

IMS General Conditions of Service and Maintenance

IMS Messsysteme GmbH

1 Definition and Interpretation

- 1.1 In these Conditions, the following words and expression shall have the following meanings except where the context otherwise requires:

"Additional Charge" means a charge payable by the Customer for additional services outside the scope of the Services in accordance with IMS' prevailing rates for such services including without limitation, the supply of spare parts and goods.

"Agreement" means the Service & Maintenance Agreement (including its Schedules) for the Services entered into by IMS and the Customer, and includes these Conditions.

"Conditions" means these General Conditions of Service & Maintenance which are incorporated into and form part of the Agreement.

"Customer" means the person or persons, firm or company named on the cover page of the Agreement.

"Equipment" means the equipment listed in Schedule 1.

"Fee" means the fee payable for the Services as specified in Section II of the Agreement.

"Party" means the Customer or IMS, and "Parties" means both of them.

"Services" means the maintenance and other services provided in respect of the Equipment detailed in Schedule 2 and as defined in these Conditions.

"Service Time" means the period set out in Clause 2 herein.

"Site" means the premises where the Services are provided.

"IMS" means the IMS company named on the cover page of the Agreement including its successors, agents and assigns.

"Term" means the duration of the Agreement as set out in Section III of the Agreement.

- 1.2 Any reference in these Conditions to any provision of a statute and any regulations made in pursuance thereof as from time to time modified or re-enacted, whether before, on or after the date of the Agreement, so far as such modification or re-enactment applies or is capable of applying to any transaction entered into prior to completion of the Agreement (so far as liability thereunder may exist or can arise) shall be construed as a reference to that provision or regulation as amended, re-enacted or extended at the relevant time and shall include also any past statutory provision or regulation (as from time to time modified or re-enacted) which such provision or regulation has directly or indirectly replaced.

- 1.3 The headings in these Conditions are for convenience only and shall be ignored in construing these Conditions and shall not affect their interpretation.
- 1.4 Words (including words defined in the Agreement) importing the singular also include the plural and vice-versa where the context requires. The words "written" and "in writing" include any means of visible reproduction.
- 1.5 IMS shall provide the Services to Customer in accordance with this Agreement. In the event of any inconsistency between these Conditions and other documents forming part of the Agreement, the following order or priority shall apply:
 - 1.5.1 Any written agreement between the Parties where the Parties agree that any of the provisions in these Conditions should be superseded with an express reference to this Clause 1.5;
 - 1.5.2 IMS' quotation and documents (if any) incorporated by express reference to this Clause 1.5;
 - 1.5.3 This Agreement; and
 - 1.5.4 These Conditions.

2 Service Time

The Services shall be performed within the Service Time, which shall be between 7.00 a.m. and 5.00 p.m., Mondays to Fridays, Public Holidays excluded unless otherwise agreed in Schedule 2. Response times for corrective maintenance services shall be as set out in Schedule 2 or as otherwise agreed between the Parties.

3 Modification, Changes and Enhancements

- 3.1 During the Term, IMS shall at their discretion undertake such modifications, changes or enhancements to the Equipment and/or implement any practice, procedure or measure, which is deemed by IMS to be necessary and/or to prevent or minimise damage to the Equipment.
- 3.2 IMS will before undertaking any such modification, change or enhancement etc as mentioned in 3.1 above, explain to the Customer, if IMS deems necessary, the need and cost (where applicable) of such modification, change or enhancement. The Customer shall pay any Additional Charge for such modification, change or enhancement according to Clause 7.2.

