

Zimmer Biomet South Africa Proprietary Limited, registration number 1989/005660/07

**Physical address: 2 Bridal Veil Rd, Waterfall Distribution Campus**

**E-mail address: CSD.Johannesburg@zimmerbiomet.com**

**("Company")**

### **Terms and Conditions of Sale - South Africa**

#### **1. Applicability**

These Terms shall apply to all contracts for the sale or rental of goods by the Company to the customer, to the exclusion of all other terms and conditions including any terms or conditions which the customer may purport to impose.

#### **2. Orders**

2.1 All orders for goods shall be made by the customer to the Company in writing and shall be deemed to be an offer by the customer to purchase or rent the goods pursuant to these Terms.

2.2 No order for goods is binding on the Company unless and until the Company has issued a written order acceptance.

2.3 Once accepted by the Company, the customer may not amend or revoke an order without the prior written consent of the Company.

#### **3. Price**

3.1 The price for the purchase of goods shall be the Company's quoted price or, where no price has been quoted, the Customer's issued price list, current at the date of acceptance of the order. All prices quoted are valid for 30 days.

3.2 All goods rented to the customer are subject to a rental and carriage charge listed in the Company's published price list current at the date of acceptance of the order. An additional carriage charge applies for any kit orders made after 15h00 for next day delivery.

3.3 All prices exclude VAT.

#### **4. Payment**

4.1 The customer shall pay the Company as per agreed payment terms without any deduction, withholding or set off whatsoever.

4.2 If the customer fails to make payment in full on or before the due date, without prejudice to any other right or remedy available to the Company, the Company shall be entitled, on notice to the customer, to:

4.2.1 cancel these Terms or suspend any further supplies of goods to the customer;

4.2.2 charge the customer interest on any overdue amount at 2% above the rate of interest (nominal annual compounded monthly in arrears) from time to time published by Standard Bank as its prime overdraft lending rate, from due date until date of payment;

4.2.3 enter upon any premises owned, occupied or controlled by the customer where the goods are situated and repossess the goods in respect of which ownership has not passed to the customer; and/or

4.2.4 claim the costs of collection from the customer.

4.3 A certificate issued by the Company's auditors as to the existence and amount of the customer's indebtedness to the Company at any time shall constitute *prima facie* proof of the contents and correctness thereof and shall be a valid liquid document for the purpose of summary judgment or provisional sentence proceedings in any competent court. The appointment of the person signing such certificate shall not be required to be proved.

#### **5. Delivery and collection**

5.1 The Company will deliver the goods or make them available for collection in accordance with the order.

5.2 The Company will use its reasonable endeavours to comply with the time for delivery required by the Customer.

5.3 The signature by the customer or any of its representatives on the Company's delivery note shall constitute *prima facie* proof of delivery or collection of the goods.

- 5.4 No goods may be returned without the Company's prior written consent. If such consent is granted, the return may be subject to a handling fee. All return requests must be directed in writing to the Company's Customer Services Department. The customer will be given a Return Request number once all relevant checks have been made regarding sterility of product, appropriateness to return, acceptance of return.

## 6. Risk and ownership

- 6.1 Risk of damage to or loss of the goods shall pass to the customer:
- 6.1.1 in the case of goods to be collected by the customer, at the time when the Company notifies the customer that the goods are available for collection;
  - 6.1.2 in the case of goods delivered to the customer, at the time of delivery;
  - 6.1.3 if the customer fails to collect or take delivery of the goods at the scheduled time, the time when the Company tendered collection or delivery.
- 6.2 In respect of goods rented, and until ownership of goods purchased has passed to the customer, the customer shall:
- 6.2.1 hold the goods on a fiduciary basis for the Company;
  - 6.2.2 store the goods (at no cost to the Company) separately from all other goods and mark them clearly as the Company's property;
  - 6.2.3 not sell, dispose of, pledge or otherwise encumber the goods;
  - 6.2.4 insure the goods with a reputable insurer to the full value thereof against fire, theft and all risks, and note the Company as first loss payee, to the reasonable satisfaction of the Company; and
  - 6.2.5 notify the lessor of the Customer's premises that the goods belong to the Company and accordingly are not subject to the lessor's tacit hypothec.

## 7. Defective goods

- 7.1 As far as the law allows, the customer must notify the Company in writing of any non-delivery, short delivery, defects or damage to goods within 2 days of delivery or collection.
- 7.2 The Company's liability for defective goods shall, as far as the law allows, be determined in accordance with Clause 10 and shall not, as far as the law allows, arise unless the Company, acting reasonably, agrees that the goods are defective.

