

## Instron® - Division of ITW Ltd. Terms & Conditions of Sale

### 1. Interpretation

In these conditions 'the Seller' shall mean Instron – Division of ITW Ltd. and 'the Buyer' shall mean the person or company to whom this form is addressed whose order for the goods is accepted by the Seller, 'the Goods' means the goods or any of them which the Seller is to supply in accordance with these terms and conditions and 'the Conditions' means the terms and conditions of sale set out in this document.

### 2. Terms and Modifications

- a. All Goods are sold subject to the Conditions and insofar as they may be excluded all other conditions guarantees warranties terms undertakings and representations expressed or implied statutory or otherwise are hereby expressly excluded.
- b. The Agreement shall become effective subject to the Seller having obtained any export licence which may be required to fulfil the terms of the Agreement (the parties hereto having both expressly agreed to use their best endeavours to obtain such a licence).
- c. The Conditions:
  - i. shall constitute the entire agreement and understanding between the Seller and the Buyer and supersede all prior representations arrangements understandings and agreements between the Seller and the Buyer relating to the subject matter hereof; and
  - ii. prevail over and exclude any other terms and conditions stipulated or incorporated or referred to by the Buyer or his agent or any third party.
- d. The Buyer irrevocably and unconditionally waives any right that it may have to claim damages for any misrepresentation arrangement understanding or agreement not contained in these Conditions or for any breach of any representation not contained in these Conditions (unless such misrepresentation or representation was made fraudulently);
- e. Unless previously agreed in writing by an authorised officer of the Seller no oral written or other addition to or variation of these Conditions shall be effective.
- f. All particulars given by the Seller relating to technical performance dimensions capacity output consumption and weight of any Goods and all illustrations descriptions specifications and drawings are given as accurately as possible but are approximate only and all such material contained in brochures, catalogues, price lists, and other advertising matter is intended merely to present a general idea of the Goods described therein and none of such material shall form part of the contract and the Goods may vary slightly.
- g. Every effort is made to ensure that the latest specification and design are available and the Seller reserves the right to incorporate changes in design construction composition materials arrangement or equipment as the Seller shall think fit without notifying the Buyer and to supply Goods which may not be in strict accordance with the agreed specification.

### 3. Prices and Taxes

- a. The prices on all quotations issued by the Seller shall be valid and remain open for acceptance for a period of thirty days from the date of the quotation unless stated otherwise on the face of the quotation. No order (whether made pursuant to a quotation or not) shall create any agreement unless it is accepted by the Seller either by acceptance in writing or by the despatch of the Goods ordered.
- b. Prices quoted are based on the cost of materials, labour, transport, duties, levies, currency exchange rates and statutory obligations ruling at the date of the quotation and if, before delivery of all of the Goods there occurs any substantial increase in any of such costs, the price payable may be appropriately increased to allow for such increase.
- c. Unless otherwise agreed in writing delivery shall mean "ex Works", High Wycombe, England and all prices are exclusive of any additional charges whether in respect of insurance, shipping carriage, any costs of dismantling, loading, unloading, installations, calibration, or any special packing or alteration to the order required by the Buyer taxes or duties or otherwise howsoever all of which shall be for the Buyer's account.
- d. Where delivery is made by the Seller or the Seller's agents the Buyer will provide safe and proper means of access to the Buyer's delivery points for the Seller and its Agents and if appropriate any vehicles used by the Seller or its Agents and carriers. If the Buyer fails to provide suitable means or facilities for the reception and unloading of the Goods the Seller shall be entitled to charge the Buyer for any additional costs and time thereby incurred or spent by the Seller. Off-

loading and storing of the Goods are the responsibility of the Buyer alone and the Seller shall not be responsible for any costs or damage to the Goods in connection therewith.

- e. No deduction to the price shall be made by the Buyer in respect of any set-off or counter-claim howsoever arising.
- f. Where applicable, VAT will be charged to and paid by the Buyer in addition to the price of the Goods at the rate in force at the appropriate tax point.

