



## STANDARD TERMS AND CONDITIONS OF SALE

2<sup>nd</sup> edition January 2023

### 1 SCOPE

- 1.1 These Conditions shall apply to all contracts and agreements between Phönix and the Customer (hereinafter Phönix and the Customer each a "Party" or collectively the "Parties"), whether written or oral, for the sale or supply by Phönix of any Products and/or Services, to the exclusion of any other terms and conditions on which any purchase order or other offer has been given to Phönix.
- 1.2 In case of any inconsistency between the terms and conditions of any Quotation, purchase order, acknowledgement or form of contract sent from the Customer to Phönix, or contained in any other communication between the Customer and Phönix, or any terms and conditions implied by trade, custom, practice or prior course of dealings, and these Conditions, then these Conditions shall prevail. Additional or alternative terms and conditions shall not apply unless expressly accepted in writing and signed by an authorized representative of Phönix. Additional, alternative or contradictory provisions contained in any purchase order, acknowledgement or other communication from the Customer are hereby expressly rejected and shall have no binding effect.
- 1.3 Each purchase order, acknowledgement or form of contract sent from the Customer to Phönix for the supply of Products and/or Services shall be deemed to be an offer by the Customer to purchase Products and/or Services subject to these terms and conditions. Phönix may accept or reject any such offer to purchase. Silence on the part of Phönix shall not constitute acceptance of Customer's offer to purchase.

### 2 ORDERS AND ACCEPTANCE

Specifications or any description of the Products or Services appearing in any catalogue or marketing materials shall not form a part of the contract between Phönix and the Customer unless such specification or description is specifically referenced and restated in the Order and specifically acknowledged by Phönix in its acceptance.

### 3 PRICE AND PAYMENT

- 3.1 All prices quoted by Phönix are exclusive of Value Added Tax and all other sales, use, excise taxes, duties, charges or similar. Where prices are published in standard pricelists or pricing schedules, these prices are subject to change without notice.
- 3.2 Phönix reserves the right, after conclusion of the contract, to adjust the prices to be paid on the basis of this contract in addition to this at its reasonable discretion to the development of the costs which are decisive for the price calculation. A price increase shall be considered and a price reduction shall be made if and to the extent that the costs for the contract concluded change due to circumstances beyond the control of Phönix. Such circumstances are, for example, exchange rate fluctuations, currency regulation, changes in customs duties, increases in the rate of inflation, significant increases in transport, material, energy or labor costs or other manufacturing costs. Increases in one type of cost, e.g. electricity purchase costs, may only be used to increase prices to the extent that they are not offset by any decreases in other areas, e.g. metal procurement costs. In the event of cost reductions, e.g. in electricity procurement costs, Phönix shall reduce prices to the extent that these cost reductions are not fully or partially offset by increases in other areas. In exercising its equitable discretion, Phönix shall choose the respective points in time of a price change in such a way that cost reductions are not taken into account according to standards which are less beneficial for the customer than cost increases, i.e. cost reductions shall have at least the same effect on prices as cost increases. The customer has the option of having the appropriateness of the new prices reviewed by the courts. Apart from this, § 315 of the German Civil Code (BGB) shall remain unaffected.
- 3.3 If, after the contract has been concluded, it becomes apparent that Phönix will not be able to adhere to the calculation on which the order was originally based due to macroeconomic circumstances beyond the control of Phönix and for which Phönix is not responsible and that an adjustment cannot be made in an economically reasonable manner (e.g. due to price increases, supply bottlenecks, staff shortages, etc.), Phönix has a contractual right of withdrawal up to four calendar weeks before the last agreed delivery date. An adjustment shall no longer be made in an economically reasonable manner if the increased costs are not reasonable in the sense of clause 3.2 and a price adjustment cannot be made effectively.
- 3.4 Unless otherwise stated in any Quotation or otherwise expressly agreed in writing, all prices are exclusive of all shipping costs and insurance, which shall be invoiced to and be paid by the Customer as additional charges.