## 8. Rental/Loan of goods

The customer shall:

- 8.1 verify that all goods required for a procedure are present on delivery, and inform the Company immediately if this is not the case;
- 8.2 ensure that the goods are kept and used exclusively at the location identified in the order;
- 8.3 inform the Company immediately of any wear, damage or loss of any goods;
- 8.4 be liable to the Company for the cost of replacement of any goods where the extent of wear, damage or loss is unreasonable;
- 8.5 provide the Company with a completed decontamination certificate for all instrument kits returned to the Company, failing which the Company shall decontaminate the goods at the cost of the customer;
- 8.6 ensure that all goods which have been decontaminated are free of debris and visibly clean, failing which the Company shall decontaminate the goods at the cost of the customer;
- 8.7 ensure that the goods are available for collection by the Company on the date and at the time specified in the order, failing which additional rental charges will become payable by the customer; and
- 8.8 be liable for the cost of any sterile item supplied by the Company and returned opened to the Company.

## 9. Compliance with instructions, warnings and laws

The customer shall, at all times:

- 9.1 comply with the instructions provided by the Company in relation to the goods, including but not limited to the handling, care, transportation, storage, decontamination, sterilisation and use of the goods;

- 9.2 take proper notice of the written warnings provided by the Company in relation to any hazards associated with the goods;
- 9.3 comply with all applicable laws relevant to the goods; and
- 9.4 communicate the items listed in 9.1 and 9.2 to all persons to whom the customer provides access to the goods,

and, as far as the law allows, the customer indemnifies the Company from and against any claims instituted against the Company arising from the customer's failure to comply with its obligations under this 9.

## 10. Exclusion of warranties and limitation of the Company's liability

- 10.1 The Company gives the customer no warranties in relation to the goods, whether express, implied or tacit.
- 10.2 As far as the law allows, the Company shall not be liable in respect of any losses, damages, costs or expenses ("**Losses**") which may be suffered and/or incurred by the customer arising from or in connection with the goods or in any other way related to these Terms, to the extent that such Losses exceed the purchase price of the goods in question.
- 10.3 As far as the law allows, the Company shall not be liable for any indirect, consequential, special, incidental or punitive loss or damages, loss of profits, or loss of business.
- 10.4 Nothing contained in this 10:
  - 10.4.1 does or purports to limit or exempt the Company from any liability (including, without limitation, for any loss directly or indirectly attributable to the gross negligence or wilful default of the Company or that of any person acting for or controlled by the Company) to the extent that the law does not allow such a limitation or exemption; or
  - 10.4.2 requires the customer to assume risk or liability, including for the kind of liability or loss referred to in 10.4.1, to the extent that the law does not allow such an assumption of risk or liability.

## 11. Business rescue

- 11.1 If the customer is a company, it shall notify the Company in writing, telephonically and by e-mail within two days of the occurrence of the following events:
  - 11.1.1 when the board of the customer becomes aware that the customer is Financially Distressed;
  - 11.1.2 when the board of the customer contemplates, considers, discusses or agrees to any Business Rescue of the customer or proposes to do any of the things referred to in this 10.1; or
  - 11.1.3 when the customer becomes aware of any person proposing to take, or taking, any step to apply to court for the Business Rescue of the customer.
- 11.2 The written notice contemplated in clause 10.1 shall set out the full details of the Financial Distress or the actual or proposed activity contemplated in clause 10.1.2 and/or 10.1.3 above, as the case may be.
- 11.3 "**Business Rescue**" bears the meaning assigned to it in section 128(1)(b) of the Companies Act, 2008, and "**Financial Distress**" bears the meaning assigned to it in section 128(1)(f) of that Act.

## 12. Breach

- 12.1 If the customer commits any material breach of these Terms and fail to remedy the breach within 7 days after receipt from the Company of written notice calling upon it to do so, then the Company shall be entitled, in addition to and without prejudice to any right it may have as a result of the breach, either to:
  - 12.1.1 enforce the performance of the terms of these Terms; or
  - 12.1.2 cancel these Terms;

and in either event, the customer shall be liable to the Company for all damages, losses and liability incurred by it or resulting from the customer's breach.
- 12.2 The Company may immediately cancel these Terms if:
  - 12.2.1 the customer commits an irremediable breach of a provision of these Terms;
  - 12.2.2 the customer takes steps to place itself, or is placed, in liquidation, whether voluntary or compulsory, whether provisionally or finally;
  - 12.2.3 the customer takes steps to deregister itself or is deregistered;

- 12.2.4 the customer commits an act which would be such an act of insolvency if committed by a natural person;
- 12.2.5 the customer undergoes a change of control without the Company's prior written consent;
- 12.2.6 any of the customer's assets are attached;
- 12.2.7 a written notice in terms of clause 10.1 is received by the Company;
- 12.2.8 the Company becomes aware that the customer is Financially Distressed, or of any actual or proposed activity contemplated in clauses 10.1.2 or 10.1.3;
- 12.2.9 the customer falsifies any documents or records or committing any act of fraud or dishonesty in respect of its dealings with the Company or matters arising from the terms of these Terms; or
- 12.2.10 the customer commits any act that, in the reasonable opinion of the Company, adversely affects or is likely to affect the goodwill and/or the reputation of the Company.
- 12.3 Termination of these Terms will be without prejudice to any rights that have accrued to a party as at the termination date, including without limitation the right to claim damages.

