and work carried out and the cost of the Equipment or any part thereof replaced and all amounts due in terms hereof shall be paid by the Customer prior to the Equipment being operated by the Customer.

41.7 Only OEM genuine parts can be used for the maintenance and/or repairs.

41.8 Any maintenance and repairs to the non-OEM attachments fitted to the Equipment in accordance to clause 42.18 will be the responsibility and at the risk of the Customer.

41.9 The Customer shall -

- (a) once a day, inspect the hour meter on the Equipment ("**Meter**") to confirm that the Meter is working and immediately notify Barloworld if the Meter stops working or is faulty;
- (b) not modify or tamper with the Meter;
- (c) repair and replace at its own expense all Tyres, Tubes, Tracks and GET forming part of the Equipment and which are damaged or defective for any reason, including accident, intentional damage or wear and tear, to Barloworld's satisfaction;
- (d) carry out the routine maintenance checks of the Equipment as 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 Equipment;
- (e) immediately and by the quickest available means, report to Barloworld any breakdown of, or repair required to the Equipment;
- (f) except as specifically provided in the Contract, not carry out any repairs to, or replace any parts of, the Equipment, without Barloworld's prior written consent;
- (g) not make any material alterations or modifications to the Equipment without the prior consent of Barloworld, and in the event of such alterations or modifications being made (whether with or without Barloworld's consent) then, at Barloworld's election, at the hire end date, such alterations or modifications will accede to the Equipment and the Customer shall receive no compensation therefor, or Barloworld may require the Customer to remove and make good at the Customer's expense, within 14 (fourteen) days of a demand so to do, any alterations or modifications, in which latter event the Customer shall be required to pay on demand for any such damage or loss occasioned by the making and/or removal of the said alterations and modifications.

## 42. THE CUSTOMER'S OBLIGATIONS

The Customer shall:

42.1 before collecting the Equipment from Barloworld's Premises:

- (a) advise Barloworld in writing of the Site where the Equipment will be used and stored; provided that the Customer shall not be entitled to move the Equipment to a new address unless it has obtained the prior written consent of Barloworld for the change of that address;
- (b) if the Customer leases the Site, inform the lessor of those premises (the "**Lessor**"), by written notice, that Barloworld owns the Equipment and that the Equipment 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 42.1(b) and provide Barloworld with a copy of that proof upon receiving it;
- (d) satisfy Barloworld that it has arranged suitable transport for the transportation of the Equipment from Barloworld's Premises to the Site;

42.2 immediately advise Barloworld of any change to the Lessor and proceed in terms of clauses 42.1(a), 42.1(b) and 42.1(c) for each new Lessor;

