

SD SAILS LIMITED

Terms and Conditions: 19th July 2012

The customer's attention is drawn in particular to the provisions of clause 9.

1. INTERPRETATION

1.1 **Definitions.** In these Conditions, the following definitions apply:

Business Day: a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.

Conditions: the terms and conditions set out in this document as amended from time to time in accordance with clause 11.6.

Contract: the contract between SD Sails and the Customer for the sale and purchase of the Goods and/or Services in accordance with these Conditions.

Credit Terms: an agreement between SD Sails and the Customer that any invoice for the supply of Goods and/or Services is to be paid within 30 days of the date of that invoice.

Customer: the person or firm who purchases the Goods and/or Services from SD Sails.

Force Majeure Event: has the meaning given in clause 10.

Goods: the goods (or any part of them) set out in the Order.

Goods Specification: any specification for the Goods including any related plans and drawings, that is provided in writing to SD Sails by the Customer, or produced by SD Sails and agreed in writing by the Customer.

Order: the Customer's order for the Goods or Services, as set out in the Customer's written acceptance of SD Sails's quotation.

SD Sails: SD Sails Limited (registered in England and Wales with company number **06156723**).

Services: the services supplied by SD Sails to the Customer as set out in the Order or Service Specification

Service Specification: the description or specification for the Services provided in writing to SD Sails by the Customer, or produced by SD Sails and agreed in writing by the Customer.

1.2 **Construction.** In these Conditions, the following rules apply:

- (a) A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

- (b) A reference to a party includes its personal representatives, successors or permitted assigns.
- (c) A reference to a statute or statutory provision is a reference to such statute or provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.
- (d) Any phrase introduced by the terms **including, include, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- (e) A reference to **writing** or **written** includes faxes and e-mails.

2. BASIS OF CONTRACT

- 2.1 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 2.2 The Order constitutes an offer by the Customer to purchase the Goods and/or Services in accordance with these Conditions. The Customer shall ensure that the terms of the Order and any relevant Specification are complete and accurate.
- 2.3 The Order shall only be deemed to be accepted when SD Sails issues a written acceptance of the Order, at which point the Contract shall come into existence.
- 2.4 The Contract constitutes the entire agreement between the parties. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of SD Sails which is not set out in the Contract. Any samples, drawings, descriptive matter, or advertising issued by SD Sails and any descriptions or illustrations contained in SD Sails's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Goods and/or Services described in them. They shall not form part of the Contract or any other contract between SD Sails and the Customer for the sale of the Goods.
- 2.5 A quotation for the Goods given by SD Sails shall not constitute an offer. Where a quotation states that it shall only be valid for a certain number of Business Days from its date of issue, this constitutes only a commitment by SD Sails to honour the terms of such quotation and not renegotiate it in the event that the Customer makes an offer on the basis of the quotation, but SD Sails shall not be obliged to accept the offer.

3. DELIVERY

- 3.1 SD Sails shall ensure that:

- (a) each delivery of the Goods is accompanied by a delivery note which shows the date of the Order, all relevant Customer and SD Sails reference numbers, the type and quantity of the Goods (including the code number of the Goods, where applicable), special storage instructions (if any) and, if the Order is being delivered by instalments, the outstanding balance of Goods remaining to be delivered; and
- (b) if SD Sails requires the Customer to return any packaging materials to SD Sails, that fact is clearly stated on the delivery note. The Customer shall make any such packaging materials available for collection at such times as SD Sails shall reasonably request. Returns of packaging materials shall be at SD Sails's expense.

SD Sails shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (**Delivery Location**) at any time after SD Sails notifies the Customer that the Goods are ready. If the parties have agreed that the Customer shall collect the Goods from SD Sails's premises or some other location (**Collection Location**), the Customer shall make such collection within 3 Business Days of SD Sails notifying the Customer that the Goods are ready and the Customer shall sign a delivery note to confirm the Goods have been collected.

