



## Conditions of Sale and Delivery of Maschinenfabrik Alfing Kessler GmbH

December 2013

### § 1 General Details

These Conditions of Sale and Delivery apply to all goods and services supplied by Maschinenfabrik Alfing Kessler GmbH (hereinafter called "deliveries"), unless they are amended by express written agreement between the parties. These Conditions of Sale and Delivery apply exclusively, they apply even where the Supplier provides Goods or Services without condition and where Supplier knows that the Customer has opposing or divergent conditions. They also apply to all future business transactions.

### § 2 Contract Conclusion

1. Quotations by the Supplier are provided without obligation, unless otherwise indicated. The Supplier reserves all rights (esp. copyright and intellectual property right) in respect of quotations, samples, cost estimates, drawings, technical information and other documents. Third Parties may only be allowed access to such documentation with the prior written consent of the Supplier.

2. Orders placed are binding on the Customer for a period of six weeks from the date of receipt by the Supplier. The Contract is concluded by written confirmation of order acceptance by the Supplier. Such confirmation is also definitive with regard to the quantity and specifications of the Goods/ Services to be supplied if the Customer fails to contradict any differences from the Order.

3. Contracts, amendments and additions to them and any agreement on technical specification require our written confirmation in order to be valid. There are no verbal side agreements.

### § 3 Prices

1. Prices are stated net ex Supplier's works without discount or other reductions. If applicable, value added tax (VAT) at the relevant statutory rate shall be charged by Seller. If the contract items are to be exported, it is the Customer's responsibility to submit to the Supplier an export certificate for VAT purposes. Failing to do so, the Supplier is entitled to charge the Customer with any VAT that might have been raised. Any public duties such as tax, fees, customs fees, which shall be accrued on account of exporting the contract items, as well as packing, loading, transport, installation, insurance or any other charges (such as, for example, for consulate certificates or certificates of origin) shall be at the Customer's charge.

2. The Supplier is entitled to appropriate additional payment (even in cases where a fixed price is agreed), if technical specifications or delivery deadlines are changed at the request of the Customer after the contract is concluded. The Supplier is entitled to reasonably increase the unit prices or – as far as completed shipments are concerned – to claim compensation if ordered quantities, batch sizes or call-offs are reduced by the Customer contrary to any agreements made. In the event of changes in the price of materials, labour costs, freight charges or other cost factors, the Supplier reserves the right to adjust prices accordingly provided there is a period of at least four months between the date the Contract is concluded and

the delivery date and a fixed price has not been agreed.

### § 4 Payment terms

1. Payments for induction hardening machine shipments shall be made as follows to the account of Maschinenfabrik Alfing Kessler GmbH within 30 days of the invoice date, unless otherwise agreed: (i) 30% on conclusion of the Contract (ii) 60% prior to shipment and (iii) 10% upon acceptance. In all other cases and unless otherwise agreed, payments shall be made within 30 days from shipment and invoice to the account of Maschinenfabrik Alfing Kessler GmbH.

2. Bank charges and cost of letters of credit are payable by the Customer. Payment instructions, checks and bills of exchange are only accepted upon special arrangement and only for the purpose of settlement – taking account of all collection and discount charges.

3. Should the Customer fall into arrears with its payments, the Supplier may claim interest for delay at the relevant statutory rate and claim payment prior to future shipments. If it becomes evident due to the Customer's inability to pay that there is a risk it may not meet its obligations, then the Supplier is entitled to terminate the Contract or to refuse to supply the Goods/Services (including under other Contracts) until the Customer has fully met its obligations or provided appropriate security.

4. The Customer may only offset its own claims against the claims of the Supplier or exercise a right to withhold payment if the Customer's counterclaim is undisputed or a legally enforceable title exists.

### § 5 Retention of ownership

1. All Goods supplied shall remain the property of the Supplier (retained-ownership Goods) until such time as all commitments arising from the business relationship have been settled in full.

2. Any processing or modification of the retained-ownership Goods by the Customer shall be performed on behalf of the Supplier. If the retained-ownership Goods are combined with other Goods not belonging to the Supplier, the Supplier shall acquire part-ownership of the resulting products in proportion to the value of the Goods.