- 42.3 ensure that at all times the Equipment remains identifiable as belonging to and owned by Barloworld and wherever possible shall ensure that a visible sign to that effect is attached to the Equipment;
- 42.4 not remove or permit the removal of the Equipment beyond the borders of the country where Barloworld's Premises are located without the prior written consent of Barloworld;
- 42.5 collect the Equipment on the date specified in the Hire Schedule from Barloworld's Premises and keep the Equipment in its possession and under its care and control at all times and shall take reasonable care in the use of the Equipment;
- 42.6 within 48 (forty eight) hours after becoming aware of a defect, notify Barloworld, in writing, that the Equipment is defective and specify the defect, failing which the Equipment will be deemed to have been received by the Customer in good working order and remains in good working order for the duration of the rental period;
- 42.7 use the Equipment only for the purpose for which it is designed, with specific reference to the OEM specifications with regard to fuel, lubrication products, and operation and recommended operating conditions;
- 42.8 use the Equipment with proper care and in a normal, proper and reasonable manner and in accordance with any instructions and directions supplied by Barloworld to the Customer and the Customer shall take all reasonable precautions to safeguard the Equipment from all loss or damage;
- 42.9 take such steps (including compliance with all safety and usage instructions provided by Barloworld) as may be necessary to ensure, so far as is reasonably practicable, that the Equipment is at all times safe and without risk to health when it is being set, used, cleaned or maintained;
- 42.10 not allow the Equipment 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 Equipment;
- 42.11 not permit the Equipment to be confiscated, seized or taken from its possession or control under any distress, execution or other legal process, but if the Equipment is so confiscated, seized or taken, the Customer shall notify Barloworld and the Customer shall at its sole expense use its best endeavours to procure an immediate release of the Equipment and shall indemnify Barloworld on demand against all losses, costs, charges, damages and expenses incurred as a result of such confiscation and/or seizure;
- 42.12 during the subsistence of the Contract and at its own expense apply for and obtain all and any licenses, certificates, commissions or exemptions that may be required for or in connection with the use of the Equipment and shall at all times comply with all requirements of all the applicable legislation in this regard and shall, on request by Barloworld furnish copies of any or all of the documents referred to in this clause;
- 42.13 ensure that the Equipment is operated and used only by competent and properly trained, licensed and qualified persons in accordance with the operating and safety manual and shall not permit the Equipment to be used in contravention of any statute, ordinance, by-laws or any other legislation enforced during the Rental Period. In this regard, the Customer indemnifies Barloworld against any claim or loss arising as a result of non-compliance by the Customer of legislation;
- 42.14 allow Barloworld, or its agent, to inspect the Equipment, from time to time and, for this purpose, shall procure that Barloworld is granted access to the Equipment wherever it may be located;
- 42.15 take all such steps as may be required to ensure that, insofar as reasonably practicable, that the Equipment is at all times safe and is not a risk to safety and health of third parties when in use;
- 42.16 not allow the Equipment 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 Equipment, invalid;
- 42.17 read all operating and safety instructions provided with the Equipment, 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 Equipment safely;
- 42.18 not fit any non-OEM attachment onto the Equipment other than as supplied by Barloworld without the prior written consent of Barloworld. Any such non-OEM attachment will be inspected and approved by Barloworld before any installation/fitment. Any such items/ attachments and fitment will be at the Customer's cost;
- 42.19 immediately upon becoming aware thereof, notify Barloworld of any theft of, loss of, or damage to, the Equipment or the occurrence of any other event which may give rise to a claim under any insurance policy covering the Equipment (any shortfall from the insurer will be for the Customer's account);
- 42.20 not cede, assign, delegate, encumber, alienate or transfer any of its rights or obligations in respect of the Equipment to any other person, without the prior written consent of Barloworld;
- 42.21 not tamper with the operation of the Equipment following the stoppage or deactivation thereof; and
- 42.22 subject to clause 44, return the Equipment at the end of the rental period or on earlier termination of the Contract to Barloworld's Premises, even in the event that Barloworld consented to the Equipment being removed across border as set out in clause 42.4 above, or if necessary, allow Barloworld or its representatives access to the Site or any premises where the Equipment is located for the purpose of repossessing the Equipment, in which event the Customer

shall be liable for any additional expenses, loss, damage arising as a result of Barloworld repossessing the Equipment.

#### **43. BARLOWORLD'S OBLIGATIONS**

- 43.1 Subject to clause 41.1, Barloworld shall, within a reasonable time and at its cost, repair or replace any of the Equipment which break down or require repair.
- 43.2 Without prejudice to Barloworld's other rights under the Contract or at law, if the Equipment has to be cleaned, 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 while the Equipment is under its possession, then the Customer shall pay to Barloworld, on demand, all costs of and associated with that cleaning, repair or replacement, together with the Rental for the period during which the Equipment was being repaired or replaced.