4 Exclusions & Additional Services

4.1 The Services do not include:-

- a.) Repair of damage arising from the act, error, fault, neglect, misuse, improper operation or omission of the Customer or its servants, agents, contractors or invitees or any person whether or not that person is under the control or direction or authority of the Customer.
- b.) Repair of damage arising from changes, alterations, additions or modifications of the Equipment by a person other than IMS.
- c.) Repair of damage caused by incorrect power supply, failure of electrical power, air-conditioning, humidity control or any environmental factor.
- d.) Repair of damage caused by the operation of the Equipment other than in accordance with the specifications or otherwise than in accordance with the direction, instruction or recommendations of IMS or its personnel.
- e.) Repair of damage arising from the re-installation, moving or removing of the Equipment by a person other than IMS.
- f.) Repair of damage caused by any circumstances beyond IMS' reasonable control.
- g.) Furnishing or supplying maintenance of accessories, attachments, supplies, spare parts, consumables or items associated with the Equipment unless otherwise provided in Schedule 2.
- h.) Transportation charges, whether for air, sea or land transport for Services carried on within or outside Heiligenhaus.
- i.) Work performed outside IMS' Service Time.
- j.) The cost of any Equipment or part whether spare part, consumable or otherwise supplied, unless otherwise provided in Schedule 2.
- k.) The upgrading of or retrofitting of improvements or major modification to the Equipment.

4.2 IMS may at the Customer's option provide any of the services referred to in clause 4.1 or any other services requested by the Customer, at the relevant Additional Charge. IMS shall inform the Customer of the associated Additional Charge, and the Customer shall accept the Additional Charge in writing before the services are performed. The Additional Charge shall be payable by the Customer according to clause 7.2.

5 Customer's Responsibilities

- 5.1 The Customer shall undertake to release all Equipment which is being maintained by IMS from all operational demands when so requested to do so by IMS in order for IMS to perform the Services. Alternatively, the Customer shall ensure that IMS' personnel have full and safe access to the Equipment at all reasonable times for the purpose of providing the Services. The Customer shall also ensure that such access conforms to any specifications issued by IMS from time to time.
- 5.2 The Customer will ensure that IMS' personnel or representatives are provided a safe and secure work environment at all times while they are on the Site to enable work to be carried out.
- 5.3 The Customer shall provide on request a suitably qualified or informed representative, agent or employee to accompany IMS' personnel when providing the Services or to render such assistance or to give such advice as will enable IMS' personnel to exercise unrestricted access to the Site and the Equipment and otherwise to perform the Services effectively.
- 5.4 The Customer shall supply auxiliary facilities and services when requested by IMS as necessary for the provision of the Services. Where the Customer does not provide the auxiliary facilities and services, IMS shall be entitled to procure such auxiliary facilities and services and seek full reimbursement from the Customer provided IMS has given the Customer written notice of the non-compliance and the Customer has failed to remedy the non-compliance within the time specified in the notice. The auxiliary facilities and services shall include without limitation:
- a.) Adequate telephone/communications facilities;
 - b.) Lighting for all work areas;
 - c.) Main and auxiliary electrical power necessary for the operation of all equipment, capable of being isolated either by isolating switches, removal of fuses or other means to the reasonable satisfaction of IMS;
 - d.) Suitable dry lockable storage space for the storage of machinery, equipment, materials and tools;
 - e.) Suitable rooms on or adjacent to the Site with adequate air- conditioning, lighting, washing, toilet and drinking water facilities for the use of IMS' personnel or representatives; and/or
 - f.) Lifting machinery or devices, timber, planking, strutting, cement, fuels, water, gas etc.
 - g.) The customer has to equip our personnel with the necessary protective suits and protective devices free of charge. If these requirements are not met, IMS service personnel may refuse to perform the work, and the customer is liable for any damages suffered by our employees.
For safety and accident prevention purposes, the customer is obligated to alert our staff to any hazards and risks prior to starting any work - for example, if there are explosion hazards.
Safety instructions have to be in English or German language.

- 5.5 The Customer shall upon IMS' request furnish to IMS sufficient information which, in IMS' reasonable opinion, will enable the Services to be carried out forthwith and without interruption. The Customer shall be responsible for and bear the cost of any modification to the scope of the Services arising from any discrepancy, error or omission in any drawings, specification or other information supplied or approved by the Customer.
- 5.6 All such assistance to be provided by the Customer under this Clause 5 or in general shall be at the Customer's sole cost and expense.
- 5.7 Nothing in this Agreement shall relieve the Customer from its obligations to perform normal day to day maintenance on the Equipment as per the Operator's Manuals supplied by the manufacturer and/or IMS including but not restricted to normal cleaning procedures, checks and adjustments designed for operational use.
- 5.8 During the continuance of this Agreement, the Customer shall not carry out or attempt to carry out modifications to, repair of, experiments on, or maintenance of the Equipment other than day to day maintenance and the Customer shall not permit any other person except IMS' personnel or representatives to carry out such work unless prior written approval has first been obtained from IMS.