#### 4. Terms of Payment

- a. Unless otherwise agreed in writing payment shall be made net cash (no settlement discount being allowed) within seven days of invoice for UK deliveries and for export sales by confirmed irrevocable letter of credit to be advised direct to and confirmed by such bank as the Seller may from time to time designate ('the Seller's Bank').
- b. The Seller reserves the right to charge interest on any amounts unpaid after the due date of payment at 2% per month or part thereof accruing after as well as before any judgement obtained by the Seller against the Buyer in respect thereof.

#### 5. Title

It is hereby agreed and declared between the Seller and the buyer that until the Seller has been paid in full for the Goods supplied under the Agreement and other payments due to the Seller from the buyer have been made.

- a. The property in the Goods shall remain vested in the Seller (although the risk therein passes to the Buyer in accordance with Clause 8 hereof).
- b. The Buyer shall hold the Goods as fiduciary agent for the Seller and shall mark the Goods with an indication that they remain the Seller's property and they shall be kept separate and identifiable from any other goods in the Buyer's possession and shall be returned to the Seller upon request and all the incidence associated with a fiduciary relationship shall apply.
- c. The Seller its servants or agents shall have the right with or without prior notice at any time to retake possession of the whole or any part of the Goods (and for that purpose shall be granted an irrevocable licence to go upon any premises occupied by the Buyer) and the Buyer shall indemnify the Seller against all costs and liabilities which the Seller incurs in retaking possession of the Goods (or any part thereof) without limitation any liability in respect of any damage (caused to such premises in such retaking of possession and removal of goods) which it was not reasonably practical to avoid.
- d. The Seller shall have the right to dismantle the Goods or detach the Goods from any items in which they may have been incorporated without prejudice to any of the Seller's other remedies.
- e. If the Buyer incorporates the Goods into other products whether with the addition of its goods or those of others or uses the Goods as materials for other products (with or without such addition) the property in those other products is upon incorporation or use transferred to the Seller and the buyer as bailee of them for the Seller will store the same separately and marked so as to be identifiable without charging the Seller.
- f. The Buyer shall be permitted to sell the Goods to third parties in the normal course of business. In this respect the Buyer shall act in the capacity of a Commission Agent and the proceeds of any such sale shall be held in trust for the Seller in a manner which enables proceeds to be identified as such. The Seller as Principal shall remunerate the Buyer as Commission Agent by payment of a commission equivalent to the surplus which the Commission Agent may obtain over and above the price payable by the Buyer to the Seller under the original contract of supply in respect of the goods sold.
- g. If the Buyer has not received payment for a disposal under (f) above then the Buyer shall upon notice in writing being given to it by the Seller assign to the Seller all its rights against its customer in respect of that disposal.
- h. Notwithstanding that ownership of the Goods remains with the Seller, the Seller shall be entitled to maintain an action for the price of the goods in the event of default in payment by the Buyer.

#### 6. Delivery Dates and Force Majeure

- a. Dates for delivery are estimates given in good faith and as accurately as possible but are not guaranteed and the Seller cannot accept responsibility for any failure to deliver or late delivery due to circumstances beyond the Seller's control.
- b. Both the Seller and the Buyer shall be released from their respective obligations in the event of national emergency war prohibitive governmental regulations or if any cause beyond either parties reasonable control rendering the performance of any order impossible. For the avoidance of doubt this provision shall not relieve the Buyer of its obligation to pay for

all Goods delivered pursuant to any order.