#### **44. RETURN OF EQUIPMENT**

- 44.1 The Customer shall, at its own expense at the termination of the Hire Schedule, whether by effluxion of time or otherwise, return the Equipment in good working order and condition (fair wear and tear excepted) to Barloworld's Premises with a full tank of fuel and specifically, but without limitation:
- (a) all damage, including operational abuse of the Equipment shall be repaired;
  - (b) all broken or cracked glass shall be replaced;
  - (c) GET and liners shall be replaced;
  - (d) tyres, tracks and undercarriage shall be replaced.
- 44.2 Return of the Equipment shall include delivery of all licence papers, registration certificates, operating manuals and all other papers, as well as any keys, accessories and parts related to the Equipment which was collected by the Customer from Barloworld.
- 44.3 Upon the return of the Equipment, Barloworld shall inspect the Equipment and following such inspection prepare a report setting out the general conditions of the Equipment, and compute the costs (if any) required to replace parts or repair the Equipment in order to return it to a good working order and condition (fair wear and tear excepted), at the expense of the Customer. A certificate from any manager of Barloworld (whose appointment or authority need not be proved) as to the costs of the repairs shall be *prima facie* evidence of the amount owing by the Customer to Barloworld for such repairs.

#### **45. DEACTIVATION**

- 45.1 The Customer acknowledges that the Equipment is by its nature movable. The Customer further acknowledges and accepts that Barloworld may, in certain circumstances, be able to, and shall be entitled to remotely stop/deactivate the operation of the Equipment by written notice to the Customer ("**Stoppage Notice**"), thereby rendering it incapable of operation in the following circumstances:-
- (a) where the Customer fails to make immediate payment of any amount that is due to Barloworld within 24 (twenty four) hours of receipt of written demand to do so or within the period specified in the notice from Barloworld;
  - (b) where Barloworld cancels the Contract under circumstances contemplated in clause 14.3.
- 45.2 The Stoppage Notice will remain in force until all overdue Rental, including interest are received in full by Barloworld. In the event where the Equipment is stopped/deactivated following the Stoppage Notice, the Customer will be liable for payment of the costs set out in the Stoppage Notice.
- 45.3 The Customer acknowledges that the right to stop/deactivate the operation of the Equipment is a right in addition to, and not in substitution of any other rights which may accrue to Barloworld upon breach or cancellation of the Contract and/or Hire Schedule.

#### **46. LIABILITY AND EQUIPMENT BREAKDOWN**

In the event that the Equipment breaks down due to any defective workmanship, Barloworld's liability shall, subject to clause 3, be limited to the cost of repair, including parts and labour, to return the Equipment to full working order. Barloworld shall not be liable for the costs of the Customer's labour or standby time in connection to any breakdown, nor any consequential losses or costs related to the delay of the Customer projects.

#### **47. OWNERSHIP**

Notwithstanding anything to the contrary contained in the Contract, the Equipment shall at all times remain the property of Barloworld, and the Customer shall have no right, title or interest in or to the Equipment (save the right to possession and use of the Equipment subject to these Conditions).

#### **48. RISKS AND INSURANCE**

- 48.1 For as long as the Equipment is in the possession, custody or control of the Customer ("**Risk Period**"), the Customer shall bear all risk of theft, loss of, or damage to, or caused by, the Equipment until such time as the Equipment is returned to Barloworld, both days included. The Customer shall insure the Equipment and any ancillary or related equipment supplied by Barloworld for their full replacement value as advised by Barloworld, with an insurer approved by, and on terms and conditions acceptable to, Barloworld during the Risk Period. The interests of Barloworld and the Customer shall be endorsed on the policy. The Customer shall, on demand by Barloworld, furnish Barloworld with proof of the existence and subsistence of such insurance policy. Each such policy shall provide that the insurer shall be obliged to give 30 (thirty) days' prior written notice to Barloworld before the cancellation of, or any material change to the policy.
- 48.2 The Customer must comply with the terms and conditions of any insurance policy taken out by it in terms of this clause 48, including paying all premiums when due. If the Customer does not comply with its obligations in terms of this clause 48, then Barloworld shall be entitled in its discretion to insure the Equipment on behalf of and at the expense of the Customer.
- 48.3 The Customer shall, on demand, supply copies of the relevant insurance policies or other insurance confirmation acceptable to Barloworld and proof of premium payment to Barloworld to confirm the insurance arrangements.
- 48.4 The Customer undertakes to advise Barloworld and the insurance company concerned of any event or accident caused by or involving the Equipment which may give rise to a claim in terms of the policy immediately such event or accident occurs, and shall render to Barloworld all such assistance as may be reasonably required in connection with or relating to any claim made against the insurance company or anyone else relating to the Equipment.
- 48.5 Any insurance policy taken out by the Customer in terms of this clause 48 does not relieve the Customer of any of its obligations in terms of the Contract or in any way limit Barloworld's claims against the Customer.
- 48.6 Should the Equipment or any item thereof become defective or be damaged, whether by risk insured against or other cause, the Customer shall cause the Equipment concerned to be restored or repaired forthwith. Any cost or expense in this respect shall be borne by the Customer. The Customer shall not withhold any Rental during any period whilst the Equipment is in a defective or damaged state and shall have no claim against Barloworld in the event of the costs of the repairs, restoration or replacement not being recovered in full or at all from the insurer.
- 48.7 In the event of the Customer failing to pay any sum of money due in respect of any insurance, maintenance or any other fees, costs or expenses under the Contract, then Barloworld shall be entitled, without prejudice to any of its rights in terms hereof, to pay such sums and to recover from the Customer, the payments so made, together with interest thereon, at the Prime Rate.