### 13. Intellectual property

- 13.1 All intellectual property held by a party remains the property of that party and nothing in these Terms is intended to transfer any ownership of, or right or licence to, such intellectual property to the other party save as is expressly set out in these Terms.
- 13.2 All intellectual property in and to the goods vests in the Company (the "**Company's Intellectual Property**").
- 13.3 The Company grants the customer a non-exclusive, non-transferable, non-sub-licensable licence to use the Company's Intellectual Property throughout South Africa for the duration of these Terms for the sole purpose of enabling the customer to use the goods.
- 13.4 The customer shall compensate the Company to the full extent of the customer's profit arising from any use of the Company's Intellectual Property not expressly permitted by these Terms.
- 13.5 The customer shall not, directly or indirectly do or attempt to any of the following:
  - 13.5.1 claim ownership of the Company's Intellectual Property;
  - 13.5.2 apply for registration of the Company's Intellectual Property in its own or any third party's name;
  - 13.5.3 possess or assert any lien or assert any right or title against, in or to the Company's Intellectual Property;
  - 13.5.4 challenge or otherwise contest the ownership of the Company's Intellectual Property or the Company's entitlement to registration of the Company Intellectual Property in its name; or
  - 13.5.5 sell, assign, transfer, lease or otherwise dispose of the Company's Intellectual Property;
  - 13.5.6 permit the use of the Company's Intellectual Property in such a way as to give the impression that it is the property of the customer; or
  - 13.5.7 alter, obscure, remove or replace any of the Company's Intellectual Property, including but not limited to trade marks on the goods.

### 14. Confidentiality

- 14.1 Save as set out below, the parties agree to keep confidential and not to disclose to any person:
  - 14.1.1 the details of these Terms, the details of the negotiations leading to these Terms, and the information handed over to the other party during the course of negotiations, as well as the details of the transactions or agreements contemplated in these Terms; and
  - 14.1.2 all information relating to the business, operations and affairs of the parties;
 (together "**Confidential Information**").
- 14.2 This clause shall not prevent a party from disclosing Confidential Information to its shareholders, officers, directors, employees, consultants and professional advisers who:
  - 14.2.1 have a need to know (and then only to the extent that each such person has a need to know);
  - 14.2.2 are aware that the Confidential Information should be kept confidential;
  - 14.2.3 are aware of the disclosing party's undertaking in relation to such information in terms of these Terms; and

- 14.2.4 have been directed by the disclosing party to keep the Confidential Information confidential and have undertaken to keep the Confidential Information confidential.
- 14.3 The obligations of non-disclosure under these Terms do not extend to information that:
- 14.3.1 is disclosed to a receiving party in terms of these Terms but at the time of such disclosure, such information is in the lawful possession or control of that party and not subject to an obligation of confidentiality;
- 14.3.2 is or becomes public knowledge, otherwise than pursuant to a breach of these Terms by the party who disclosed such Confidential Information; or
- 14.3.3 is required by the provisions of any law, or regulation, or during any proceedings, or by the rules or regulations of any stock exchange to be disclosed, and the party required to make the disclosure has taken all reasonable steps to oppose or prevent the disclosure and has consulted with the other party prior to making such disclosure.

## 15. Force Majeure

- 15.1 For the purposes of these Terms, circumstances beyond the control of a party will include any of the following matters:
- 15.1.1 war, invasion, act of foreign enemy, hostilities or warlike operations (whether that be declared or not), civil war, mutiny, rebellion, revolution, insurrection, military or usurped power, confiscation or destruction or requisition by order of any Government or any public authority, or any other Act of state, including prevention or denial of trade, sanctions or closure of borders;
- 15.1.2 earthquake, flood, fire, drought or other physical disaster;
- 15.1.3 a national strike or lockout or other national industrial action by employees;
- 15.1.4 pandemic or serious epidemic;
- 15.1.5 any other circumstances beyond the reasonable control and not within the reasonable expectation of either party ("**Force Majeure**").
- 15.2 Should a party be prevented from fulfilling any of its obligations in terms of these Terms as a result of Force Majeure then then the affected party will notify the other party in writing of the nature and expected duration of such circumstances and of the obligation, performance of which is delayed or prevented and the affected party will thereupon be excused from the performance or punctual performance, as the case may be, of its respective obligations from the date of such notification, for so long as the circumstances or prevention or delay may continue.

