



Standard Terms & Conditions for Manufacturing Agreement

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Compiled By: FH Marais

Authorised By:
Phillip Sanderson
General Manager

Standard Terms and Conditions for Manufacturing Agreement

1 INTERPRETATION

1.1 In this Agreement, unless inconsistent with or otherwise indicated by the context –

1.1.1 **"Agent"** means the Customer's agent and or representative identified by the Customer as the person or entity who shall deal with the implementation and operational matters relating to the provisions of this Agreement on the Customer's behalf;

1.1.2 **"the/this Agreement"** means the agreement as contained in these Standard Terms and Conditions;

1.1.3 **"Customer"** means the person, entity, partnership, firm, association or trust purchasing the Products from the Manufacturer;

1.1.4 **"Manufacturer"** means GVTEC (Pty) Ltd;

1.1.5 **"the Parties"** means the Customer and the Manufacturer;

1.1.6 **"the Products"** means the products sold by the Manufacturer to the Customer as more specifically referred to in the Quote;

1.1.7 **"Product and Technical Specifications"** means the product specifications and technical specifications relating to the manufacture of the Products;

1.1.8 **"Quote"** means the written quotation prepared by the Manufacturer, setting out, *inter alia*, the description of the product(s), quantity and price;

1.1.9 **"VAT"** means Value-Added Tax, payable in terms of the VAT Act;

1.1.10 **"VAT Act"** means the Value-Added Tax, No. 89 of 1991, as amended;

1.1.11 **"Writing"** means (or words with a similar meaning) legible writing and in English and includes electronic mail messages as defined in the Electronic Communications and Transactions Act, No. 25 of 2002;

1.2 The rule of construction that the contract shall be interpreted against the Party responsible for the drafting or preparation of this Agreement, shall not apply.

1.3 This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa.

2 QUOTATION

2.1 The Parties agree and record that -

2.1.1 the Quote constitutes the Manufacturer's offer to manufacture the Products on behalf of the Customer subject to the terms of this Agreement; and

2.1.2 the Customer's signature of the Quote constitutes the Customer's acceptance of the Manufacturer's offer referred to in clause 2.1 and acceptance of the terms of this Agreement.

2.2 In the event that the Customer requests the Manufacturer to perform services not contemplated in the Quote, including but not limited to alterations to the Products (**"Additional Services"**), and the Manufacturer agrees to perform the Additional Services –

2.2.1 the terms of this Agreement shall apply to the provision of the Additional Services; and

2.2.2 the Customer shall be liable to pay to the Manufacturer, in addition to the purchase price of the Products in accordance with the Quote, its normal rate for the provision of the Additional Services, unless otherwise agreed to in Writing.

2.3 The terms and conditions of this Agreement shall be deemed to have been incorporated in the Quote regardless of whether specific reference is made to this Agreement in the Quote. In the event of a conflict between –

2.3.1 the terms and conditions of this Agreement and those that may be contained in the Quote, the provisions of the Quote shall prevail; or

2.3.2 the terms and conditions of this Agreement and those that may be contained in any of the Customer or Agent's documentation, the provisions of this Agreement shall prevail, unless the Manufacturer approves the terms contained in the said documentation in Writing; or

2.3.3 the terms and conditions of the Quote and those that may be contained in any of the Customer or Agent's documentation, the provisions of the Quote shall prevail, unless the Manufacturer approves the terms contained in the said documentation in Writing.

3 PRICE AND PAYMENT

3.1 The purchase price payable by the Customer to the Manufacturer shall be in accordance with the pricing stipulated in the Quote and shall exclude VAT, subject to an adjustment stipulated in clause 3.2 below.

3.2 It is recorded that the price of the Products has been calculated by using the cost as at the date on which the Quote is sent to the Customer of the components required for the manufacture of the Products and the manufacturing costs of the Product. The purchase price of the Products shall be increased with reference to -

3.2.1 any increase in the cost to the Manufacturer which is due to any factor beyond the Manufacturer's control;

3.2.2 any change in the delivery date, quantity and/or specifications of the Products required by the Customer and/or Agent; and

3.2.3 any delays caused by the Customer and/or the Agent in respect of the completion of the Products.

