
MANGANESE METAL COMPANY PROPRIETARY LIMITED

1 DEFINITIONS

- 1.1 For the purposes of these terms, unless the context indicates otherwise, the following words will have the following meanings;
 - 1.1.1 **"Agreement"** will mean, collectively, these terms and the Order Confirmation by MMC and any appendices thereto;
 - 1.1.2 **"MMC"** will mean Manganese Metal Company Proprietary Limited of 15 Heyneke Street, Mbombela, Mpumalanga Province, Republic of South Africa;
 - 1.1.3 **"Material"** will mean the product forming the subject matter of the Agreement, namely Electrolytic Manganese Metal or related products;
 - 1.1.4 **"Order Confirmation"** will mean the confirmation issued by MMC to the Purchaser as contemplated in clause 3 and shall be used interchangeably with the term Contract Confirmation as defined in clause 3.3;
 - 1.1.5 **"Overnight LIBOR Rate"** will mean the overnight Intercontinental Exchange London Interbank Offered Rate on the relevant currency as set out in clause 6.1;
 - 1.1.6 **"South African Prime Rate"** will mean the Prime Lending Rate (predominant rate) on the South African Rand as published by the South African Reserve Bank;
 - 1.1.7 **"Parties"** will mean MMC and the Purchaser; and
 - 1.1.8 **"Purchaser"** will mean the Party to whom the Order Confirmation is issued.
- 1.2 Any reference to the singular includes the plural and vice versa.
- 1.3 Any reference to a person includes any individual, body corporate, unincorporated association or other entity recognised under any law as having a separate legal existence or personality.
- 1.4 A reference to any gender, whether masculine, feminine or neuter, includes the other two.
- 1.5 The clause headings in these terms have been inserted for convenience only and will not be taken into account in their interpretation.
- 1.6 Words and expressions defined in any sub-clause will, for purposes of the clause of which the sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.
- 1.7 Save where specifically provided to the contrary, all trade terms use in the Agreement will be governed and interpreted in accordance with the provisions of the official rules for the interpretation of trade terms published by the International Chamber of Commerce, called **"Incoterms 2010"**.

2 INTRODUCTION

- 2.1 MMC produces or sources the Material and the Purchaser wishes to purchase the Material.
- 2.2 MMC is prepared to supply the Material to the Purchaser.
- 2.3 The Parties wish to record their agreement regarding the transaction and all aspects ancillary thereto in writing and regulate the terms on which MMC will supply the Material to the Purchaser.
- 2.4 Consequently, the Parties have further agreed that the supply of the Material will be governed by the terms herein, read with the Order Confirmation, where such terms and Order Confirmation collectively forms the Agreement.



3 ORDER CONFIRMATIONS

- 3.1 An Order Confirmation shall be issued by MMC after the Parties have reached agreement on the details, referred to in clause 3.2 below, relating to each transaction.
- 3.2 The Order Confirmation serves the purpose of capturing and recording the specific agreed details of the transaction and will specify, *inter alia*, the following aspects of the terms of sale, the:
 - 3.2.1 quantity of the Material;
 - 3.2.2 type or grade of Material;
 - 3.2.3 packing format of the Material;
 - 3.2.4 price of the Material;
 - 3.2.5 INCOTERM that defines the responsibilities of delivery and risk;
 - 3.2.6 date(s) of performance; and
 - 3.2.7 payment terms.
- 3.3 MMC will issue either an Order Confirmation before supplying a single shipment or making delivery of the Material or a Contract Confirmation before supplying multiple shipments or making multiple deliveries on the same terms.
- 3.4 Only once an Order Confirmation has been issued by MMC will the resultant transaction be binding on, and enforceable against, the Parties on the terms herein. The receipt of any order from the Purchaser prior to any such Order Confirmation being issued, shall not operate so as to bind MMC (despite anything to the contrary stated on any such order).
- 3.5 The terms stated herein are subject to the terms as may be set out in any Order Confirmation, which terms shall supersede these terms when a conflict arises between the terms and the Order Confirmation, to the extent of such conflict.
- 3.6 The details set out in the Order Confirmation shall be deemed to be true, accurate and correct and accepted by the Purchaser; unless the Purchaser objects within 48 (forty-eight) hours (during business days) of receipt of delivery of such Order Confirmation.

4 PASSING OF TITLE AND RISK

- 4.1 Ownership in and to the Material will pass to the Purchaser when the agreed price has been paid to MMC in full.
- 4.2 The risk and benefit will pass on delivery, according to the rules of the Incoterm that was stipulated on the Order Confirmation.