- 3.2 Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location or on the completion of loading of the Goods at the Collection Location.
- 3.3 Any dates quoted for delivery are approximate only, and the time of delivery is not of the essence. SD Sails shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure event or the Customer's failure to provide SD Sails with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 3.4 If SD Sails fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. SD Sails shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event or the Customer's failure to provide SD Sails with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 3.5 If the Customer fails to take or accept delivery of the Goods within 3 Business Days of SD Sails notifying the Customer that the Goods are ready, then, except where such failure or delay is caused by a Force Majeure Event or SD Sails's failure to comply with its obligations under the Contract:
 - (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the fourth Business Day following the day on which SD Sails notified the Customer that the Goods were ready; and

- (b) SD Sails shall store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance).
- 3.6 If 10 Business Days after SD Sails notified the Customer that the Goods were ready for delivery the Customer has not taken or accepted delivery of them, SD Sails may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.
- 3.7 SD Sails may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate Contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

4. QUALITY

- 4.1 SD Sails warrants that on delivery and for a period of 12 months from the date of delivery (**warranty period**), the Goods shall:
 - (a) conform in all material respects with their description and any applicable Goods Specification; and
 - (b) be free from material defects in design, material and workmanship.
- 4.2 Subject to clause 4.4, if:
 - (a) the Customer gives notice in writing to SD Sails during the warranty period within a reasonable time of discovery that some or all of the Goods do not comply with the warranty set out in clause 4.1; and
 - (b) SD Sails is given a reasonable opportunity of examining such Goods; and
 - (c) the Customer (if asked to do so by SD Sails) returns such Goods to SD Sails' place of business at the Customer's cost,

SD Sails shall, if a breach of warranty is established, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

- 4.3 If a breach of warranty is established and the defective Goods are repaired or replaced in accordance with clause 4.2, the original warranty period set out in clause 4.1 shall be extended by a period of time equivalent to the period between notification of the breach of warranty and the date of repair or replacement.
- 4.4 SD Sails shall not be liable for Goods' failure to comply with the warranty set out in clause 4.1 if:

- (a) the Customer makes any further use of such Goods after giving notice in accordance with clause 4.2; or
- (b) the defect arises because the Customer failed to follow SD Sails's oral or written instructions as to the storage, commissioning, installation, use and maintenance of the Goods or (if there are none) good trade practice; or
- (c) the defect arises as a result of SD Sails following any drawing, design or specification supplied by the Customer; or
- (d) the Customer alters or repairs such Goods without the written consent of SD Sails; or
- (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal storage or working conditions.

4.5 Except as provided in this clause 4, SD Sails shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 4.1.

4.6 Except as set out in these Conditions, all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

4.7 Except as provided in clause 4.3, these Conditions shall apply to any repaired or replacement Goods supplied by SD Sails.

5. TITLE AND RISK

5.1 The risk in the Goods shall pass to the Customer on completion of delivery.

5.2 Title to the Goods shall not pass to the Customer until SD Sails has received payment in full (in cash or cleared funds) for:

- (a) the Goods; and
- (b) all other sums which are due to SD Sails for sales of the Goods or any other products or Services to the Customer.

5.3 Until title to the Goods has passed to the Customer, the Customer shall:

- (a) hold the Goods on a fiduciary basis as SD Sails's bailee;
- (b) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as SD Sails's property;
- (c) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
- (d) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price from the date of delivery;

- (e) notify SD Sails immediately if it becomes subject to any of the events listed in clause 8.2; and
- (f) give SD Sails such information relating to the Goods as SD Sails may require from time to time,

but the Customer may resell or use the Goods in the ordinary course of its business.

5.4 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 8.2, or SD Sails reasonably believes that any such event is about to happen and notifies the Customer accordingly, then, provided that the Goods have not been resold, or irrevocably incorporated into another product, and without limiting any other right or remedy SD Sails may have, SD Sails may at any time require the Customer to deliver up the Goods and, if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored, and where such Goods are incorporated into another product (but not irrevocably) unincorporate them, in order to recover them.

6. SUPPLY OF SERVICES

6.1 SD Sails shall supply the Services to the Customer in accordance with the Service Specification in all material respects.

6.2 SD Sails shall use all reasonable endeavours to meet any performance dates specified in the Service Specification, but any such dates shall be estimates only and time shall not be of the essence for performance of the Services.

6.3 SD Sails shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and SD Sails shall notify the Customer in any such event.

6.4 SD Sails warrants to the Customer that the Services will be provided using reasonable care and skill.

7. PRICE AND PAYMENT

7.1 The price of the Goods shall be the price set out in the Order, or, if no price is quoted, the price set out in SD Sails's published price list in force as at the date of delivery.