3.3 Payment of the purchase price referred to in clause 3.1 above shall be paid by the Customer –

3.3.1 in South African Rands;

3.3.2 into a bank account nominated by the Manufacturer from time to time;

3.3.3 without deduction or set-off of any nature whatsoever; and

3.3.4 as provided for in the Quote. The following references in the Quote shall be deemed to have the following meanings -

3.3.4.1 “*deposit*” – the stipulated amount shall be paid within 7 days of receipt of the “*deposit invoice*”; and

3.3.4.2 “*deposit invoice*” - the invoice issued by the Manufacturer to the Customer in respect of the “*deposit*” defined in clause 3.3.4.1; and

3.3.4.3 “*final payment*” – the stipulated amount shall be paid against delivery of the Products as referred to in clause 5.1 below.

3.4 If no reference is made in the Quote to the manner in which the purchase price of the Products is to be paid, the Parties agree that same shall be paid as follows –

3.4.1 50% thereof as deposit within 7 days of receipt of “*deposit invoice*”; and

3.4.2 the balance thereof against delivery of the Products as referred to in clause 5.1 below.

3.5 Any payments by the Customer in terms of this Agreement shall only be deemed to have been made once the Manufacturer has unrestricted and irrevocable access to the funds so paid.

4 CERTIFICATE OF INDEBTEDNESS

A certificate under the hand of any director or manager of the Manufacturer as to the existence and the amount of the Customer's indebtedness to the Manufacturer at any time, as to the fact that such amount is due and payable and as to any other fact, matter or thing relating to the Customer's indebtedness to the Manufacturer, shall be sufficient and satisfactory proof of the contents and the correctness thereof and of the amount of the Customer's indebtedness for the purpose of any arbitration proceedings, provisional sentence or summary judgment or any other proceedings of whatsoever nature against the Customer in any competent court, and shall be valid as a liquid document for such purpose. It shall not be necessary to prove the appointment of the person signing such certificate and such certificate shall be binding on the Customer.

5 DELIVERY

5.1 The Customer shall take delivery of Products in accordance with the Ex-Works Incoterm, the Incoterms 2010 being incorporated herein by way of reference.

5.2 The Manufacturer shall deliver the Products on the delivery date/s stipulated in the Quote, subject to the following conditions –

5.2.1 if there are delays in the manufacture of the Products through no fault of the Manufacturer (including but not limited to delays caused by earthquakes, lightning, storms, hurricanes, fire, an order of Government or any public or local authority, strikes by employees or if such failure, in the Manufacturer's opinion, is due to any cause beyond the Manufacturer's control or to the failure of the Customer to pay for Products supplied or to other conduct of the Customer or Agent which in the Manufacturer's opinion constitutes improper practice), the Manufacturer shall be entitled to adjust the delivery dates to delayed dates by providing the Customer or Agent with Written confirmation of the anticipated delivery dates;

5.2.2 the materials and labour required by the Manufacturer to manufacture the Products being available to the Manufacturer;

5.2.3 time shall not be of the essence and the aforesaid delivery dates shall be deemed approximate;

5.2.4 failure by the Manufacturer for any reason whatsoever to deliver the Products to the Customer on the aforesaid delivery date/s shall not constitute a breach of this Agreement by the Manufacturer; and

5.2.5 the Manufacturer shall not be liable for any direct or indirect damages suffered by the Customer as a result of the Manufacturer's failure to deliver the Products to the Customer on the aforesaid delivery dates.

5.3 The Manufacturer shall, however, endeavour to complete the Products on the delivery date/s referred to in clause 5.2 above.

5.4 Ownership in the Products delivered to the Customer in accordance with this clause 5 shall pass to the Customer only when all amounts due by the Customer to the Manufacturer have been paid, notwithstanding delivery of the said goods to the Customer. Until such time as all amounts due by the Customer in terms of the Quote and this Agreement have been settled in full, the Customer shall –

5.4.1 store the Products separately from any other goods situated at the place of storage in a manner in which makes the Products identifiable to the Manufacturer;

5.4.2 not alter, modify or make any additions to the Products (including but not limited to making any markings on the Products);

5.4.3 maintain the Products in a good order and condition; and

5.4.4 notify its landlord in Writing that the Products belong to the Manufacturer until paid for in full, and furnish the Manufacturer with a copy of such notice and proof that it has been received by the Customer's landlord.