## 7. Warranty and Limitation of Liability

- a. The Seller warrants that the Goods to be supplied by the Seller consequent upon its acceptance of the Buyer's order will be of normal industrial quality. The Seller's obligation under this warranty shall be to correct any defective work which becomes apparent within 12 months of installation or 2000 operating hours or within 15 months of despatch, whichever period is the shorter, and to repair or at Seller's option replace free of charge any goods which are shown to the Seller's satisfaction to have been defective provided that notice of such defects and satisfactory proof thereof is given by the Buyer immediately after discovery and proved that the Goods have only been used for the purposes for which the Goods were manufactured and in accordance with normal practice and provided that the Buyer shall return any such Goods to the Seller at the Buyer's expense if required to do so by the Seller.
- b. Save as in this Clause expressed, the Seller shall be under no liability for any personal consequential or other loss or damage of whatsoever kind or howsoever caused as a result of any Goods supplied or work done being defective or not in accordance with any order or as a result of anything done or omitted in connection with any work done or omitted to be done by the Seller including any breach by the Seller of any fundamental term of any order and the Seller's liability under this Clause shall be in lieu of and to the exclusion of any liability, condition, guarantee, warranty, term undertaking or representation whether express or implied, statutory or otherwise and shall be limited to the value of the Goods supplied under the order to which any claim relates or the amount received by the Seller in relation to the Goods under any product liability insurance currently held by the Seller.
- c. There is no guarantee as to the suitability of the equipment for the Buyer's process unless sold by the Seller specifically for such process and save as aforesaid all conditions and warranties whether express statutory or implied are excluded.
- d. Notwithstanding anything contained in the last foregoing paragraph, the Seller's liability in respect of any goods not manufactured by the Seller, but supplied by the Seller shall be to give the Buyer the benefit of any manufacturer's guarantee or other rights (if any) which are available to the Seller against the manufacturer or its own supplier of such Goods or materials.
- e. Nothing contained in this Clause shall exclude:-
  - i. any liability for breach of our implied undertakings as to title.
  - ii. where the Buyer deals as a consumer (as defined by the Unfair Contract Terms Act 1977) any liability for breach of its implied undertakings as to conformity of goods with description or sample or as to their quality or fitness for a particular purpose.
  - iii. any liability arising from our negligence causing death or personal injury.
- f. The Buyer recognises that the limitation of liability contained in this clause is reasonable in that the prices quoted by the Seller are dependent upon such limitation being incorporated in the Conditions.

## 8. Acceptance of Goods

- a. Unless otherwise agreed in writing it is agreed between the Seller and the Buyer that the risk of loss or damage to the Goods howsoever caused shall pass from the Seller to the Buyer upon delivery to the Buyer or to the Buyer's order or to a carrier for delivery to the Buyer or to the Post Office for Mailing to the Buyer. It is further agreed that any returned goods remain at the risk of the Buyer until safely received by the Seller.
- b. Unless the Seller is notified to the contrary by telephone or telex within 7 days of delivery and such notification is confirmed in writing within 10 days the Goods shall be deemed to have been accepted by the Buyer as being in good condition and in accordance with the Conditions. The Buyer shall not be entitled to withhold payment of all or any of the purchase price while any claim is being investigated by the Seller.
- c. Where it is agreed that the Seller will install and demonstrate the Goods the buyer shall invalidate the warranty provided by Clause 2 (a) hereof if it installs the Goods itself or permits their installation by anyone other than a person expressly authorised to do so by the Seller.
- d. Where the Seller has undertaken to install the Goods those goods which are claimed to be defective shall not be returned to the Seller unless the Seller specifically requests that such a return is made prior to the installation visit.
- e.
  - i. If the Seller considers in its absolute discretion that the Goods are satisfactory it shall notify the Buyer of its finding in writing and this finding shall be final and binding on the Buyer.

ii. If the Seller in its sole discretion and without prejudice to the provisions of Clause 7 hereof considers the Goods to be defective it may repair or replace the Goods or allow the Buyer a credit in respect of the Goods and its liability for such defects shall not extend beyond such repair replacement or issue of credit.