3. The Supplier agrees to the Retained-ownership Goods being sold on by the Customer as part of the normal conduct of business subject to the right of revocation and the provisions of clause V.8. The Customer may not pledge or assign the Goods as security. To safeguard all the claims of Maschinenfabrik Alfing Kessler GmbH arising from the business relationship, the Customer hereby assigns to the Supplier the amounts it is owed from selling on the retained-ownership Goods – regardless of whether they have been further processed – to the value of the purchase price claimed (including VAT). Until and unless revoked, the Customer is entitled and obliged to collect the receivables assigned to the Supplier. Maschinenfabrik Alfing Kessler GmbH is entitled to revoke the authorization to collect if

the Customer falls into arrears with its payments, suspends its payments or files for bankruptcy. After cancellation of the authorization to collect, the Supplier shall be entitled to collect the amounts receivable. To that end, the Supplier may demand that the Customer discloses details of the assigned receivables and by whom they are owed, supplies all information necessary for collection, hands over the associated documentation and notifies Third Parties of the assignment.

4. At the request of the Customer, Maschinenfabrik Alfing Kessler GmbH shall release the security to which it is entitled under the above provisions to the extent that the realizable value of the security exceeds the secured receivables by more than 10% or their estimated value by 50%, the choice being at the Supplier's option.

5. The Customer is obliged to look after the Retained-ownership Goods carefully for the Supplier, maintain them in technically perfect condition and have any corrosion-proofing, servicing and repair work that may become necessary carried out immediately. Except in emergencies, the retained-ownership Goods are to be repaired at the Supplier's own workshops or workshops authorized by the Supplier.

6. For the duration of the period of ownership retention, the Customer must on request insure the retained-ownership Goods to the value of the existing remaining debt against all risks to the extent specified by the Supplier with the stipulation that the rights arising from the insurance accrue to the Supplier. The Supplier has a claim to the standard insurance certificate.

7. The Customer must inform the Supplier without delay in the event of seizure of property or other impairment of owners' interests.

8. Should the Customer fall into arrears with its payments or culpably fail to meet its insurance obligations or the obligations arising from the retention of ownership including the assignment of receivables, then the right of sale on the part of the Customer under clause V.3 shall become void. The same applies where bankruptcy, administration or comparable proceedings are instigated against the Customer's estate. If the entire remaining debt is not immediately paid, the Customer's rights of use in respect of the retained-ownership Goods shall become void. Maschinenfabrik Alfing Kessler GmbH is then entitled, after allowing a period of 14 days' grace or in the event that bankruptcy, administration or comparable proceedings are instigated against the Customer's estate after withdrawing from the Contract to demand release of the Retained-ownership Goods to the exclusion of any rights of retention and to collect them from the Customer's premises. Where possession is taken of retained-ownership Goods which are co-owned by Third Parties, such possession is taken on behalf of the co-owners at the same time. All costs arising from taking possession and realizing the value of retained-ownership Goods shall be chargeable to the Customer.



9. If the country in which the Goods supplied are located does not allow retention of ownership but allows the Supplier to retain other rights to the Goods supplied, then the Supplier may exercise all such rights. The Customer is obliged at its own expense to take all measures necessary to ensure that the retention of ownership or instead other rights to the Goods supplied can be applied and are maintained.

#### **§ 6 Supply of goods/services**

1. In the absence of other agreements, Goods shall be supplied ex works (as per Incoterms 2010). Should the Customer request shipment to a different shipping address, this shall be at his own risk and expenses.

2. The costs of packing shall be borne by the Customer. Company-owned packing apparatus such as containers and pallets shall remain the property of the Supplier. The Customer shall handle such items with care and return them at its own expense.

3. Our deliveries are subject to the provision of proper and timely delivery by our suppliers. This applies in particular to situations in which an excessive number of crankshafts need to be scrapped because of material faults for which the sub-contractors are responsible.

4. Partial shipments are permissible. Due to conditions peculiar to the crankshaft manufacturing process, we reserve the right to deliver quantities slightly above or below the quantity ordered.

5. Any delivery dates indicated in the Order Acknowledgement shall be considered as approximate and non-binding, unless otherwise agreed.

6. Dates/deadlines shall be extended/postponed accordingly provided and to the extent that the documents required for processing orders on time are not received by the Supplier in time, contractual obligations (e.g. payments on account, provision of letters of credit) are not met, contract-related work on the part of the Supplier suffers from interruptions or delays caused by the Customer. The same applies if delays occur due to other events over which the Supplier has no control (lack of raw material, energy or labour power, strikes, serious transport disruptions, e.g. due to street blockades, business disruptions, official measures which cannot be attributed to the Supplier, or due to other events over which the Supplier has no control. The Supplier shall notify the Client of the occurrence of events as those listed above. Those events shall not be the responsibility of the Supplier even if they arise during a delay. If the supply of Goods/Services is delayed by such events by more than 6 months, both Contracting Parties shall be entitled to withdraw from the Contract.