6 Replacement and Spare Parts

- 6.1 In the case of Services for which an Additional Charge is payable by the customer for replacement of spare parts, title in such replacement or spare parts shall pass to the Customer only upon full payment of the Additional Charge. Unless otherwise agreed in writing between the Parties, risk of damage to or loss of replacement spare parts shall pass to the Customer as soon as they are delivered to the Customer's designated premises.
- 6.2 Where parts of the Equipment have been replaced by or upon the instruction, recommendation or direction of IMS or otherwise, title in the replaced parts will pass to IMS upon removal from the Equipment.
- 6.3 IMS may from time to time require the Customer to purchase and store at the Site such spare parts as IMS considers necessary for the provision of effective Services.
- 6.4 IMS will not be liable for any failure or delay in providing the Services where such failure or delay is the direct or indirect result of the failure of the Customer to comply with clause 6.3.
- 6.5 Save as aforesaid, the property of and risk in the Equipment is not affected by the provisions contained in this Agreement.

7 Payment, Charges and Fees, etc.

- 7.1 The Customer shall pay all Fees at the rate and in the manner specified Section II of the Agreement.
- 7.2 The Customer shall pay the Fee, all Additional Charges and any cost wherever and howsoever incurred within fourteen (14) days from the date of IMS' invoice.
- 7.3 If the Customer fails to make full payment on the due date, then without prejudice to any other right or remedy available to IMS, IMS shall be entitled to:
- a.) terminate the Agreement or suspend any further Services or other obligations to the Customer under the Agreement (without being liable to Customer for any losses so caused);
 - b.) at its sole discretion, apply any monies received from the Customer in relation to the Agreement or any other contract or agreement between the Customer and IMS, including but not limited to deposits or security payments, towards the payment of the relevant invoice; and/or
 - c.) charge the Customer interest on the amount unpaid on a daily basis at the rate of one per cent (1%) per annum above the average Prime Lending Rate of the ECB (European Central Bank), from the due date until payment in full is received by IMS.
- 7.4 The Customer shall not be entitled to withhold from, set off against or otherwise reduce any payments due to IMS unless agreed in writing by IMS.
- 7.5 IMS shall be entitled to adjustment of the Fees and Additional Charges (to be mutually agreed in writing) in the event of changes in law or engineering standards applicable to or affecting the Equipment and/or Services after the execution of the Agreement.

8 Maintenance Equipment

IMS shall provide all the necessary tools, equipment, testing and diagnostic apparatus which IMS requires in order to carry out the Service unless otherwise agreed.

9 Customer Records & Service Reports

- 9.1 The Customer shall keep such records relating to the use and performance of the Equipment as may be directed by IMS from time to time.
- 9.2 The Customer shall permit IMS to have access to such records at all reasonable times, including all periods during which the Services are being performed or preparations are being made for the Services to be performed.