#### **49. BARLOWORLD'S RIGHTS ON TERMINATION**

Upon cancellation of this Contract for any reason:

- 49.1 Barloworld's consent to the Customer's possession of the Equipment shall terminate and Barloworld may, by its authorised representatives, without notice and at the Customer's expense, retake possession of the Equipment and for this purpose may enter the Site or any premises at which the Equipment is located.
- 49.2 all Hire Schedules with the Customer shall automatically terminate; and
- 49.3 without prejudice to any other rights or remedies of Barloworld, the Customer shall pay to Barloworld on demand:
- (a) all Rental and other sums due but unpaid at the date of such demand together with any interest accrued pursuant to clause 10.1;
  - (b) any costs and expenses incurred by Barloworld in recovering the Equipment and/or in collecting any sums due under the Contract (including any storage, insurance, repair, transport, legal and remarketing costs).

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

#### **50. PROVISION OF SERVICE**

The Customer requests Services and Barloworld agrees to render the Services on the terms and conditions specified in the Contract.

#### **51. QUOTATIONS**

- 51.1 Upon request, Barloworld will prepare a quotation for the Customer in respect of any required Services which will remain valid for the period stated in the quotation, which period shall not exceed 30 (thirty) calendar days from the date of issue. The quotation shall set out an estimate of the fee payable for the Services and will not be binding on Barloworld until accepted in terms of clause 2.2(c).

- 51.2 If Barloworld deems it necessary to strip and/or dismantle the equipment in respect of which Services are to be performed (the **"Goods"**) in order to prepare a quotation for the Customer:
- (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 Goods, which fee is determined in accordance with Barloworld's usual rates for such Services on the date on which the Goods are dismantled;
  - (c) if the Customer does not accept Barloworld's quotation, Barloworld is not obliged to assemble the Goods and, if the Goods have been dismantled at Barloworld's Premises, the Customer must promptly, but by no later than 7 (seven) days after notice from Barloworld, remove the Goods from Barloworld's Premises in their dismantled condition. Any Goods left on Barloworld's Premises shall be at the Customer's own risk and Barloworld reserves the right to charge storage costs and other holding costs incurred by Barloworld to the Customer commencing on the first day following the expiry of the 7 (seven) day period referred to above (whether or not the Goods have been dismantled).