5 LOSS OR DAMAGE

- 5.1 In the event of partial or total loss or damaging of Material after delivery, the Purchaser will be liable to pay to MMC the full purchase price as agreed upon in terms of the Agreement and MMC will not be obliged to await the settlement of any insurance claim by the Purchaser for the loss or damage.
- 5.2 In the event of partial loss or damage to the Material prior to delivery, as defined by the Incoterm indicated on the Order Confirmation, to the extent that MMC delivered less Material than what was agreed upon, then the amount to be paid by the Purchaser in respect of that Material will be the discharge weight of the Material and will be based on the analysis and moisture content determined for the Material at the port of discharge, multiplied by the agreed price per metric tonne.

6 PAYMENT

- 6.1 Any amount or balance outstanding which has not been settled by the Purchaser by due date will be subject to interest charges. If the Material was invoiced in:
- 6.1.1 USD, EUR, GBP or JPY, then interest will be charged at the current Overnight LIBOR Rate applicable for the invoice currency plus 2% (two percent) calculated from the due date for payment to the date of final payment; or
- 6.1.2 ZAR then interest will be charged at the current South African Prime Lending Rate plus 2% (two percent) calculated from the due date for payment to the date of final payment.
- 6.2 All bank charges, including costs of telegraphic payment and foreign bill stamps incurred, will be for the account of the Purchaser, unless otherwise agreed in writing by the Parties.

7 CIRCUMSTANCES BEYOND THE CONTROL OF A PARTY

- 7.1 If either Party should be prevented or restricted directly or indirectly by circumstances, where such circumstances include, but are not limited to *force majeure*, *vis major* and *causae fortuitae*, beyond its control (hereinafter collectively referred to as "**force majeure**") from performing all or any of its obligations under the Agreement other than the obligation to make monetary payments, the Party so affected (the "**affected party**") will be relieved of performance of its obligations hereunder during the period that such circumstances and the consequences thereof will continue, but only to the extent so prevented and will not be liable for any delay or failure in the performance of any of its obligations hereunder or loss or damage whether general, special, or consequential which the other Party (the "**unaffected party**") may suffer due to or resulting from such delay or failure, provided always that notice will be given by the affected party to the unaffected party at the earliest possible opportunity by fax, e-mail or registered mail of the occurrence of the event constituting *force majeure*, together with details thereof and an estimate of the period of time for which it will endure.
- 7.2 The term "*force majeure*" will include strike, labour dispute, lock-out, fire, explosion, flood, riot, war, accident, act of God, embargo, legislation, regulation or directive having the force of law, shortage of or a breakdown in transportation facilities, civil commotion, unrest or disturbance, compliance with any order or instruction of any port, local or other authority, non-availability or rationing of electricity, coal, fuel or raw Material, failure of the seller's suppliers to supply, breakdown or malfunctioning of plant or without any limitation any other cause beyond the control of the affected party, whether similar or dissimilar to the causes enumerated above.
- 7.3 The affected party will use its best endeavours to terminate the circumstances giving rise to the *force majeure*, and upon termination of the event giving rise thereto, will forthwith give notice thereof by fax, e-mail or registered mail to the unaffected party.
- 7.4 Notwithstanding any other obligations of this clause 7, the Purchaser will be obliged to accept delivery of and pay for any Material which has been booked aboard a vessel or loaded on a truck for delivery prior to MMC being advised by the Purchaser of any *force majeure*.
- 7.5 The requirement that any *force majeure* will be remedied with all possible diligence will not require the settlement of strikes, lock-outs or other labour difficulties by the other Party concerned on terms which are detrimental and contrary to its reasonable wishes. The manner in which all such labour difficulties will be handled will be entirely within the discretion of the Party so concerned.
- 7.6 The onus of proving *force majeure* is on the Party relying thereon.
- 7.7 Once the *force majeure* has been proven by the Party relying thereon, the Parties shall meet to discuss the *force majeure* event and discuss the consequences thereof, after which the Parties shall endeavour in good faith to renegotiate the terms of the Agreement to ameliorate the *force majeure*, so that it will operate between them with fairness and equity, to the extent possible.

- 7.8 If no agreement can be reached between the Parties within 5 (five) business days' of the Parties renegotiation of the Agreement, then MMC shall be entitled, but not obliged, to cancel the Agreement immediately on written notice to the Purchaser. Any accrued rights of MMC shall continue to be binding, notwithstanding such cancellation.