7. The time the Supplier gets into delay is governed by statutory regulations. In any case, the Customer shall submit an overdue notice. Should the delivery of the Goods/Services become overdue, The Customer is entitled to claim liquidated damages for

late delivery. The liquidated damages shall be 0.5% of the net price of the overdue Goods/Services for each complete week by which delivery is overdue but in any case not more than 5% in total. The Supplier shall be at liberty to demonstrate that such costs have not accrued or are substantially lower.

#### **§ 7 Tooling for Crankshaft and Forging Manufacture**

1. The tooling and fixtures produced by Maschinenfabrik Alfing Kessler for the manufacture of crankshafts and/or forgings shall remain the property of the Supplier irrespective if the Customer has paid a cost contribution or not. Unless otherwise agreed, the Supplier is entitled to use such tooling and fixtures for manufacture of crankshafts covered by other Contracts.

2. Maschinenfabrik Alfing Kessler GmbH undertakes to store such tooling and fixtures at its own expenses over a period of five years following the last delivery, however, excluding any liability, and to inform the Customer reasonably in advance of the imminent expiry of this storage period. Once this storage period has expired, the Customer may request to continue such storage against payment of a reasonable storage fee. At the end of such storage period including its possible extension, Maschinenfabrik Alfing Kessler GmbH shall be entitled to make free use of such tooling and fixtures.

#### **§ 8 Warranty of Quality**

1. Maschinenfabrik Alfing Kessler GmbH warrants to the Customer that the Goods supplied against the contract will be free of defects in workmanship at the point of passage of risk and – to the extent Maschinenfabrik Alfing Kessler GmbH is responsible for material procurement and no specific sub-contractor has been specified by the Customer – free of defects in material. The warranty period is twelve months from commissioning but in any case no longer than twenty-four months from delivery. For components that have been rectified or replaced, a warranty shall be provided until expiry of the limitation period applicable to the Goods supplied.

2. If a product is defective, Maschinenfabrik Alfing Kessler GmbH will, at its option, either replace or repair the product free of charge. Maschinenfabrik Alfing Kessler GmbH shall decide without undue delay after receipt of a detailed description of the defect with sufficient information to enable the Supplier to determine whether such defects will be repaired at Supplier's factory, at site where the product is used or at the premises of the Customer. If the Supplier opts for repair at its premises, Customer shall pack the defective products properly and safe for shipment and send it to the Supplier. Maschinenfabrik Alfing Kessler GmbH will insofar bear the costs of shipment from the place of initial delivery to the Supplier's premises. All parts replaced shall become the property of the Supplier.

3. In the event of retrospective fulfilment by the Customer or by third parties authorized by the Supplier, Maschinenfabrik Alfing Kessler GmbH shall bear all reasonable costs of transport, storage,

remedy or replacement. Any claims beyond those shall be excluded.

4. A right to cancellation of the Contract shall only exist if retrospective fulfilment by the Supplier ultimately fails. Provided the Supplier is prepared and able to provide retrospective fulfilment within a reasonable period, the Customer must allow the required time and opportunity for retrospective fulfilment at least three times in order to protect its defect liability claims. In the event of insignificant defects, the Customer shall be entitled to claim a price reduction only. In all other cases, price reductions shall be excluded.

5. Any visible defects (especially transport damages) shall be notified within three days after receipt of the contract items, all other defects shall be notified without any delay after their detection in the normal course of business, indicating the nature of the defect and the Alfing serial number of the crankshaft.

6. Maschinenfabrik Alfing Kessler GmbH shall be obliged to remedy defects in accordance with this section only on the condition that the Customer complies with its contractual obligations. In particular, payments must be made in accordance with the payment terms.

7. Defects resulting from normal wear and tear, from mishandling/misuse or improper installation or any other reasons caused by the Customer, shall not be covered by this warranty. The same shall apply if contract products are modified by the Customer or by Third Parties without prior authorization and damages have been caused by such modification.

#### **§ 9 Warranty of Title**

1. If the use of the contract items leads to a violation of industrial or intellectual property rights for reasons that we can be held responsible for, we will, at our cost, provide the right to our customer to further use the contract item or modify the contract item in a way reasonable to the customer so that the breach of industrial or intellectual property right does not persist. If this is not possible at reasonable cost or within due time, the Customer shall be entitled to terminate the contract. We furthermore shall hold the customer harmless of all undisputed or legally recognized claims of the relevant proprietors.