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- 3.5 Unless otherwise stated in any Quotation or otherwise expressly agreed in writing, all prices are exclusive of the cost of installation, engineering and related charges, which shall be invoiced to and be paid by the Customer as additional charges.
- 3.6 Unless otherwise agreed in writing, the Customer shall make payment of the purchase price in the currency stated in the Quotation, at the times stated in the Order or otherwise upon delivery of the Products and/or completion of the Services, without deduction or set off of any kind in accordance with Article 3.6.
- 3.7 In the event that manufacture, shipment or delivery of the Products or performance of Services is delayed either at the request of the Customer or by reason of the Customer's act or omission (including the Customer's failure to ready the site for installation), payment of the balance of the purchase price shall nevertheless fall due on the date on which payment would otherwise have fallen due but for such act, omission or event. Risk in the Products shall pass to the Customer as if the Products had been delivered in accordance with the original delivery schedule and Phönix may ship the Products (in either completed or incomplete form) to either a storage facility designated by the Customer, or to any storage facility designated by Phönix, and the Customer shall (without limiting any other right or remedy available to Phönix) pay to Phönix upon demand the amount of any additional storage, transport or other, costs and insurance expense incurred by Phönix.
- 3.8 Each payment shall be made within thirty days of the date of invoice. Except where a credit account has been opened for the Customer by Phönix, payment shall be made in advance of Products being released for shipment against a pro-forma invoice.
- 3.9 If the Customer disputes any invoice or part thereof, the Customer shall immediately pay the undisputed portion of the invoice and shall immediately notify Phönix in writing of the reasons for such dispute. The parties shall seek to resolve the dispute within fourteen days of such notification. Upon resolution of the dispute, such sum as is agreed by the parties as payable shall be paid immediately to Phönix, together with any interest due.
- (a) In addition to any other rights and remedies Phönix may have, if any payment due to Phönix is not made on the due date: Phönix is entitled to charge the Customer interest on the outstanding amount at the rate of nine (9) percentage points per year above the base rate of European Central Bank. Phönix's right to claim further damages remains unaffected;
- (b) Phönix may suspend further deliveries to the Customer until all sums overdue from the Customer have been paid;
- (c) all sums invoiced by Phönix to the Customer (whether or not outstanding) shall become immediately due and payable in full;
- (d) all outstanding bonds issued by Phönix, if any, shall be released; and
- (e) Phönix may deduct the same from any sum then due to the Customer under the Order or any other contract between Phönix and the Customer.
- 3.10 Phönix may, as a condition of the performance of any of its manufacturing, supply or other obligations under its contract with the Customer, require the Customer to provide to Phönix written evidence in a form satisfactory to Phönix that the Customer has secured the finance necessary for the Customer to pay the purchase price. Without limiting any other right or remedy available to Phönix, Phönix may cease or delay the manufacture or shipment or installation of any Product until the Customer has provided such evidence to Phönix. If the Customer fails to provide such evidence to Phönix's satisfaction, Phönix may terminate immediately upon written notice all or part of the Order. The customer shall be at liberty to claim damages in accordance with the statutory provisions; the provisions of Article 8 shall remain unaffected.

#### **4 DELIVERY, TITLE AND RISK OF LOSS**

- 4.1 All times and dates given by Phönix for delivery of Products and performance of Services are given in good faith, and Phönix shall use reasonable efforts to meet such delivery times and dates.
- 4.2 In the event of a delay in delivery or performance by Phönix, by way of deviation from Article 8 and as a general liability cap for Phönix, the Customer shall be entitled to claim liquidated damages for such delay which shall be limited to a maximum amount of 5% of the net Order price payable by the Customer in relation to the Order affected by the delay.
- 4.3 The Customer shall make available free of charge and risk to Phönix at the times stated in the Quotation or otherwise in a timely manner all necessary personnel, materials, equipment, resources, instructions, documents, licenses, authorizations, approvals and site access ("Customer Resources") reasonably required by Phönix to supply the Products and/or Services, and where applicable, the Customer shall remove any Customer Resources which are at Phönix's premises and which have not been incorporated into the Products, at its sole expense on expiry or earlier termination of any Order. The Customer hereby represents and warrants that it has the full right, authority and license to supply and disclose the Customer Resources and that any Customer Resource and its use by Phönix for the purpose of supplying the Products and/or Services will not infringe the copyright or other intellectual property rights of any third party.
- 4.4 In the event of any failure or delay on the part of the Customer in supplying the Customer Resources, or if the same are not in accordance with the Order or are not fit for the purpose provided, then Phönix may notify the Customer thereof, and the Customer shall as soon as reasonably practicable and at its own expense supply replacement Customer Resources. Phönix may: (i) extend the period for delivery of the Products and/or Services by a reasonable time; and/or (ii) adjust the price to reflect any additional costs incurred by Phönix as a result thereof and the Customer shall pay such additional charges; and/or (iii) serve