#### 9. General Obligations of the Buyer

In addition to such other obligations of the Buyer as are defined in the Agreement the Buyer's responsibilities shall include (but are not limited to):-

- a. Maintenance of the room or place in or at which the Goods or any part of the Goods are to be installed in accordance with the requirements of The Health and Safety at Work etc Act 1974 and in accordance with the site specifications contained in the operating instructions for the Goods furnished by the Seller to the Buyer.
- b. Ensuring that the Buyer's employees or any other third parties duly authorised by the Buyer to operate the Goods are adequately trained in their use and operation and comply with the safety and user recommendations contained in the operating instructions. The products or specimens being tested by the Goods may themselves cause hazards to the operator during the tests and each user must therefore ensure that his test methods are safe.
- c. Sole responsibility and control for the use of the Goods.
- d. Protection of all information which the Seller shall have designated as proprietary or which the Buyer ought reasonably to know is regarded as confidential by the Seller.

#### 10. Alterations

If the Buyer uses any part fixture device or attachment not supplied by the Seller with any part of the Goods or makes any alteration or modification to any part of the Goods the Seller shall be relieved of its obligations under Clause 7(c) hereof.

#### 11. Indemnity

The Buyer hereby undertakes to take all such steps as shall be sufficient to ensure so far as is reasonably practicable that the Goods shall be safe and without risk to health and properly used and the buyer hereby agrees to indemnify and save the Seller harmless from and against any and all loss damage liability and claims (including amounts paid for legal fees and in settlement of such claims) of persons other than the Buyer arising out of the sale resale or use of the Goods provided that nothing herein shall limit or exclude the Seller's liability for personal injury or death.

#### 12. Default

- a. In the event that
  - i. the Buyer fails to carry out its obligations under the Agreement or
  - ii. the Buyer suspends payment to the Seller at any time or
  - iii. the buyer ceases or threatens to cease to carry on its business or any part thereof or
  - iv. a distress execution judgement or order of any Court is levied or enforced or executed upon or against any of the chattels or property of the Buyer or
  - v. if the Buyer becomes insolvent or in the Seller's opinion is likely to go into bankruptcy receivership administration or liquidation The Buyer will be deemed to be in default and the Seller shall have the right without notice or judicial intervention either to suspend the performance of the agreement or to cancel the agreement without liability to the Buyer or without prejudice to the Seller's rights which may have accrued up to the date of termination.
- b. The Seller shall have the right without giving rise to any liability for damages to cancel the Agreement in whole or in part in the event of any governmental or international price regulation order or statutory instrument limiting the price of the Goods to below the price specified or if any government (including the Commission of the E.U.) shall in any way prevent the Seller from purchasing or otherwise acquiring any commodity or service necessary for the performance of the Agreement or prevents or limits any price increases by the Seller which result from increased costs of materials or services.
- c. In the event of cancellation for any reason the Seller shall have the right in accordance with Clause 5 hereof to recover from the Buyer as the Seller's own property any and all of the Goods delivered to the Buyer but for which the Seller has

not received payment.

### 13. Cancellation by the Buyer

The Buyer shall have no right to cancel the agreement without the previous written consent of the Seller and on the Seller granting such consent the Buyer shall pay to the Seller:

- a. The purchase price for all of the Goods delivered to the Buyer or completed and in their deliverable state at the date of the cancellation.
- b. All costs and other expenses of whatever nature incurred by the Seller in connection with the cancelled portion of the Buyer's order including in particular any damages payable by the Seller in respect of any contracts made with its suppliers or others which as a result of the cancellation have been broken or cancelled.

### 14. Trade Marks/Patents

The supply of Goods by the Seller shall not confer any rights on the Buyer

- a. To use any of the Seller's trade marks or
- b. To use any of the Seller's patents or indemnities against infringement of third party patents without the prior written consent of the Seller and at all times such trade marks patents and indemnities shall together with any copyright of the Seller in the Goods supplied remain the property of the Seller.

### 15. Assignment

The Buyer shall not without the prior written consent of the Seller assign or transfer or purport to assign or transfer the Agreement.

### 16. Waiver

Any failure or delay by the Seller to exercise any right or remedy available to it under the terms of the Agreement or otherwise shall not operate as a waiver of such right nor shall any single or partial exercise by the Seller of such right or remedy preclude the exercise of any other right or remedy.