5.5 In the event that delivery of the Products takes place at the Customer's premises or another location nominated by the Customer and/or the Agent, notwithstanding clause 5.1 above, the Manufacturer's certificate of installation signed by the Customer (or its representative or employee) or Agent shall be deemed to be correct in all respects and shall be *prima facie* proof of delivery of the Products to the Customer provided that in the event that the Manufacturer is for any reason whatsoever unable to attend to the installation of the Products, through no fault of the Manufacturer, delivery shall be deemed to occur on the date/s on

which the Products have been delivered to the premises nominated by Customer or Agent.

5.6 Risk in the Products shall pass to the Customer against delivery as contemplated in clauses 5.1 or 5.5, as the case may be.

5.7 The Customer shall within 7 (seven) days from the date on which the Manufacturer notifies the Customer or the Agent that the Products are available for collection take delivery of the Products. If the Customer fails to take delivery of the Products in accordance with this clause 5.7 then in any such event the Manufacturer shall be entitled to, but not obliged, arrange for the storage of the Products and the Customer shall be liable to pay to the Manufacturer on demand –

5.7.1 the storage cost incurred by the Manufacturer; or

5.7.2 if stored on the Manufacturer's premises, the reasonable costs of such storage; and

5.7.3 the cost of insuring the Products,

from the expiry of the aforesaid 7 (seven) day period to the date on which the Customer takes delivery of the Products as contemplated in this clause 5.

5.8 If the Customer does not collect the Product within 90 (ninety) days from the date on which the Manufacturer notifies the Customer or the Agent that the Products are available for collection, as contemplated in clause 5.7 above, then the Manufacturer shall be entitled to sell the Products and use the proceeds of such sale to settle -

5.8.1 all amounts due by the Customer in terms of this Agreement; and

5.8.2 any costs incurred by the Customer directly or indirectly in connection with the sale of the Products.

5.9 Notwithstanding any clause to the contrary contained in this Agreement and/or the Quote, the Parties agree and the Customer and Agent specifically acknowledge that the Manufacturer shall not be liable to prepare the Customer's premises, installation site and/or buildings to enable installation of the Products by the Manufacturer and to ensure that the Products will perform as intended. Without limiting the generality of the foregoing, the Manufacturer will not be liable for the costs and expenses related to lifting the roofs of any of the Customer's buildings to enable the Products to be placed within such buildings.

6 DEFECTS

6.1 If the Customer discovers a manufacturing defect in any one or more of the Products, the provisions of 6.3 below shall apply.

6.2 For the purposes of this clause 6, "**Manufacturing Defect**" means a defect in the Products which arises as a result of failure by the Manufacturer during the manufacturing process and specifically excludes any defect that arises as a result of -

6.2.1 the information contained in the Product and Technical Specifications provided to the Manufacturer by the Customer or the Agent, notwithstanding the Manufacturer's approval thereof in terms of this Agreement; and/or

6.2.2 any information furnished to the Manufacturer by the Customer or the Agent, whether Written or otherwise and relied on by the Manufacturer for purposes of manufacturing the Products.

6.3 If 6.1 becomes applicable, the Customer shall, within 90 (ninety) days from the date on which the Products are put into service by the Customer, deliver a Written notice ("**Defect Notice**") to that effect to the Manufacturer in which –

6.3.1 the nature of the defect and the number of items affected is clearly stipulated; and

6.3.2 the Manufacturer is invited to inspect the relevant items within a reasonable period.

6.4 If the Manufacturing Defect is of such a nature that it can be repaired, the Customer shall allow the Manufacturer 14 (fourteen) business days after delivery of the Defect Notice to repair the defect at its own cost.

6.5 If the Manufacturing Defect is of such a nature that it cannot reasonably be repaired or the Manufacturer fails to remedy the defect within the period stipulated in 6.4 above, then the Manufacturer shall be entitled in its sole and absolute discretion to either –

6.5.1 refund the Customer the amount paid in terms of this Agreement for the Product in question and take possession of that Product; or

6.5.2 replace the Product in question.

7 OWNERSHIP OF INTELLECTUAL PROPERTY

7.1 The Customer acknowledges the Manufacturer's right, title and interest in the Product and Technical Specifications which have been prepared by the Manufacturer.