## 16. Miscellaneous matters

### 16.1 Addresses

- 16.1.1 Any written notice or legal process in connection with these Terms may be addressed:
- 16.1.1.1 in the case of the Company, to the address set out on page 1;
- 16.1.1.2 in the case of the customer, to the address set out on the customer's most recent order issued to the Company.
- 16.1.2 The notice shall be deemed to have been duly given:
- 16.1.2.1 7 Business Days after posting, if posted by registered post (airmail, if available) to the party's address in terms of sub-clause 16.1.1;
- 16.1.2.2 on delivery, if delivered to the party's physical address before 17h00 on a Business Day, or if delivered on a Business Day but after 17h00 on that Business Day or on any day other than a Business Day, it will be deemed to have been given at 08h30 on the first Business Day after it was delivered;
- 16.1.2.3 on despatch, if sent to the party's then e-mail address before 17h00 on a Business Day or if sent on a Business Day but after 17h00 on that Business Day, or on any day other than a Business Day, it will be deemed to have been given at 08h30 on the first Business Day after it was sent;
- unless the addressor is aware, at the time the notice would otherwise be deemed to have been given, that the notice is unlikely to have been received by the addressee through no act or omission of the addressee.
- 16.1.3 A party may change that party's address or fax number or e-mail address for this purpose by notice in writing to the other party, such change to be effective only on and with effect from the 7<sup>th</sup> Business Day after the giving of such notice.
- 16.1.4 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a party shall be an adequate written notice or

communication to that party notwithstanding that it was not sent to or delivered at that party's chosen address in 16.1.1.

- 16.2 Any provision in these Terms which is or may become illegal, invalid or unenforceable in any jurisdiction affected by these Terms shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated as having not been written (ie *pro non scripto*) and severed from the balance of these Terms, without invalidating the remaining provisions of these Terms or affecting the validity or enforceability of such provision in any other jurisdiction;
- 16.3 The rule of construction that if general words or terms are used in association with specific words or terms which are a species of a particular genus or class, the meaning of the general words or terms shall be restricted to that same class (ie the *eiusdem generis* rule) shall not apply, and whenever the word "**including**" is used followed by specific examples, such examples shall not be interpreted so as to limit the meaning of any word or term to the same genus or class as the examples given.
- 16.4 The expiration or termination of these Terms shall not affect such of the provisions of these Terms which are expressly provided to operate after any such expiration or termination, or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the relevant provisions themselves do not provide for this.
- 16.5 These Terms contains all the provisions agreed on by the parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the parties in respect thereof, and the parties waive the right to rely on any alleged provision not expressly contained in these Terms.
- 16.6 Save as is expressly provided for in these Terms, no provision of these Terms constitutes a stipulation for the benefit of a third person (ie a *stipulatio alteri*) which, if accepted by the person, would bind either party in favour of that person.
- 16.7 A party may not rely on any representation which allegedly induced that party to enter into these Terms, unless the representation is recorded in these Terms.
- 16.8 No contract varying, adding to, deleting from or cancelling these Terms, and no waiver of any right under these Terms, shall be effective unless reduced to writing and signed by or on behalf of the parties.
- 16.9 The grant of any indulgence, extension of time or relaxation of any provision by a party under these Terms shall not constitute a waiver of any right by the grantor or prevent or adversely affect the exercise by the grantor of any existing or future right of the grantor.
- 16.10 The customer may not cede any or all of its rights or delegate any or all of its obligations under these Terms without the prior written consent of the Company.
- 16.11 These Terms is to be governed, interpreted and implemented in accordance with the laws of the Republic of South Africa.
- 16.12 The parties consent to the non-exclusive jurisdiction of the High Court of South Africa (Gauteng Local Division, Johannesburg) for any proceedings arising out of or in connection with these Terms.
- 16.13 Each of the parties hereby respectively agrees and acknowledges that:
- 16.13.1 it has been free to secure independent legal advice as to the nature and effect of each provision of these Terms and that it has either taken such independent legal advice or has dispensed with the necessity of doing so; and
- 16.13.2 each provision of these Terms is fair and reasonable in all the circumstances and is part of the overall intention of the parties in connection with these Terms.
- 16.14 The parties shall at all times act in good faith towards each other and shall not bring the other party into disrepute.