10 Intellectual Property Rights & Confidentiality

- 10.1 All intellectual property rights in all materials (whether in hard copy or electronic form) which IMS creates or supplies to the Customer in the course of performing the Services under this Agreement will, as between the Parties, be owned by IMS.
- 10.2 The Customer acknowledges the confidential nature of, and the technology and design of the replacement parts and spare parts for the Equipment and items associated with the Equipment including, but not limited to, documentation, forms, trade marks, instructions, operating manuals and other information.
- 10.3 The Customer shall not, without IMS' prior consent in writing, copy or cause to be copied or disclosed any details of such technology, design, procedure or items to a third party.
- 10.4 The Customer may only make use of such details to the extent necessary to enable the Equipment to be used in a manner reasonably contemplated by IMS.
- 10.5 The Customer may only disclose such details to those of its employees by whom it is required to enable the Equipment to be used in a manner reasonably contemplated by IMS.
- 10.6 The Customer acknowledges that any discoveries, inventions, patents, designs or other rights arising directly or indirectly out of or in the performance of this Agreement are the property of IMS.
- 10.7 The Customer's obligations under this clause 10 shall survive the termination of this Agreement.
- 10.8 The Customer is responsible for the security of its proprietary and other classified information. The Customer undertakes to indemnify IMS against all claims brought by any party for loss or damage to such information howsoever caused.
- 10.9 Other than as specifically provided for in this Agreement, nothing in this Agreement assigns, transfers or grants a licence to a Party over or in relation to pre-existing intellectual property rights owned by the other Party, IMS' supplier or a third party.
- 10.10 Each Party agrees not to, and shall ensure that its employees, agents and advisors do not, disclose to third parties, any confidential or proprietary information arising or disclosed pursuant to this Agreement (including information not generally known to the public, such as without limitation technical, development, marketing, sales, operating, performance, cost, know-how, business and process information or computer programming techniques), except: (i) with the prior written permission of the Party to whom such information belongs; (ii) as required by applicable law or regulation or pursuant to a court order or direction of any government authority or regulatory body or stock exchange; or (iii) where the information is already known to, or obtained by independent means, or independently developed, by the recipient, or is already in the public domain through no fault of the recipient.

11 Liability of Parties

- 11.1 The Customer shall keep IMS, its personnel and agents fully and effectively indemnified against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or breach of this Agreement by the Customer, its employees, agents or servants, and shall pay to IMS all reasonable costs, charges and losses sustained or incurred by IMS as a result of IMS being prevented or delayed from performing its obligations under this Agreement by reason of any act or omission of the Customer, its employees, agents or servants.
- 11.2 Except as expressly provided in this Agreement, all terms, conditions, warranties, undertakings or representations whether express, implied, statutory or otherwise relating in any way to the Services or to this Agreement are excluded. Without limiting the generality of the foregoing, IMS shall not be under any liability to the Customer for any loss of profit (actual or anticipated), loss of use, loss of production (including loss of hydrocarbons), loss of contracts, loss of opportunities, loss of revenue, cost of capital, costs of replacement, loss of goodwill, loss of reputation, loss of information or data, loss from any third party contracts, loss due to business interruption, loss of interest, loss of power, cost of purchased or replacement power, contractual claims from third parties or any indirect, incidental, special or consequential losses or damages arising from or in connection with its performance or non-performance under this Agreement and whether based upon contract, tort, or any other legal theory. This Clause 11.2 shall apply to the benefit of IMS' personnel, IMS' affiliates and IMS' sub- contractors.
- 11.3 Notwithstanding any other provision of this Agreement IMS' total cumulative liability for any act or omission, whether in contract, tort (including negligence or strict liability) or any other legal or equitable theory during the Term of this Agreement shall not exceed in the aggregate, 10% of the Fee payable under this Agreement during the preceding one (1) year. This Clause 11.3 shall apply to the benefit of IMS' personnel, IMS' affiliates and IMS' sub-contractors.

12 Warranties

- 12.1 IMS warrants that:
- a.) it will provide the Services in a proper, workmanlike and professional manner at all times;
 - b.) it will exercise the reasonable standards of skill, care and diligence in the performance of the Services;
 - c.) it will retain a sufficient number of personnel with the expertise required to provide the Services; and
 - d.) its personnel possess the required skills and experience required to provide the Services.
- 12.2 The above warranties shall not replace or supersede the warranty applicable to the Equipment as specified in any sale and purchase agreement.