## 52. FEE

- 52.1 The fee for performing the Services (the **"Fee"**) is the fee as set out in Acceptance, and any amounts set out in clause 52.2. If the Fee does not appear in either the quotation or, as the case may be, the Acceptance, then the Fee shall be calculated by applying Barloworld's standard rate and/or charge for the Services applicable as at the date on which the Services are performed, plus Barloworld's standard price for any parts supplied in the course of providing the Services (the **"Parts"**).
- 52.2 Notwithstanding anything to the contrary contained in the Contract, the Fee does not include, and Barloworld shall be entitled to be reimbursed by the Customer for, the following:
- (a) any cost incurred by Barloworld arising from a change to the service requirements;
  - (b) any escalations or increases by third party suppliers, including without limitation, the OEM
  - (c) any cost incurred by Barloworld as a result of a change in applicable law after the date of quotation or Commencement Date, whichever is the earlier (comprising (i) the enactment of any new law, (ii) the modification or repeal of any law, (iii) the commencement of any law which was not in full force and effect at the Commencement Date (except to the extent that such law was enacted prior to the Commencement Date with an intended start date after the Commencement Date and such law takes effect without material amendment) and/or (iv) a change in the interpretation or application of a law by judicial or other authority having the authority to interpret or apply such law);
  - (d) all taxes, levies, duties (including import and customs duties) royalties, penalties, charges, fines, interest, withholding taxes and imposts, or any similar charges, duties, penalties or levies which may be imposed on Barloworld as a result of the Contract (other than those which are expressly Barloworld's responsibility in accordance with the relevant delivery terms);
  - (e) any cost arising as a result of any variation to an Acceptance;
  - (f) any cost incurred by Barloworld as a result of any delay caused by any third party contracted by the Customer to provide any service and/or goods which may have an impact upon the Services by Barloworld;
  - (g) any cost incurred by Barloworld as a result of improper or defective performance by the third party referred to above; and/or
  - (h) any costs incurred by Barloworld as a result of the happening of an event for which Barloworld is not liable.
- 52.3 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 quotation or the Acceptance, then 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 an additional fee therefore, calculated by applying Barloworld's current standard rates and/or charges for such Services, which shall be made available to the Customer on request.

## 53. PAYMENT

- 53.1 The Customer shall pay to Barloworld the Fee set out in the invoice within 30 (thirty) days from date of statement or where the Customer does not have a Trading Account on presentation of Barloworld's invoice following the provision of the Services.
- 53.2 Performance of the Services in phases will be invoiced separately and must be paid for separately.

## 54. LIEN

- 54.1 Barloworld shall, in addition to any other right or remedy it may have in law, have a lien and power of sale over the Goods and all other property of the Customer at Barloworld's Premises for the Fees and all other costs and expenses charged under or in connection with the Contract.

- 54.2 If any such sums remain unpaid (in full or part) more than 3 (three) months after it becomes due, then Barloworld shall, without prejudice to any other right which it has in terms hereof or at law, be entitled and is irrevocably authorised *in rem suam*:
- (a) to hold the Goods as security for the payment of all amounts owing by the Customer to Barloworld and to retain such possession for so long as Barloworld may deem fit;
  - (b) to dispose of the Goods or any of them by private treaty (at a fair price) or public auction or by any other form of disposal in Barloworld's sole discretion and on such terms and conditions as Barloworld in its sole discretion may deem fit and to convey good valid and free title to the purchaser or transferee thereof; and
  - (c) to apply the full proceeds received from any realisation of the Goods in payment or reduction of the Customer's indebtedness to it in respect of the Contract, and to defray out of the proceeds of any such realisation all expenses and costs incurred in or arising out of the realisation, provided that after the payment of all costs and expenses in connection with any such realisation and all amounts due to Barloworld, any balance of the proceeds of any such sale shall be paid to the Customer;
  - (d) to apply for provisional sentence and to execute upon all or any of the Goods; or
  - (e) to employ such other remedies and to take such other steps against the Customer as are allowed in law.
- 54.3 For the purpose of enforcing clause 54.2, Barloworld shall be entitled to exercise the following rights either in its own name or in the name of the Customer, as it may elect:
- (a) to make, sign and execute all such deeds, documents, instruments, notices or other writings as shall or may be required;
  - (b) to give and grant good, valid and effectual receipts and discharges for all and any moneys or other receipts received or recovered by it in respect of the Goods; and
  - (c) generally to exercise all or any rights in respect of the Goods in such manner and to such extent as it considers necessary or expedient.
- 54.4 The Customer hereby authorises Barloworld, including any officer or manager of Barloworld nominated by Barloworld for this purpose, irrevocably and in *rem suam*, to exercise any of its rights in terms of clause 54.2 or 54.3 above in the name and on behalf of the Customer, should Barloworld so require.
- 54.5 **The Customer hereby indemnifies and holds the Indemnified Parties harmless against all and any Claims of whatsoever nature which may be made by any person against the Indemnified Parties arising out of or in connection with any exercise of its rights in terms of this clause.**