2. The obligations stated in paragraph IX.1 are final for the case of violation of industrial or intellectual property rights. They shall apply only if  
a) the customer has informed us immediately of any violations of industrial or intellectual property rights claimed,  
b) the customer provides due support in the defence of such claims or enables us to carry out the modifications as outlined in section 1,  
c) we are left of defence action including out-of-court settlement,  
d) a title is not based on instructions of the customer (e.g. by a given technical specification), while we are not obliged to investigate such specifications for possible violation of industrial or intellectual



property rights, and

e) the violation was not caused by an unauthorized change of the contract item by the customer or by a non-contractual use of the contract item.

#### **§ 10 Liability**

1. The Supplier's liability and the personal liability of its employees and other agents (especially persons employed in performing and executing its obligations) shall be determined – regardless of the legal grounds for liability – exclusively according to the present Clause X.

2. For damages not occurring on the Goods supplied, the Supplier shall be liable only for personal injury or property damage to objects which by their nature are normally intended for private use or consumption and which have been used by the injured party primarily for private purposes to the extent that compulsory liability exists under the product liability legislation.

3. In the case of negligence, the Supplier's liability is limited to the value of the shipment in question. There shall be no liability for financial losses, in particular either for loss of use or loss of profit. No further rights exist.

4. Should claims exceeding the above liability limit be made against the Supplier by Third Parties, the Supplier shall to that extent have a claim to recourse against the Customer.

5. Any claims to compensation, price reduction, cancellation of the Contract or withdrawal from the Contract not expressly stated in these Terms and Conditions shall – provided it is legally permissible – be excluded. That applies in particular to claims for compensation for damage not occurring on the Goods supplied themselves (e.g. such as but not limited to loss of production, loss of use, loss of orders, loss of profit, other direct and/or indirect loss or damage).

#### **§ 11 Supply of Forgings**

If, at the Customer's request, forgings (slab-forged round bars as forgings or crankshaft forgings) used in manufacture are supplied to us by third parties, or if the Customer requests that we purchase blanks from specified third parties, our warranty and liability for such defects in the product as may be attributed to defects in these forgings is excluded if the defects in the forgings supplied to us could not be discerned upon inspection conducted according to the state of the art without destruction of the material.

#### **§ 12 Limitation of Claims**

Subject to the regulations covering the limitation of materials defect liability claims, all claims of the Customer shall be limited to 12 months. However, for liability claims according to paragraph IX. a) – d) and f), legal stipulations shall apply.

#### **§ 13. Transferability of Contractual Rights**

The transfer of the customer's contractual rights and obligations to Third Parties requires the prior written consent of the Supplier.

#### **§ 14 Foreign Trade Legislation**

1. The supply of Goods and Services by the Supplier is subject to its permissibility under national and international export control provisions and the procurement of any export license that may be required. To that extent the Client undertakes to provide all necessary information and documentation, especially any final destination declaration that may be required, at least 6 months before delivery. Delayed cooperation on the part of the Customer or delays in the approval procedure shall entitle the Supplier to postpone the delivery dates accordingly. Should an export license not be granted, the Supplier shall be entitled to withdraw from the Contract. Neither a delay nor withdrawal under this Clause shall entitle the Client to compensation.

2. In the event that the supplied Goods are sold on by the Client, it shall be responsible for compliance with the requirements of the local foreign trade legislation.

#### **§ 15 Place of Performance**

The Place of Performance for both Parties shall be the domicile of Maschinenfabrik Alfing Kessler GmbH.

#### **§ 16 Inapplicability Clause**

In the event that any of the individual Clauses above or parts of them should prove to be inapplicable, void or unenforceable it shall not affect the applicability of the remaining provisions of this Contract. The same shall apply if omissions are identified.

The inapplicable, void or unenforceable provision or the omission shall be replaced by an appropriate provision that to the extent possible under law most closely approximates to the economic intention of the contracting Parties or what they would have intended according to the sense and purpose of the contract if they had taken the factor into account when agreeing the Contract or subsequently inserting the provision. The above shall apply even if the inapplicability of a provision is based on a quantity of work or Goods or a time (period or deadline) provided for in this Contract. In such cases, what was agreed shall be replaced by a legally permissible quantity or time (period or deadline) that most closely approximates in economic terms to what was intended.

#### **§ 17 Arbitration and applicable law**

1. Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. The seat of the arbitration shall be in Zurich, Switzerland. The language of the arbitration proceedings shall be German or English. Arbitration proceedings shall be conducted without the Anglo-American convention of pre-trial-discovery.

2. The legal relationships between the Client and the Supplier shall be governed by Swiss substantive law to the exclusion of the UN Convention of 11.04.1980 on Contracts for the International Sale of Goods (CISG).