7.2 Upon termination of this Agreement the Customer shall and shall take all such steps to ensure that the Agent shall –

7.2.1 immediately cease to use the Product and Technical Specifications referred to in clause 7.1; and

7.2.2 immediately return to the Manufacturer all plans, examples, designs, drawings and descriptions of any nature that was made available by the Manufacturer to the Customer and/or the Agent.

7.3 Without limitation of any of the aforementioned provisions, the Customer undertakes to take all such steps to protect the rights of the Manufacturer with regard to the Product and Technical Specifications referred to in clause 7.1.

8 LIMITATION OF LIABILITY

Notwithstanding any provision to the contrary contained in this Agreement, the Manufacturer shall not be liable for any loss or damage (whether direct or indirect) suffered by the Customer and/or the Agent directly or indirectly as a result of the transaction contained in this Agreement, unless such loss is caused by fraud on the part of the Manufacturer, and if held to be liable to the Customer for any amount whatsoever, the Manufacturer's total liability to the Customer for such loss shall not exceed the purchase price actually paid by the Customer for the Products.

9 FORCE MAJEURE

9.1 A Party shall not be liable for any failure to fulfil its duties and obligations in terms of this Agreement to the extent that such failure is caused by any event, occurrence, circumstance or condition (whether foreseen or unforeseen) beyond the reasonable control of such Party and which, despite the exercise of reasonably diligent efforts could not have been prevented, limited or minimised, that affects the powers, rights, duties or obligations of that Party under this Agreement including but not limited to -

9.1.1 a landslide, lightning, earthquake, tornado, floods, drought or other Acts of God;

9.1.2 the acts of civil or military authority, the acts of a public enemy, war, blockade, sabotage, fire, explosion, bombing, insurrection, riot, civil disturbance or any major power failure;

9.1.3 material adverse governmental action;

9.1.4 unlawful industrial action; and

9.1.5 consumer boycotts resulting from the performance of any powers, rights, duties or obligations in terms of this Agreement;

9.1.6 which materially delays or prevents the performance of any of such Party's duties and obligations in terms of this Agreement.

9.2 If a Party is affected by an event, occurrence, circumstance or condition referred to in clause 9.1 above, that Party shall promptly notify the other in writing of the event, occurrence, circumstance or condition and the estimated extent and duration of that Party's inability to perform its duties and obligations.

9.3 Upon the cessation of the event, occurrence, circumstance or condition referred to in clause 9.1 above, the Party shall notify the other Party of such cessation.

9.4 If, as a result of the event, occurrence, circumstance or condition referred to in clause 9.1 above, the performance of the relevant Party's duties and obligations is only partially affected, that Party shall remain liable for the performance of those duties and obligations not affected by the event, occurrence, circumstance or condition.

9.5 If any force majeure event contemplated in this 9 continues for an uninterrupted period of 30 (thirty) days, either Party may cancel this Agreement with immediate effect by delivering a written notice to that effect to the other of them.

10 WARRANTIES & INDEMNITY

10.1 The Customer hereby warrants to and in favour of the Manufacturer that –

10.1.1 the Agent is duly authorised to deal with the implementation and operational matters relating to the provisions of this Agreement on the Customer's behalf;

10.1.2 the Manufacturer's use of and reliance on the Product and Technical Specifications which have been furnished to the Manufacturer by the Customer and/or the Agent shall not cause the Manufacturer to infringe any third party's patent, copyright design, trade mark or other intellectual property rights; and

10.1.3 the Product and Technical Specifications which have been furnished to the Manufacturer by the Customer and/or the Agent are complete in every respect so as to enable the Manufacturer to manufacture the Products in compliance with performance, durability, health, safety and labelling requirements, as determined by law and/or the Customer and/or the Agent.

10.2 The Customer hereby indemnifies the Manufacturer against, and holds it harmless against, any claim, liability, cost or expense, of whatsoever nature (including but not limited to legal costs as between attorney and own client) made by a third party against the Manufacturer or its associated entities arising directly or indirectly from –

10.2.1 a breach by the Customer of any warranties contained in this clause 10.1; or

10.2.2 the Customer's possession of the Products.

11 GUARANTEE

11.1 In lieu of any guarantee/warranty implied by the law, the Manufacturer hereby expressly guarantee to repair or supply new, any part within a period not exceeding two consecutive years from the date of delivery (whether the equipment has been utilized or not), which may prove defective through bad workmanship; but all goods are supplied on the condition that the Manufacturer shall not be liable for any losses incurred through stoppages, nor for any direct or consequential losses or damages.