- notice under Article 11.1(b).
- 4.5 Unless otherwise expressly stated in the Quotation or Order, delivery of Products shall take place Ex Works (EXW in accordance with Incoterms® 2020) at the place where the Product is handed to a carrier for carriage either to the Customer or to a storage facility pursuant to Article 3.5, at which point title to, risk of damage to, and loss of the Products shall pass to the Customer. For the avoidance of doubt any such transfer of title in the Products shall not imply transfer of ownership of any Intellectual Property therein. Where Phönix arrange delivery of the Products at Customer's request and expense, such delivery does not change the Incoterm under which the Products are delivered.
- 4.6 Notwithstanding the delivery and the passing of risk in the Products, or any other provision of these Conditions, the property in the Products shall not pass to the Customer until Phönix has received payment in full of the price of the Products under the respective purchase order and all other Products agreed to be sold by Phönix to the Customer for which payment is then due. If the Customer fails to comply with the provisions of these Conditions or with any other provisions agreed between the parties - in particular in the case of default in payment (*Zahlungsverzug*) - Phönix shall be entitled to request payment within an appropriate period of time and - once such period has lapsed without full payment - to retake, sell or otherwise exploit (*verwerten*), or seize (*pfänden*) all or any part of the Products in which title remains vested in Phönix ("Reserved Products"). To the extent Phönix retakes, sells, exploits, or seizes the Reserved Products, Phönix shall be deemed to have rescinded the respective purchase order. The Customer shall bear the transportation costs of retaken, sold, exploited or seized Reserved Products. The proceeds from any sale, exploitation or seizure of the Reserved Products shall reduce the amount owed by the Customer to Phönix, provided that Phönix shall be entitled to reduce the proceeds by reasonable costs of the sale, exploitation or seizure.
- Until such time as the property in the Reserved Products passes to the Customer, the Customer shall hold the Reserved Products as Phönix's fiduciary agent, and shall keep the Reserved Products properly stored, protected and insured. Until such time as the property in the Reserved Products passes to the Customer, the Customer shall be entitled to resell or use the Reserved Products in the ordinary course of its business provided, however, that it shall be accountable to Phönix for the proceeds of sale or other disposal of the Reserved Products including insurance proceeds and shall keep all such proceeds separate from its funds or assets or from funds and assets of third parties.
- If third parties seize or otherwise enforce rights into (*vollstrecken in*) the Reserved Products, the Customer shall immediately notify Phönix in order to enable Phönix to seek a court injunction in accordance with § 771 of the German Code of Civil Procedure (*Zivilprozessordnung – ZPO*). If the Customer fails to do so in due time, he will be held liable for any damages caused. Phönix shall on demand of the Customer release any part of the collateral if the value of the collateral held in favor of Phönix exceeds the value of the claims being secured.
- 4.7 In addition to the aforementioned provision (Article 4.6) and Phönix's rights under Article 11, if the Customer fails to pay or perform when due any amount or obligation owing to Phönix under these Conditions, or if the Customer ceases or threatens to cease to carry on business or substantially the whole of its business, becomes unable to pay its debts, becomes insolvent or bankrupt, enters into liquidation, or a receiver, administrator, administrative receiver, manager, trustee or similar officer is appointed in relation to it or over any of its assets, or any action is taken or threatened by or against it analogous to the foregoing in any jurisdiction, then Phönix may – after expiry of a reasonable period of time - declare all amounts and obligations of the Customer owing to Phönix immediately due and payable, unless the Customer provides securities for the amounts due and obligations owed to Phönix.
- 4.8 In the event that the period of delay referenced in Article 3.5 exceeds six months, Phönix shall be entitled (at its sole discretion) to cancel the Order, whereupon Phönix's further obligations to the Customer shall be extinguished. Nothing in this Article 4.8 shall restrict Phönix's right to pursue damages or any other remedy to which Phönix may be entitled as a matter of law.
- 4.9 Phönix reserves the right to make substitutions, modifications and improvements to the Products or Services ordered by the Customer provided that such substitutions, modifications or improvements shall not adversely affect the functionality or performance of the Products or the quality of the Services, in a manner material to the intended application of the Products or Services.
- 4.10 Phönix shall have the right to make, and the Customer agrees to accept, delivery by instalments.
- 4.11 Upon delivery the Customer is obliged to inspect each product for defects and to notify Phönix immediately in writing of any defects in accordance with the statutory provisions (§§ 377 ff. HGB). If the Customer fails to notify Phönix of a defect, the products shall be deemed to have been accepted, unless the defect was not recognizable upon inspection. If a defect becomes apparent later, the notification must be made immediately after discovery; otherwise, the products shall be deemed approved also in view of this defect.