7.2 The charges for Services shall be on a time and materials basis:

- (a) the charges shall be calculated in accordance with the SD Sails's standard daily fee rates;

- (b) SD Sails's standard daily fee rates for each individual person are calculated on the basis of an eight-hour day from 9.00 am to 5.00 pm worked on Business Days and include travel time between SD Sails's premises and the Customer's premises; and;
 - (c) SD Sails shall be entitled to charge the Customer for any expenses reasonably incurred by the individuals whom SD Sails engages in connection with the Services including, but not limited to, travelling expenses, hotel costs, subsistence and any associated expenses, and for the cost of services provided by third parties and required by SD Sails for the performance of the Services, and for the cost of any materials.
- 7.3 SD Sails reserves the right to increase its standard daily fee rates for the charges for the Services. SD Sails will give the Customer written notice of any such increase one month before the proposed date of the increase. If such increase is not acceptable to the Customer, it shall notify SD Sails in writing within 2 weeks of the date of SD Sails's notice and SD Sails shall have the right without limiting its other rights or remedies to terminate the Contract by giving 7 days written notice to the Customer;
- 7.4 SD Sails may, by giving notice to the Customer at any time before delivery, increase the price of the Goods to reflect any increase in the cost of the Goods that is due to:
 - (d) any factor beyond SD Sails's control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
 - (e) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Goods Specification; or
 - (f) any delay caused by any instructions of the Customer or failure of the Customer to give SD Sails adequate or accurate information or instructions.
- 7.5 The price of the Goods is exclusive of the costs and charges of packaging, insurance and transport of the Goods, which shall be paid by the Customer when it pays for the Goods.
- 7.6 The price of the Goods is exclusive of amounts in respect of value added tax (**VAT**). The Customer shall, on receipt of a valid VAT invoice from SD Sails, pay to SD Sails such additional amounts in respect of VAT as are chargeable on the supply of the Goods.
- 7.7 SD Sails may invoice the Customer for the Goods and/or Services on or at any time after the completion of delivery.
- 7.8 Where a Customer has agreed Credit Terms with SD Sails, the Customer shall pay the invoice in full and in cleared funds within 30 days of the date of the invoice. Payment

shall be made to the bank account nominated in writing by SD Sails. Time of payment is of the essence.

- 7.9 Where a Customer has not agreed Credit Terms with SD Sails, the Customer shall pay for the Goods and/or Services at the time the Customer issues a written acceptance of SD Sails' quotation or estimate for the supply of Goods and/or Services. Where this clause 7.9 applies, SD Sails shall not be obliged to issue a written acceptance of the Order until payment has been received from the Customer.
- 7.10 If the Customer fails to make any payment due to SD Sails under the Contract by the due date for payment (**due date**), then the Customer shall pay interest on the overdue amount at the rate of 4% per annum above Lloyds TSB Bank's UK base lending rate from time to time. Such interest shall accrue on a daily basis from the due date until the date of actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.
- 7.11 The Customer shall pay all amounts due under the Contract in full without any deduction or withholding except as required by law and the Customer shall not be entitled to assert any credit, set-off or counterclaim against SD Sails in order to justify withholding payment of any such amount in whole or in part. SD Sails may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it by the Customer against any amount payable by SD Sails to the Customer.
- 7.12 Where the Contract is for the supply of Services that requires SD Sails to be in possession of any of the Customer's property, or have access to the property through the possession of keys to its place of storage or otherwise, SD Sails shall have a pledge over such property and be entitled to retain possession of such property until any invoice raised in relation to that property has been paid in full, and in the event of non-payment within three months of the date of the relevant invoice SD Sails may exercise its power of sale over the property. In the event of such exercise, the Customer shall not do anything, and shall procure that no third party on whose premises the property is located does anything, to restrict SD Sails' access to the property and the removal of such property from its location.

8. CUSTOMER'S INSOLVENCY OR INCAPACITY

- 8.1 If the Customer becomes subject to any of the events listed in clause 8.2, or SD Sails reasonably believes that the Customer is about to become subject to any of them and notifies the Customer accordingly, then, without limiting any other right or remedy available to SD Sails, SD Sails may cancel or suspend all further deliveries under the Contract or under any other contract between the Customer and SD Sails without incurring any liability to the Customer, and all outstanding sums in respect of Goods delivered to the Customer shall become immediately due.