## 55. PERFORMANCE OF THE SERVICES

- 55.1 Barloworld shall carry out the Services within a reasonable time after issuing the Acceptance.
- 55.2 Barloworld shall notify the Customer of the date on which it will commence the Services and the anticipated completion thereof. Barloworld shall use all reasonable endeavours to meet any performance dates for the Services specified in the Acceptance, but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.
- 55.3 The Services will be provided at the address specified in the Acceptance and if no address is specified, at Barloworld's Premises.
- 55.4 If the Services will be provided at Barloworld's Premises, then the Customer shall, at the Customer's cost:
- (a) deliver the Goods, unloaded at the place designated by Barloworld at Barloworld's Premises by not later than 16:00 on the date requested by Barloworld;
  - (b) continue to bear all risk of loss of, or damage to, or caused by, the Goods whilst they are at Barloworld's Premises;
  - (c) promptly on the completion of the Services, collect the Goods from Barloworld's Premises and if the Customer fails to do so, then the Customer shall pay to Barloworld, on demand, any costs incurred by Barloworld arising from or in connection with that delay (including any storage, holding, carriage and insurance costs) and the provisions of clause 54 shall apply *mutatis mutandis*;
  - (d) be responsible for loading and securing the Goods on its carrier's vehicle for transportation from Barloworld's Premises.
- 55.5 Where the Services are provided anywhere other than Barloworld's Premises, then the Customer must:
- (a) ensure that the Goods are 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.

- 55.6 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 it, all materials, supplies or Parts required for, or in connection with, the Services;
  - (b) the timeous receipt by Barloworld of any Instructions.
- 55.7 Upon completion of the Services, the Customer shall conduct an inspection on the Goods to ensure that the Services have been correctly carried out.
- 55.8 Barloworld's standard service warranty shall apply to any Services provided in terms of the Contract.

## 56. CUSTOMER'S OBLIGATIONS

- 56.1 The Customer shall:
- (a) ensure that the terms of the Purchase Order and (if submitted by the Customer) the Specification are complete and accurate;
  - (b) co-operate with Barloworld in all matters relating to the Services;
  - (c) provide Barloworld, its employees, agents, consultants and subcontractors, with access to the Customer's premises, office accommodation and other facilities as reasonably required by Barloworld to provide the Services;
  - (d) provide Barloworld with such information and materials as Barloworld may reasonably require to supply the Services, and ensure that such information is accurate in all material respects;
  - (e) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start.
- 56.2 If Barloworld's performance of any of its obligations in respect of the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation ("**Customer Default**"), then:
- (a) Barloworld shall, without limiting its other rights or remedies, have the right to suspend its performance of the Services until the Customer remedies the Customer Default, and shall be entitled to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays Barloworld's performance of any of its obligations;
  - (b) Barloworld shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from Barloworld's failure or delay to perform any of its obligations as set out in this clause 56.2; and
  - (c) the Customer shall reimburse Barloworld on written demand for any costs or losses sustained or incurred by Barloworld arising directly or indirectly from the Customer Default.

## 57. Excess Material

Where any components, parts and/or materials ("**Material**") required to perform the Services have been ordered by Barloworld in accordance with the Acceptance for the purposes of providing the Services, then should the Material no longer be required for the Services as a result of the termination of the Contract or change in the Customer's requirements, and Barloworld has no other reasonable use for such Material, Barloworld shall provide such Material to the Customer, and the Customer shall reimburse Barloworld for the cost thereof.