## 5 WORK PERFORMED ON Phönix's OR CUSTOMER'S PREMISES

- 5.1 Where Customer's employees, agents and representatives attend Phönix's or its Affiliates' sites, they shall abide by such

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regulations, including without limitation security and health and safety regulations, as are applicable to their presence on CW- l's and/or its' Affiliates' premises. Customer shall ensure that appropriate insurance is maintained to cover its obligations under the Order and shall upon Phönix's request provide current certificates of insurance

- 5.2 Phönix shall have the right to require the removal from its premises of any person disobeying such regulations and reserve the right to refuse entry to its premises to any person whom it considers unsuitable.
- 5.3 Where the Order requires Phönix to perform work at the Customer's or others' premises, the Customer shall be responsible for arranging, in good time, all permits, licenses or other permissions necessary to enable Phönix's employees, agents and representatives to gain access to and perform work at such premises. Phönix's employees, agents and representatives working on the Customer's or others' premises shall abide by such regulations detailed in the Order as are applicable. If installation services are part of the Services contained in any Order, then the parties shall agree separate terms and conditions which apply to the installation services.

## 6 LICENSE

- 6.1 Phönix grants to the Customer a non-exclusive royalty-free license to use the Products solely for the purposes expressly stated in the Order as being the purpose for which the Products are supplied or, if no such purpose is stated, solely for the purpose stated within Phönix's accompanying documentation and in any event, solely in accordance with any instructions set out in such documentation.
- 6.2 The license granted by Article 6.1 is non-transferable except that the Customer may, subject to the provisions of Article 6.3, sublicense the Software to its customers in conjunction with the resale of any Products in which the Software is installed or with which it is used.
- 6.3 It is a condition of the Customer's right to sublicense the Software to its customers, pursuant to Article 6.2, that the Customer procures from the Customer's customer a written agreement whereby the Customer's customer becomes bound by the other terms of this Article 6. The Customer shall promptly deliver to Phönix a copy of each such written agreement upon request.
- 6.4 The Customer shall not make any copies of the Software, unless this is necessary for the intended use or if copies of the software components are made for backup purposes. The Customer may not, either itself or with the assistance of any third party make modifications to the Software or seek to recover any portion of the Software (including object code, source code, program listing or any data).
- 6.5 Notwithstanding the provisions of 6.4, the Customer shall not revise, decompile, copy or adapt the whole or any part of the Software except for the purpose of observing, studying or testing the functioning of the Software in order to understand the ideas and principles which underlie the Software or for the purpose of achieving interoperability, and then only to the extent required by applicable legislation.
- 6.6 The Customer shall not remove or alter any copyright or other proprietary notice on any of the Software, and shall ensure that such notices appear on each and every copy of the Software supplied to the Customer's customers pursuant to the license granted by Article 6.2.
- 6.7 Without limiting the generality of the limitations in Articles 6.1 to 6.6 inclusive, and subject only to Article 6.2, the Customer shall not sub-license, sell, rent, disclose, or otherwise make the Software available to any other person, or use the Software except as expressly authorized in writing by Phönix.

The Software may include one or more programs and documentation owned by third parties and distributed by Phönix under license. The Customer hereby agrees to be bound by all third party licenses that govern the Customer's possession and use of such program(s), and if provided to the Customer, regardless of whether provided as part of the program's shrink wrap package or in electronic format displayed during program boot up or operation or in any other form. The Software will at all times remain the sole and exclusive property of Phönix or its licensor (as the case may be), and the Customer shall obtain no title to or interest in the Software.