13 Force Majeure

- 13.1 IMS shall not be liable to the Customer or be deemed to be in breach of the Agreement by reason of any delay in performing, or any failure to perform, any of IMS' obligations in relation to the Services, if the delay or failure was due to force majeure. For the purposes of this clause, force majeure shall mean any unforeseen event beyond the reasonable control of IMS such as, but not limited to any act of God, act of government or any authorities, hostilities between nations, war, riot, civil commotions, civil war, insurrection, blockades, import or export regulations or embargoes, rainstorms, national emergency, earthquake, fires, explosion, flooding, hurricane or other exceptional weather conditions or natural disaster, acts of terrorism, accidents, sabotages, strikes, shortages in material or supply, infectious diseases, epidemics, as well as travel restrictions or travel warnings due to any such events. If any delay in performing, or any failure to perform the Agreement is caused by the delay of a subcontractor of IMS, and is beyond the control and without the fault or gross negligence of IMS, IMS shall incur no liability for such delay.
- 13.2 If such delay or failure continues for at least one (1) month, the other party may terminate this Agreement immediately with written notice. In such event, the Customer shall pay IMS a reasonable sum in relation to Services already rendered and costs and expenses incurred prior to termination.

14 Termination and/or Suspension of Services

- 14.1 In addition to IMS' right to terminate the Agreement under Clause 7.3, IMS shall be entitled to (i) terminate the Agreement or suspend any further Services under the Agreement without any liability to the Customer, and (ii) demand that the Fee, Additional Charges or balance thereof shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary, and (iii) retain any security given or monies paid by the Customer and apply the said security or monies against the assessed loss and damages, if any, suffered by IMS, in the event that:
- a.) the Customer is in breach of the Agreement; or
 - b.) the Customer makes any voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) goes into liquidation (otherwise than for the purposes of amalgamation or reconstruction) or has an order made or resolution passed for such winding-up or shall otherwise become insolvent or make such proposal, assignment or arrangement for the benefit of its creditors or have a receiver or manager appointed over its affairs or have an application made to court for the appointment of a judicial manager or be placed under a judicial management order; or
 - c.) an encumbrancer takes possession of, or a receiver is appointed over, any of the property or assets of the Customer; or
 - d.) the Customer ceases, or threatens to cease, to carry on business; or
 - e.) there is a change in control of the Customer which in the reasonable opinion of IMS adversely affects the position, rights or interests of the Customer. (For the purpose of this sub-clause, "control" means the ability to direct the affairs of another whether by virtue of Agreement, ownership of shares, or otherwise howsoever); or
 - f.) in the reasonable opinion of IMS, there occurs a material change in the financial position of the Customer which is likely to affect the Customer's ability to perform its obligations under the Agreement; or
 - g.) IMS reasonably apprehends that any of the events mentioned above is about to occur in relation to the Customer and notifies the Customer accordingly.
- 14.2 Termination of the Agreement by IMS shall not discharge the Customer from any existing obligation accrued due on or prior to the date of termination.
- 14.3 The rights and remedies granted to IMS pursuant to the Agreement are in addition to, and shall not limit or affect, any other rights or remedies available at law or in equity.

15 Export Controls

- 15.1 The fulfilment of the Agreement on IMS' part is conditional upon the following:
- (i) all necessary export licenses, permits, licenses and other permissions being obtained by the Customer from the relevant authorities for the destination and intended use of the Equipment and/or Services;
 - (ii) If IMS is required to have any permit or license from any governmental or other regulatory authority, such permit or license being granted to the IMS at the required time;
 - (iii) such performance shall not be prevented by impediments on the grounds of national and international legal requirements, including but not limited to export control regulations, customs requirements, embargoes or other sanctions.
- 15.2 The Customer shall comply with all relevant statutes, rules and regulations and by-laws affecting its obligations and the performance of the Agreement (including any laws and regulations concerning the export, re-export or import of Equipment, technology or technical data and Services) and shall obtain at its own costs and expenses all necessary permits and licences. IMS may suspend performance if the Customer is in violation of applicable laws or regulations.
- 15.3 Equipment labelled with "AL not equal to N" are subject to European or German export authorisation when being exported out of the European Union. Equipment labelled with "ECCN not equal to N" are subject to the United States of America's re-exporting authorisation. Even without a label, or with label "AL:N" or "ECCN:N", authorisation may be required due to the final end-use and destination for which the Equipment are to be used.
- 15.4 If the Customer transfers any Equipment (hardware and/ or software and/ or technology as well as corresponding documentation regardless of the mode of provision and including all kinds of technical support) delivered or performed by IMS or Services (including all kinds of technical support) to a third party, the Customer shall comply with all applicable national and international (re-) export control regulations. In any event of such transfer of Equipment and/or Services, the Customer shall comply with the (re-) export control regulations of the Federal Republic of Germany, of the European Union and of the United States of America.