## E. SPECIFIC TERMS APPLYING TO TECHNOLOGY ENABLED SOLUTIONS

### 58. DEFINITION OF TES

"**TES**" refers to solutions, including consultative services, for Equipment and/or Goods management, productivity and/or safety and/or sustainability improvement, enabled by:

- (a) a Telemetry Device fitted to the Equipment and/or Goods which transmits Telematics Information from the Equipment and/or Goods to Barloworld and/or the relevant OEM; and/or
- (b) other hardware, a website, database, application program and/or software which collates, displays, relays, summarizes, reports on and/or in any way processes Telematics Information and/or other information relating to the status, condition, performance, productivity, safety, sustainability and/or history of Equipment and/or Goods and/or the job Site and/or the operator and/or the sampling and analysis of fluids.

**59. SALE OF EQUIPMENT MANAGEMENT TES**

The Customer requests the TES and Barloworld agrees to provide the TES on the terms and conditions specified in the Contract.

**60. OWNERSHIP**

Notwithstanding delivery and installation of any Telemetry Device, the Customer does not acquire ownership of, or any other right in and to the Telemetry Device, until Barloworld has received the full Price for the sale and installation of the Telemetry Device, together with any other amount (including Tax) which is payable to Barloworld for, or in connection with, that Equipment.

**61. RISK**

All risk of loss of, damage to, or caused by, the Telemetry Device, including without limitation the SIM Card shall pass to the Customer on delivery and installation on the Goods and/or Equipment.

**62. FEE**

62.1 The fee for performing the TES (the “**Fee**”) is the fee as set out in the Acceptance, and any amounts set out in clause 62.5. The Fee may include:

- (a) the purchase price for the sale and installation of the Telemetry Device; and/or
- (b) a monthly or annual subscription payable for the activation of the Telemetry Device and transmission of Telematics Information.

62.2 The Fee is subject to fluctuations in Barloworld’s list price for the TES from time to time. Barloworld shall notify the Customer in writing of such fluctuation at least 30 (thirty) days prior to effecting such fluctuation to the Fee and unless the Customer informs Barloworld in writing, within that 30 (thirty) day period, that it objects the change, the Customer shall be deemed to have assented to such change in Fee.

62.3 If, within the 30 (thirty) day period referred to in clause 62.2 above, the Customer objects to the fluctuation, Barloworld shall be entitled to terminate the Contract immediately on written notice to the Customer.

62.4 Following the adjustment of the Fee as set out in clause 62.2; Barloworld shall confirm and notify the Customer of the new Fee payable.

62.5 Notwithstanding anything to the contrary contained in the Contract, the Fee does not include, and Barloworld shall be entitled to be reimbursed by the Customer for, the following:

- (a) any cost incurred by Barloworld arising from a change to the TES requirements;
- (b) any cost incurred by Barloworld as a result of escalation or increases by third party suppliers, including without limitation, the OEM;
- (c) any cost incurred by Barloworld as a result of a change in applicable law after the date of quotation or Commencement Date, whichever is the earlier (comprising (i) the enactment of any new law, (ii) the modification or repeal of any law, (iii) the commencement of any law which was not in full force and effect at the Commencement Date (except to the extent that such law was enacted prior to the Commencement Date with an intended start date after the Commencement Date and such law takes effect without material amendment) and/or (iv) a change in the interpretation or application of a law by judicial or other authority having the authority to interpret or apply such law);
- (d) all taxes, levies, duties (including import and customs duties) royalties, penalties, charges, fines, interest, withholding taxes and imposts, or any similar charges, duties, penalties or levies (other than those which are expressly Barloworld’s responsibility in accordance with the relevant delivery terms);
- (e) any cost arising as a result of any variation to an Acceptance;
- (f) any cost incurred by Barloworld as a result of any delay caused by any third party contracted by the Customer to provide any service and/or goods which may have an impact upon the TES by Barloworld;
- (g) any cost incurred by Barloworld as a result of improper or defective performance by the above third party; and/or
- (h) any costs incurred by Barloworld as a result of the happening of an event for which Barloworld is not liable.