### 17. Notices

Any notice or demand requiring to be served hereunder must be sent by ordinary first class letter post or facsimile or electronic mail and if posted shall be deemed to have been received two days after posting for internal mail and four days after posting for international mail and on receipt if by facsimile or electronic mail.

### 18. Proper Law

- a. These Conditions shall be governed by and construed in accordance with English law and the parties irrevocably agree for the exclusive benefit of the Seller that the Courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with these Conditions and that accordingly any suit action or proceeding arising out of or in connection with these Conditions ("Proceedings") may be brought in such Courts.
- b. Without prejudice to Clause 18(a) above the Buyer further irrevocably agrees that any Proceedings may be brought in the Courts of any country or state other than a Contracting State as defined in section 1(3) of the Civil Jurisdiction and Judgements Act 1982 and submits to the non-exclusive jurisdiction of each of such Courts.
- c. Nothing contained in this Clause shall limit the right of the Sellers to take Proceedings against the Buyers in any other Court of competent jurisdiction nor shall the taking of proceedings in one or more jurisdiction preclude the taking of Proceedings in any other jurisdiction whether concurrently or not.
- d. The Buyer irrevocably waives (and irrevocably agrees not to raise) any objection which it may have now or subsequently to the laying of the venue of any Proceedings in any such Court as is referred to in this Clause and any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgement in any Proceedings brought in any such Court as is referred to in this Clause shall be conclusive and binding upon the Buyer and may be enforced in the Courts of any other jurisdiction.

### 19. Patent and Copyright Indemnification

- a. The Buyer agrees to indemnify the Seller against all demands claims damages charges liabilities costs and expenses

which may be incurred or sustained by the Seller by reason of or arising directly out of any third party claims or rights or otherwise howsoever in respect of any Goods manufactured or services supplied in accordance with any specification design information equipment or instruction given by or on behalf of the Buyer and whether relating to the infringement or the alleged infringement of a Patent Copyright Registered Design or other protected industrial right or property or otherwise howsoever.

- b. In the event that such a claim results in an order by a court of competent jurisdiction that the Buyer's use of the Goods or any part of the Goods constitutes infringement of a third party's rights the Seller shall, provided that the Buyer has complied with the terms of sub-paragraph (a) above, indemnify the Buyer in respect of any award of damages and costs made against the Buyer and all costs fees and expenses incurred by the Buyer as a result thereof and at its own expense and with sole discretion as to which of the following remedies to provide:
  - i. procure the right from the said third party for the Buyer to continue to use the Goods without infringement of the said third party's rights therein or
  - ii. replace or modify the Goods to eliminate the said infringement of third party rights therein or
  - iii. grant the Buyer credit for the Goods such credit to be based both on the price paid for the Goods by the buyer and the length of use of the Goods enjoyed by the Buyer.
- c. The Seller shall have no liability to the Buyer under this clause if any successful claim for infringement of third party rights is based upon:-
  - alteration of the Goods by the Buyer or
  - failure by the Buyer to use modifications to or replacements of the Goods provided by the Seller in order to avoid any potential infringement of third party rights or
    - i. use of the Goods in a manner for which they were not designed or
    - ii. a patent copyright or other like right in which the Buyer or any affiliated or subsidiary company of the Buyer has any direct or indirect interest.
- d. Except as herein stated the Seller shall have no other liability to the Buyer for or resulting from infringement of third party patent copyright or other like rights.

## 20. Software

The Conditions shall not apply to the supply of all or any of the programs, operating systems, compilers, translators and related visually readable documentation (' software' ). The supply of any Software contained in an offer is subject to the terms and conditions of the licence (and where appropriate the schedule) supplied separately by the Seller.

## 21 Consequential Damages

There shall be no express or implied warranty, guarantee or liability except as stated here. Instron shall have no liability for indirect, incidental or consequential damages.