## 7 WARRANTIES

- 7.1 Phönix warrants that as at the time of delivery the Products (excluding Software) (1) shall be and shall perform substantially in compliance with any specification, drawings and other documents expressly incorporated into the Order; and (2) during the Warranty Period the Products shall remain free from defects in material and workmanship (the "Equipment Warranty"), failing which Phönix shall (at its option) either repair or replace the defective Products. If the repair or replacement by Phönix fails twice within a reasonable period of time, in any event not less than 6 month following the Customer's notice subject to Article 7.4(a), the only other warranty claim of the Customer shall be a damages claim subject to the provisions of Article 8 below. .
- 7.2 Phönix warrants that the Services shall be performed with a reasonable degree of care and skill (the "Services Warranty"), failing which Phönix shall (at its option) repeat the performance of the defective portion of the Services.
- 7.3 Phönix warrants that all physical media containing the Software shall be free of defects in materials and workmanship at the

time of delivery and that the Software shall during the Warranty Period operate substantially in compliance with any specification contained in the Order (the "Software Warranty"), failing which Phönix shall replace the physical media containing the Software with a version in which errors or bugs have been corrected.

- 7.4 Prior to Phönix fulfilling any claims of the Customer under the Equipment Warranty, Software Warranty or Services Warranty, the Customer shall:
- (a) give Phönix notice of the claim in a timely manner, specifying in reasonable detail the nature of the claim together with all relevant information; and (b) provide Phönix a reasonable opportunity to examine the Products concerned; and (c) on Phönix's request, return, at the Phönix's cost, such Products for examination at Phönix's place of business.
- 7.5 Where Phönix supplies any goods supplied by a third party (excluding any Affiliate of Phönix), notwithstanding the following Article 8 of these Conditions, Phönix does not give any warranty, guarantee or indemnity on such goods, but shall, where possible, assign to the Customer the benefit of any warranty, guarantee or indemnity provided to Phönix by such third party.
- 7.6 Notwithstanding the foregoing as well as the following Article 8 of these Conditions, any samples and/or prototypes supplied by Phönix to Customer are provided "AS IS," without warranty of any kind.
- 7.7 The period of limitation is 12 months, beginning with the transfer of risk. This does not apply if the purchase item is normally used for a structure and caused the defect.

## **8 LIMITATIONS OF LIABILITY**

- 8.1 Phönix shall be liable for damages, irrespective of the legal grounds, including in the event of breach of contractual obligations or claims in tort, exclusively in the following cases:
- a) intent;
  - b) culpable injury to life, body or health;
  - c) insofar as Phönix (i) has expressly assumed a guarantee and/or (ii) has expressly assumed the risk of the unavailability of certain products by written agreement and/or (ii) is subject to product liability claims under the Product Liability Act;
  - (d) gross negligence; and/or
  - (e) in other cases of breach of a material contractual obligation, i.e. an obligation the fulfilment of which is a prerequisite for the proper performance of the contract and on the fulfilment of which the Customer regularly relies and may rely and/or the breach of which jeopardizes the purpose of the contract.
- Otherwise, the Phönix's liability is excluded.
- 8.2 In the cases of clauses 8.1d) and 8.1e), Phönix's liability shall be limited to the typical and foreseeable damage.
- 8.3 The exclusions or limitations of liability pursuant to clauses 8.1 to 8.2 shall also apply to the same extent to acts of Phönix's legal representatives and vicarious agents. Furthermore, the Phönix shall not be liable for the grossly negligent breach of non-essential contractual obligations by simple, non-executive vicarious agents.
- 8.4 Phönix shall not be liable for the non-performance of its obligations if the non-performance is due to Force Majeure. Force Majeure shall be deemed to exist if there is an external influence that is exceptional and unavoidable, such as in cases of operational disruptions, riots, actions or inactions of government bodies whether in its sovereign or contractual capacity, war, judicial action, civil disturbance, insurrection, natural disasters, political unrest, pandemics, official orders and other acts of God ("Force Majeure").
- 8.5 The warranties set forth in Article 7 do not extend to damage, defects, failures or malfunctions caused or contributed to by:
- (a) the Customer's failure to follow the instructions and advice provided by Phönix regarding the installation, operation, storage, use and maintenance of the Products;
  - (b) modifications, alterations or repairs made by a Person other than by Phönix;
  - (c) the mishandling, abuse, misuse, negligence, or improper storage, servicing or operation of Products (including without limitation use with incompatible equipment or non-standard connections) by the Customer or its agents;
  - (d) power failures, surges, fire, flood, accident, actions of third parties or any act of Force Majeure;
  - (e) the Customer continuing to make full or substantially full use of the Products after such defect is or should have been discovered; or
  - (f) Phönix's compliance with instruction of the Customer.
- 8.6 Phönix does not warrant that the Software is error free or that the Customer will be able to operate the Software without problems or interruptions.
- 8.7 The Software Warranty does not apply to any software media or Software that (a) has been altered or modified by any Person other than Phönix; (b) has been installed, operated, repaired or maintained otherwise than in accordance with instructions supplied by Phönix; (c) has been subjected to abnormal physical or electrical stress, misuse, negligence, or accident; or (d) has been used in an application other than its intended application.