8.2 For the purposes of clause 8.1, the relevant events are:

- (a) the Customer suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, or (being an individual) is deemed either unable to pay its debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986, or (being a partnership) has any partner to whom any of the foregoing apply; or
- (b) the Customer commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors; or
- (c) (being an individual) the Customer is the subject of a bankruptcy petition or order; or
- (d) a creditor or encumbrancer of the Customer attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days; or
- (e) (being a company) an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the Customer; or
- (f) (being a company) a floating charge holder over the assets of the Customer has become entitled to appoint or has appointed an administrative receiver; or
- (g) a person becomes entitled to appoint a receiver over the assets of the Customer or a receiver is appointed over the assets of the Customer; or
- (h) any event occurs, or proceeding is taken, with respect to the Customer in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 8.2(a) to clause 8.2(g) (inclusive); or
- (i) the Customer suspends, threatens to suspend, ceases or threatens to cease to carry on all or substantially the whole of its business; or
- (j) the financial position of SD Sails deteriorates to such an extent that in the opinion of the Customer the capability of the Seller adequately to fulfil its obligations under the Contract has been placed in jeopardy.
- (k) (being an individual) the Customer dies or, by reason of illness or incapacity (whether mental or physical), is incapable of managing his or her own affairs or becomes a patient under any mental health legislation.

9. LIMITATION OF LIABILITY

9.1 Nothing in these Conditions shall limit or exclude SD Sails' liability for:

- (a) death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);
- (b) fraud or fraudulent misrepresentation; or
- (c) breach of the terms implied by section 12 of the Sale of Goods Act 1979; or
- (d) defective products under the Consumer Protection Act 1987; or
- (e) any matter in respect of which it would be unlawful for SD Sails to exclude or restrict liability.

9.2 Subject to clause 9.1:

- (a) SD Sails shall not be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit or indirect or consequential loss arising under or in connection with the Contract (including any losses that may result from a deliberate breach of the Contract by SD Sails, its employees, agents or subcontractors); and
- (b) SD Sails's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, including losses caused by a deliberate breach of the Contract by SD Sails, its employees, agents or subcontractors, shall not exceed 105% of the price of the Goods.
- (c) Where a breach of warranty has been established under clause 4.1 and SD Sails has agreed to repair the Goods, SD Sails' liability extends only to the obligation to repair the goods in accordance with clause 4.2 and the Customer shall be responsible for any costs incurred in transporting the Goods to and from SD Sails for repair, and removing and re-installing the Goods.
- (d) Where a minor fault to the Goods has not been remedied promptly by the Customer or brought to the attention of SD Sails, and the fault subsequently leads to increased damage to the Goods due to the effects of adverse weather conditions, SD Sails shall not be liable to the Customer for the increased damage.
- (e) Where SD Sails has designed an item in accordance with the British Standard referring to wind and snow loads, SD Sails shall assess any damage to the canopy in the light of Met Office weather forecasts and records for the time of the alleged breach. Where the Met Office records show that wind or snow was forecast to exceed, or in fact exceeded, the level requiring protection under the British Standards, SD Sails shall not be held in breach of warranty in relation to the item.

10. FORCE MAJEURE

Neither party shall be liable for any failure or delay in performing its obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. A **Force Majeure Event** means any event beyond a party's reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, including strikes, lock-outs or other industrial disputes (whether involving its own workforce or a third party's), failure of energy sources or transport network, acts of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions, or default of SD Sails or subcontractors.

11. GENERAL

11.1 Assignment and subcontracting.

- (a) SD Sails may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract.
- (b) The Customer may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract without the prior written consent of SD Sails.

11.2 Notices and other communications

- (a) Any notice or other communication given to a party under or in connection with the Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, sent by pre-paid first-class post, recorded delivery, commercial courier, fax or e-mail.
- (b) A notice or other communication sent by one party to the other shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 11.2(a); if sent by pre-paid first-class post or recorded delivery, at 9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.
- (c) A notice or other communication sent by one party to the other by fax or e-mail shall not be deemed to have been received until the sending party has received a written response from the receiving party confirming receipt of the notice or other communication.

- (d) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

11.3 **Severance**

- (a) If any court or competent authority finds that any provision of the Contract (or part of any provision) is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of the Contract shall not be affected.
- (b) If any invalid, unenforceable or illegal provision of the Contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

11.4 **Waiver.** A waiver of any right or remedy under the Contract is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.

11.5 **Third party rights.** A person who is not a party to the Contract shall not have any rights under or in connection with it.

11.6 **Variation.** Any variation to the Contract, including the introduction of any additional terms and conditions, shall only be binding when agreed in writing and signed by the Customer.

11.7 **Governing law and jurisdiction.** The Contract, and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims), shall be governed by, and construed in accordance with, English law, and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.