8 DEFAULT

- 8.1 In the event of either Party (the "**defaulting party**") committing a breach of any of the provisions of the Agreement, the Party not in breach (the "**aggrieved party**") will give the defaulting party notice in writing, by either e-mail or fax, to remedy the breach.
- 8.2 If the defaulting party fails to comply with the notice within 21 (twenty one) days of the date of the notice, the aggrieved party will be entitled to cancel the Agreement or to claim specific performance, in either event without prejudice to the aggrieved party's right to claim damages.
- 8.3 If the Purchaser fails to pay the amount due by it by due date for whatsoever reason or applies for suspension of payments or is put into liquidation or the like, MMC will be entitled to recover Material which has been delivered but has not been paid for and to withhold delivery of further Material.
- 8.4 In the event of default by the Purchaser, MMC will be entitled to any remedy available to it in terms of the South African Law, as well as *mora* interest.

9 GENERAL

- 9.1 The Material supplied by the seller in the condition in which it is sold is considered not to constitute a hazard to health or safety, provided that it is handled and used in accordance with normally accepted safe working practices applicable to the Material. The Purchaser should for its own safeguard consult MMC's Material Safety Data Sheet (the aforementioned data sheet is to be found at www.mmc.co.za) and relevant codes of practice and factory inspectorates with regard to; adequate hygiene, safety, environmental standards and enforcement thereof, with respect to handling and processing of the Material, its products and waste of any sort.
- 9.2 The Purchaser accepts the inherent risks associated with the Material as set out in clause 9.1 above and will accordingly have no claim of any kind against the seller directly or indirectly arising from death, illness or injury of any person or damage to any property as a result of direct or indirect exposure to the Material.
- 9.3 No warranties are given other than that the Material will conform to the specifications agreed to between the Parties, within any tolerance stated and in no event will MMC be liable for special, direct, indirect or consequential damages incurred by the Purchaser in respect of the Material, in this regard:
- 9.3.1 MMC does not warrant that the Material is suitable or fit for the specific purpose the Purchaser has indicated; and
- 9.3.2 the Material is sold *voetstoots* (as it stands). MMC will not be responsible for any defects, latent or patent, if MMC pointed out the defects to the Purchaser or if the defects were known to the Purchaser at the time of the sale. MMC acknowledges that it has made the Purchaser aware of the quality of the Material and the Purchaser agrees to accept the Material as it stands with all defects that were pointed out.
- 9.4 Notwithstanding anything to the contrary contained herein, MMC will in no event be liable for any general, special, direct, indirect or consequential damages, including, but not limited to loss of profit, loss of production, loss of opportunity or contracts or any other consequential or general or special damages, arising out of or in connection with the Agreement from whatsoever cause arising, whether or not such loss was reasonably foreseeable as at the time of contracting.



- 9.5 MMC's liability will not exceed the amount for which MMC's relevant insurer has agreed to accept liability for under MMC's relevant insurance policy.
- 9.6 The Purchaser hereby indemnifies and holds MMC harmless from any and all claims or loss suffered or incurred by any user of the Material or any part of the Material thereof, directly or indirectly for any reason whatsoever and howsoever arising.
- 9.7 MMC's liability under the indemnity in clause 9.6 and the Agreement generally, shall be limited to, and shall not exceed for any reason whatsoever the replacement cost value of the Materials that such loss arose from (including any claim under any law of equities or under any tort law).
- 9.8 The Purchaser will notify MMC in writing of any failure of the Material to comply with specifications within 7 (seven) days from the date on which such failure did come to its knowledge or from the date on which it could reasonably have been expected to come to its knowledge. After receiving such notice, MMC will have the right to verify the nature and extent of the non-conformance by requesting samples of the non-compliant Material for internal and/or external evaluation, and/or requesting descriptions of it in terms of appearance, analysis and performance (at the Purchaser's cost).
- 9.9 After the procedure in clause 9.8 has been complied with and such Material is determined not to comply, MMC will have an option to:
- 9.9.1 replace the Material with conforming Material at MMC's expense; or
 - 9.9.2 recover the Material and reimburse the Purchaser the price paid for the non-conforming Material and thereby terminate the Agreement with regard to that Material; or
 - 9.9.3 offer a rebate to the Purchaser if he elects to retain non-conforming Material; or
 - 9.9.4 rectify the non-compliance at MMC's cost; and/or
 - 9.9.5 at MMC's election, undertake any combination of the above.
- 9.10 Unless otherwise agreed, no action for lack of conformity of the Material or any other matter arising from this contract may be taken by the Purchaser after the expiry of a period of 6 (six) months from the date of delivery of the Material.
- 9.11 Each Party warrants to the other Party that he/she has power, authority and legal right to sign and perform the Agreement and that the Agreement has been duly authorised by all necessary actions of its liquidators, directors, members or trustees (as the case may be) and constitutes valid and binding obligations on it in accordance with the terms of this Agreement.