## 9 EXPORT AND IMPORT TERMS

- 9.1 Delivery and performance respectively of the Products and Services supplied by Phönix are subject to applicable export control laws and regulations and conditioned upon receipt of required government licenses and approvals. The Customer shall not re-export the Products or any technical data supplied by Phönix (a) from the country of delivery, or (b) to any facility anywhere in the world engaged in the design, development, stockpiling, manufacturing or use of nuclear, missile, chemical or biological weapons, or (c) to any military end-user or to any Person for military end-use or distribution to a military end-user, in each case without fully complying with the regulations of all relevant government agencies.
- 9.2 Phönix shall use its reasonable endeavours to obtain all necessary export or other licenses, consents, clearances and/or authorisations (the "Export Licenses") required in order to fulfil its obligations under the Order.
- 9.3 The Customer shall, in a timely manner and at its own cost and expense, provide to Phönix such end-user certificates, end-user undertakings or other information as Phönix may request in support of obtaining and maintaining Export Licenses.
- 9.4 In the event that such Export Licenses are not granted or are revoked, Phönix shall be entitled to terminate the Order without notice. Notwithstanding the provisions of Article 8, Phönix shall have no liability to the Customer for completing its obligations affected by such Export Licenses (including without limitation the supply of any Products), or for any loss, expense or damage whatsoever suffered by the Customer.
- 9.5 The Customer shall be responsible for complying with any legislation or regulations governing the importation of the Products into the country of destination and for the payment of any duties or taxes. If any license or consent of any government or other authority shall be required for the acquisition, import, carriage or use of the Product by the Customer, the Customer shall obtain the same at its own expense and produce evidence of the same to Phönix on demand. Phönix shall provide certificates of delivery, certificates of origin and other information in its control that is reasonably necessary for the Customer to import the Products. The failure of any authority or government agency to issue such license or consent or the withdrawal thereof shall not entitle the Customer to withhold or delay payment of the purchase price.

## 10 FORCE MAJEURE

Notwithstanding Article 8.4 of these Conditions, for the avoidance of doubt, Phönix shall not be liable for delay or failure in performance of any of its obligations to the Customer attributable in whole or in part to any cause in case of Force Majeure. As long as Force Majeure exists, the Phönix's obligation to perform its duties shall be suspended.

If Phönix fails to perform its obligations due to Force Majeure for a period of more than sixty days, either Party may rescind the contract without judicial intervention and without any obligation to pay damages.

The parties acknowledge that due to the ongoing COVID-19 epidemic/pandemic and its uncertain further development (in particular, but not limited to, the further spread of the epidemic/pandemic and further direct or indirect shutdowns of businesses and/or infrastructure), the ability of either party to perform its obligations under the contract between the Customer and Phönix might be negatively impacted thereby. Therefore, the currently on-going COVID-19 epidemic/pandemic or any future epidemic/pandemic, and/or its aftermath, shall constitute a releasing excuse for non-performance and shall be subject to this section 10, except for the aforementioned right of rescission after a period of sixty days, to the extent it diminishes, delays, or prevents the performance of the contractual obligation by a party.

## 11 TERMINATION

- 11.1 Phönix may terminate any Order:
- (a) immediately upon notice to the Customer if the Customer is delinquent for more than 30 days in the payment of any sum due to Phönix;
  - (b) immediately upon notice to the Customer if it is in breach of any obligation under the Order and the Customer has failed to remedy such breach within thirty days of written notice to the Customer requiring the breach to be remedied;
  - (c) immediately upon notice to the Customer if there is any change in the ownership, management or control of the Customer;
  - (d) immediately upon notice to the Customer if the Customer ceases or threatens to cease to carry on business or substantially the whole of its business or Phönix has reasonable cause to believe that the Customer is unable to pay its debts when due;  
or
  - (e) without notice to the Customer if the Customer becomes insolvent or bankrupt, enters into liquidation, or a receiver, administrator, administrative receiver, manager, trustee or similar officer is appointed in relation to it or over any of its assets or any action is taken or threatened by or against it analogous to the foregoing in any jurisdiction.
- 11.2 Where Phönix terminates any Order under this Article 11, the Customer shall within seven (7) days pay to Phönix: (a) all amounts invoiced by Phönix under the Order which remain unpaid at the date of termination; (b) a fair and reasonable price in respect of work completed or in progress but not invoiced at the date of termination; (c) all costs (including without limitation a sum in respect of overheads) incurred by Phönix connected with termination; (d) all suppliers' and sub-contractors' termination