11.2 Goods supplied by the client are accepted in good faith and the Manufacturer shall not be held liable for any damages or losses due to the malfunctioning of these goods.

12 TERMINATION

12.1 If-

12.1.1 the Customer fails to pay any amount which it may owe to the Manufacturer on due date; or

12.1.2 the Customer breaches any of the terms and conditions of this Agreement, all of which are deemed to be material, and fails to remedy that breach within 7 (seven) days after receipt of Written notice calling upon it to do so; or

12.1.3 the Customer is provisionally or finally wound up, sequestered or placed in business rescue; or

12.1.4 a meeting of the Customer's shareholders, members or trustees is convened for the purpose of voluntarily winding up the Customer or placing the Customer in business rescue, or a resolution to that effect is passed; or

12.1.5 the Customer enters into any compromise, composition or arrangement with any one or more of its creditors; or

12.1.6 the Customer's goods are attached in pursuance of a judgment and immediate steps to the satisfaction of the Manufacturer are not taken to secure the release of those goods; or

12.1.7 a judgment is given against the Customer which is not paid or secured within 14 (fourteen) days or against which an appeal or

- application for rescission is not noted or made within that period (provided that such appeal or application is properly pursued); or
- 12.1.8 the Customer purports to cede, assign, make over or encumber its rights or delegate its obligations in terms of this Agreement without the prior Written consent of the Manufacturer; or
- 12.1.9 the Customer ceases trading altogether or alternatively, materially scales down its trading operations, for a period exceeding 30 (thirty) days;
- then and in any of such events –
- 12.2 the balance of the purchase price not yet paid by the Customer at the date thereof, shall become immediately due and payable;
- 12.3 the Manufacturer shall be entitled to retain as liquidated damages any amounts paid by the Customer to the Manufacturer in terms of this Agreement;
- 12.4 the Manufacturer shall, without prejudice to its rights to claim damages or to any other remedy of whatsoever nature that it may have against the Customer, become entitled to immediately terminate this Agreement without notice to the Customer; and
- 12.5 if in any legal proceedings or arbitration relating to the enforcement by either Party of its rights in terms of this Agreement, a Court or arbitrator awards costs to the Manufacturer, such costs shall be determined and recoverable on the scale as between an attorney and his own client and shall include collection charges, the costs incurred by the Manufacturer in endeavouring to enforce its rights prior to the institution of legal proceedings or arbitration and the costs incurred in connection with the satisfaction or enforcement of any award or judgment awarded in favour of the Manufacturer in relation to its rights in terms of or arising out of this Agreement.
- 13 DISPUTE RESOLUTION
- 13.1 In the event of any disagreement or claim (“**dispute**”) arising out of or relating to this Agreement, the senior executives of the Parties or their delegates designated in writing shall endeavour to settle the dispute through bona fide negotiations within 14 (fourteen) days of the dispute being referred to them by written notice from either Party.
- 13.2 Should the Parties be unable to settle the dispute by the means and within the timeframe stated above, either Party may demand that a dispute be determined in terms of this clause 13 by written notice given to the other Party in accordance with the Expedited Rules of the Arbitration Foundation of Southern Africa (“**AFSA**”) read with the Uniform Rules of Court made in terms of the Supreme Court Act No 59 of 1959 (“**the Supreme Court Act**”).
- 13.3 The Parties hereby consent to the arbitration being dealt with on an urgent basis in terms of the Expedited Rules of AFSA should either Party by written notice require the arbitration to be held on an urgent basis.
- 13.4 The arbitration shall be held –
- 13.4.1 at Cape Town;
- 13.4.2 with only the legal and other representatives of the Parties to the dispute present thereat;
- 13.4.3 mutatis mutandis in accordance with the provisions of the Supreme Court Act, the Uniform Rules and the practice of the Western Cape High Court, Cape Town; and
- 13.4.4 otherwise in terms of the Arbitration Act, No 42 of 1965 (“**Arbitration Act**”), unless otherwise provided for herein.
- 13.5 The arbitrator shall be a practising advocate of the Cape Bar of at least ten years’ standing, appointed by agreement between the parties to the dispute, subject to clause 13.6.
- 13.6 Should the Parties fail to agree on an arbitrator within 14 (fourteen) days after the giving of notice in terms of clause 13.2, the arbitrator shall be appointed by the Chairperson of the Cape Bar Council (or by AFSA if the Cape Bar Council no longer exists), at the request of either Party to the dispute.
- 13.7 The Parties hereby consent to the jurisdiction of the High Court of South Africa in respect of the proceedings referred to in clause 13.8.
- 13.8 The decision of the arbitrator shall be final and binding on the Parties to the dispute and may be made an order of the court referred to in clause 13.7 at the instance of any of the parties to the dispute.
- 13.9 In the event that a party to a dispute wishes to appeal the decision of the arbitrator, such party shall apply to the arbitrator for leave to appeal in accordance with the provisions of the Supreme Court Act, the Uniform Rules and the practice of the Western Cape High Court, Cape Town.
- 13.10 In the event that a party to the dispute is granted leave to appeal the decision of the arbitrator, such appeal shall be held –
- 13.10.1 before 3 (three) arbitrators appointed in accordance with 13.5 and 13.6; and
- 13.10.2 mutatis mutandis in accordance with the provisions of the Supreme Court Act, the Uniform Rules and the practice of the Western Cape High Court, Cape Town.
- 13.11 In the event that a party to the dispute is granted leave to appeal the decision of the arbitrator such party shall furnish security for the costs of the appeal in an amount of R250 000 (two hundred and fifty thousand Rand) within 10 (ten) days from the date on which leave to appeal is granted. Should the relevant party fail to furnish security to this effect the leave to appeal shall lapse and the prospective appellant will no longer be entitled to proceed with an appeal and the arbitrator’s decision shall be final and binding upon the Parties.
- 13.12 The Parties agree to keep the arbitration including the subject matter of the arbitration and the evidence heard during the arbitration confidential and not to disclose it to anyone except for purposes of obtaining an order as contemplated herein.
- 13.13 It is recorded that it is the intention of the Parties, that any dispute referred to arbitration in terms of clause 13.2 shall be resolved strictly in accordance with the provisions of this clause 13.2. The Parties accordingly agree and undertake as follows -