10 VARIATION

- 10.1 No addition to, variation or deletion of any clause of the Agreement (including this clause 10), consensual cancellation or novation of the Agreement and no waiver of any right arising from the Agreement or its breach or termination will be of any force or effect unless reduced to writing and signed by duly authorised representatives of both Parties.
- 10.2 Any reference in the Agreement to writing signed by a Party shall, notwithstanding anything to the contrary in this Agreement, be read and construed as excluding any form of electronic signature.

11 WHOLE AGREEMENT

- 11.1 No terms or conditions, other than those stated or incorporated by reference herein, and no purchase order or understanding in any way modifying the terms stated or incorporated by reference herein, shall be binding upon MMC unless made in writing and signed by MMC. Any terms imposed by the Purchaser (and whether received prior to or after the receipt of any purchase order) shall, notwithstanding anything to the contrary contained in such terms, be treated as *pro non scripto* and shall be superseded in their entirety by these terms.



- 11.2 MMC's acceptance of payment for goods or services, nor performance thereunder, shall not constitute an acceptance of any counter-proposal submitted by the Party making such counter-proposal, unless specifically accepted in writing by way of signature on behalf of MMC.
- 11.3 MMC hereby expressly objects to and rejects any and all additional or different terms proposed by the other Party, irrespective of where contained, and no such different or additional terms shall form part of this Agreement or be binding on MMC unless made in writing and signed by MMC.
- 11.4 All provisions and the various clauses of the Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other unless the context requires otherwise. Any provision or clause of the Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of the Agreement shall remain of full force and effect. The Parties declare that it is their intention that the Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.

12 ASSIGNMENT

The Purchaser will not be entitled to assign any of its rights or obligations hereunder without MMC's prior written consent, which will not be unreasonably withheld.

13 HARDSHIP

- 13.1 It is the Parties' intention that the provisions of this Agreement will operate between them with fairness and equity. If during the currency of this Agreement, a hardship event arises which is a deviation from any assumptions relied on by MMC in preparing the Order Confirmation and that did not exist at the time of the issuance of the Order Confirmation, the Parties shall each use their best endeavours to renegotiate the terms of this Agreement in good faith to ameliorate the hardship event, so that it will once again operate between them with fairness and equity.
- 13.2 If no Agreement can be reached between the Parties despite their best endeavours, then MMC shall have the right to cancel this Agreement after giving the Purchaser 5 (five) business days' written notice. Any accrued rights of MMC shall continue to be binding, notwithstanding such cancellation.

14 NOTICES

- 14.1 The Parties choose their respective addresses set out in the Agreement for all purposes arising out of or in connection with the Agreement at which addresses all processes and notices arising out of or in connection with the Agreement, its breach or termination may validly be served upon or delivered to the Parties.
- 14.2 Any notice given in terms of the Agreement will be in writing and will:
- 14.2.1 if delivered by hand, be deemed to have been duly received by the addressee on the date of delivery;
 - 14.2.2 if posted by registered post, be deemed to have been received by the addressee on the 8 (eighth) day following the date of such posting; and
 - 14.2.3 if transmitted by fax or sent by e-mail, be deemed to have been received by the addressee 1 (one) business day after dispatch.



15 DISPUTE RESOLUTION

15.1 Sales to Purchasers located within the Republic of South Africa:

Any dispute arising from or in connection with the Agreement will be finally resolved in accordance with the Rules of the Arbitration Foundation of South Africa by an arbitrator or arbitrators appointed by the Parties, alternatively will be finally resolved by institution of an action or application in an appropriate court with jurisdiction.

15.2 Sales to Purchasers located outside the Republic of South Africa:

The Parties agree to submit any dispute or difference between them arising out of the Agreement to conciliation and arbitration as provided by the UNCITRAL Arbitration Rules in respect of which the Arbitration Foundation of South Africa will act as the appointing authority, alternatively any disputes may be resolved by institution of an action or application in an appropriate court with jurisdiction within the Republic of South Africa.

15.3 The arbitration, contemplated by clause 15.2, will be held in Johannesburg, Gauteng Province, Republic of South Africa and the language will be English.

15.4 Pending the obtaining of any arbitral award on any question or difference arising between them or pending judgment by court, neither Party will be relieved or excused from the performance of any/all the obligations by which it is bound hereunder.

15.5 Foreign Purchasers consent to the jurisdiction of the High Court of South Africa, Gauteng Division, Pretoria, Gauteng Province, Republic of South Africa, alternatively any other High Court within the boundaries of the Republic of South Africa.

16 GOVERNING LAW

16.1 The Agreement will be interpreted and implemented in all respects in accordance with the laws of the Republic of South Africa.

16.2 The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the Agreement.

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