62.6 If a member, director, officer, employee, contractor and/or agent of the Customer consents in writing to any additional TES which are not recorded in the quotation or Acceptance, then that person is deemed to be authorised to agree to the performance of such additional TES and the Fee is deemed to be adjusted to include an additional fee therefore, calculated as set out in clause 62.5.

**63. PAYMENT**

63.1 Barloworld shall issue an invoice to the Customer in respect of the Fee. Such invoice will be paid by the Customer:

- (a) where the Customer has a Trading Account with Barloworld, within 30 (thirty) days from date of statement; or



- (b) where the Customer does not have a Trading Account on presentation of Barloworld's invoice in advance of the performance of any TES; or
  - (c) as otherwise agreed to with the Customer in writing.
- 63.2 Unless expressly agreed otherwise, all invoices shall be made payable in the currency set out in the invoice.

#### **64. ACCESS**

- 64.1 The Customer will be given access to the relevant TES website, database, application program and/or software ("TES Software") subject to:
- (a) prior approval by Barloworld;
  - (b) the Customer having a signed and valid license agreement authorising the Customer to use the TES Software; and
  - (c) the Customer's website subscription being activated.
- 64.2 A breach by the Customer of any of the terms and conditions of the above-mentioned licenses or agreements and/or the failure to maintain the required Approval and/or licenses shall be considered as a material breach of the Contract.

#### **65. THE CUSTOMER'S OBLIGATIONS**

- 65.1 The Customer shall maintain and keep in good working order all hardware/software and other devices required by the Customer to ensure the uninterrupted transmission of Telematics Information.
- 65.2 The Customer shall notify Barloworld of its intention to sell the Equipment and/or Goods on which the Telemetry Device is installed at least 4 weeks before the sale is effected and request Barloworld to deactivate the Telemetry Device. In the event that the Customer fails to notify Barloworld of the sale of the Equipment and/or Goods, the Customer shall remain liable for the Fee arising from providing the TES even though the Equipment and/or Goods are no longer in the Customers' possession or ownership.

#### **66. BARLOWORLD'S SERVICE OBLIGATIONS**

- 66.1 The Telemetry Device provides the Customer and Barloworld with remote access to the Telematics Information otherwise available only on the Equipment and/or Goods. Barloworld relies upon the accuracy of the Telematics' Information delivered in order to provide the TES and accepts no liability whatsoever and howsoever arising for any incorrect, lost, corrupted or undelivered data or Telematics Information.
- 66.2 TES Services which rely on Telematics Information can only be provided while the Equipment and/or Goods are located where there is good, clear and adequate GPS, GSM and UMTS (2G and 3G) network coverage or radio frequency network coverage, depending upon which kind of network coverage the Telemetry Device requires to operate.
- 66.3 Telemetry Devices are not provided with an intention to locate lost or stolen Equipment and/or Goods and Barloworld accepts no obligations or liability arising as a result of not being able to locate lost and/or stolen Equipment and/or Goods.
- 66.4 Notwithstanding anything to the contrary contained herein, Barloworld may, without incurring any liability towards the Customer, at any time and from time to time, interrupt or suspend the TES in whole or in part if:
- (a) a technical failure affects the provision of the TES, including any unavailability, interruption or suspension of any radio or communications networks or services utilised by the Telemetry Device or Barloworld to provide any of the TES or on which Barloworld is reliant;
  - (b) the provider of any of the radio or communications networks or services, in the Country, used by Barloworld to provide any TES, or on which Barloworld is reliant, ceases to make such networks or services available or ceases to trade;
  - (c) any of the Approvals as set out in clause 12 above is withdrawn, becomes invalid, is no longer available, or is in any way amended.