- 13.13.1 that it shall not make any application to Court as contemplated in terms of section 3(2) of the Arbitration Act;
- 13.13.2 that it shall not make any application to the arbitration tribunal as contemplated in terms of section 20(1); and
- 13.13.3 the periods set out in section 23 of the Arbitration Act shall not be applicable to any arbitration proceedings arising out of this Agreement.
- 13.14 For the avoidance of doubt, the provisions of this clause 13 are severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.

14 APPOINTMENT OF PROCESS AGENT

- 14.1 In the event that the Customer's registered address or principal place of business is outside of the Republic of South Africa, the Customer hereby, subject to clause 14.2 below, irrevocably appoints Boy Louw Inc Attorneys, with its offices situated at 188 Main Road, Paarl, South Africa, as its agent to accept and/or to receive for it and on its behalf service of process in the Republic of South Africa in any legal action or proceedings arising out of or in connection with this Agreement.
- 14.2 The Customer may appoint a substitute process agent, provided that such substitute process agent must be a South African firm of attorneys or accountants and must have a physical address in the Republic of South Africa, and such substitute appointment shall only be valid and effective once the Manufacturer receives due Written notice of such substitute appointment. Nothing in this Agreement shall limit the right to serve process in any other manner permitted by law.

15 GENERAL

- 15.1 No alteration, cancellation, variation of, or addition to this Agreement or the Quote shall be of any force or effect unless such alteration, cancellation, variation of, or addition is approved by the Manufacturer in Writing.
- 15.2 No indulgence, leniency or extension of time which any party may grant or show, shall in any way prejudice such party or preclude it from exercising any of its rights in the future.
- 15.3 The expiration, cancellation or other termination of this Agreement shall not affect those provisions of this Agreement which expressly provide that they will operate after such expiration, cancellation or other termination or which of necessity must continue to endure after such expiration, cancellation or other termination, notwithstanding that the relevant clause may not expressly provide for such continuation.
- 15.4 The Customer shall not cede or delegate its rights or obligations in terms of this Agreement without the prior Written consent of the Manufacturer, whose discretion in this regard shall be sole and absolute.