- 15.5 Prior to any transfer of the Equipment and/or Services provided by IMS to a third party, the Customer shall in particular check and guarantee by appropriate measures that:
- (i) There will be no infringement of an embargo imposed by the European Union, by the United States of America and/ or by the United Nations by such transfer, by brokering of contracts concerning those Equipment and/or Services or by provision of other economic resources in connection with those Equipment and/or Services, also considering the limitations of domestic business and prohibitions of by-passing those embargos; and
 - (ii) Such Equipment and/or Services are not intended for use in connection with armaments, nuclear technology or weapons, if and to the extent such use is subject to prohibition or authorization, unless required authorization is provided;
 - (iii) The regulations of all applicable Sanctioned Party Lists of the European Union and the United States of America concerning the trading with entities, persons and organizations listed therein are considered.
- 15.6 If required to enable authorities or IMS to conduct export control checks, the Customer, upon request by IMS, shall promptly provide IMS with all information pertaining to the particular end customer, the particular destination and the particular intended use of the Equipment and/or Services provided by IMS, as well as any export control restrictions existing.
- 15.7 The Customer shall indemnify and hold harmless IMS from and against any claim, proceeding, action, fine, loss, cost and damages arising out of or relating to any noncompliance with export control regulations by the Customer, and the Customer shall compensate IMS for all losses and expenses resulting thereof.

16 General

- 16.1 The fulfillment of the Agreement on IMS' part is subject to the proviso that this shall not be prevented by impediments on the grounds of national and international legal requirements.
- 16.2 Any notice required or permitted to be given by either Party to the other under the Agreement shall be in writing and signed by the authorised representatives of the Party addressed to that other Party at its registered office or principal place of business or such other address as may at the relevant time have been notified to the Party giving the notice. Notices may be delivered by hand, or by prepaid registered post or by facsimile and shall be deemed to have been served:
- (i) if by hand, at time of delivery;
 - (ii) if by prepaid registered post, 3 working days after posting;
 - (iii) if by facsimile, on the date printed on the facsimile transmission report produced by the sender's machine.
- 16.3 No waiver by either Party of any breach of the Agreement by the other Party shall be considered as a waiver of any subsequent breach of the same or any other provision. If either Party delays, neglects or chooses not to enforce its right under the Agreement, it shall not affect its right to do so at a later date.

- 16.4 If any provision of the Agreement or these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part such provision shall be construed, limited or if necessary, severed to the extent necessary to eliminate such invalidity or unenforceability and the validity of the other provisions of the Agreement and these Conditions and the remainder of the provision in question shall not be affected but shall remain in full force and effect.
- 16.5 No terms shall survive the expiry or termination of the Agreement unless expressly provided.
- 16.6 This Agreement is the entire agreement between the Parties and may not be changed unless agreed in writing by properly authorised representatives of both Parties.
- 16.7 The relationship between IMS and the Customer is one of independent contractor and nothing in this Agreement shall be construed as creating any relationship of partnership, employment, joint venture or agency between IMS and the Customer.

17 Applicable Law and Dispute Resolution

- 17.1 The contract shall be governed and construed solely according to the law of the Federal Republic of Germany under exclusion of the UN Convention on Contracts for the International Sale of Goods. Place of jurisdiction is Velbert.
- 17.2 The Parties will use their best efforts to negotiate in good faith and settle any dispute that may arise out of or relate to this Agreement or any breach of it. If any such dispute cannot be settled amicably through ordinary negotiations between representatives of the Parties, the dispute shall be referred to the management of each Party who will meet in good faith in order to try and resolve the dispute.
- 17.3 All negotiations connected with the dispute will be conducted in complete confidence and the Parties undertake not to divulge details of such negotiations except to their professional advisers who will also be subject to such confidentiality and such negotiations shall be without prejudice to the rights of the Parties in any future proceedings.