charges; and (e) a sum in respect of the profits which Phönix would have reasonably been expected to make under the Order but for its termination.

- 11.3 Termination of any Order by Phönix shall be without liability or obligation of any kind on the part of Phönix. Such termination shall not affect the rights of Phönix accrued prior to the date of termination.
- 11.4 Customer may only terminate any Order for convenience in accordance with and subject to the terms of any specific termination or cancellation schedule included in Phönix's Quotation.

## **12 CONFIDENTIALITY**

- 12.1 Subject to any deviating or more detailed provisions set out in a separate non-disclosure agreement concluded between the Parties in writing the following provisions of this Article 12 shall apply.
- 12.2 The Customer shall treat all Confidential Information disclosed by Phönix as confidential and shall not use or disclose any Confidential Information except for the proper and necessary purposes of use of the Products and Services, and any such disclosure shall be made to the Customer's employees under appropriate conditions of confidence.
- 12.3 The obligations of confidence contained in Article 12.1 shall not apply to any information which is, in the public domain through no fault of the Customer or at the time of disclosure by Phönix is already known to the Customer from a bona fide source other than Phönix.
- 12.4 Neither the Customer nor Phönix shall without the prior written consent of the other; (a) make use of the other's name or trademarks; (b) make use of the name of any of the other's personnel, customers or agents; (c) make use of any information obtained under the Order for publicity purposes; or (d) refer to the other or the Order in any advertisement or public notice.

## **13 INDEMNITIES**

- 13.1 Customer agrees to indemnify, release, defend and hold harmless Phönix and their personnel (the "Phönix Indemnitees" – Its Affiliates, their Employees, Officers, Directors, Shareholders, Agents, Subcontractors and/ or Joint Ventures) against all claims, costs, charges, expenses, damages and other liabilities (including reasonable attorney's fees) in connection with any culpable injury, death or ill health of any personnel of Customer. Further, Customer will indemnify, hold harmless and defend the Phönix Indemnitees from and against any claims, suits, judgments, expenses or liabilities of any nature (including without limitation all reasonable attorneys' fees) which are threatened or brought against, or are incurred by Phönix Indemnitees arising from any culpable actions, omissions or misrepresentations of Customer in the use, promotion, or sale of products or services provided by Phönix.

## **14 INFRINGEMENT INDEMNIFICATION**

- 14.1 The Customer agrees promptly to notify Phönix in writing of any notice, proceeding, or any action against the Customer based upon a claim that any Product infringes any patent, copyright, trademark, or other intellectual property of a third party granted or existing in any country in the world at the time of Order. Phönix will defend, at its expense, any such action, except as excluded below, and shall have full control of such defense including all appeals and negotiations, and will pay all settlement costs, or damages awarded against the Customer. In the event of such notice, suit or action, Phönix will take reasonable steps, at its expense, and at its sole option, to procure for the Customer the right to continue using the Product, or modify the Product to render it non-infringing, or accept return of and replace such Product with substantially equivalent non- infringing equipment, or accept return of the Product and refund or credit to the Customer the amount of the original purchase price, less a reasonable charge for depreciation and damage (while the right of the Customer to claim further damages for an exceeding higher proven damage incurred, subject to the provisions of Article 8 above, remains unaffected).
- 14.2 The agreements by Phönix in Article 14.1 shall not apply to any Product manufactured to specifications furnished by or on behalf of the Customer, or to any infringement arising out of the use of the Product in combination with other equipment or software not furnished by Phönix, or to use in a manner not normally intended, or to use in a country outside of the country to which the Products shipped, or to any patent, copyright, trademark or in which the Customer, or any subsidiary or Affiliate the Customer, has a direct or indirect interest, or if the Customer has not provided Phönix with prompt notice, authority, information and assistance necessary to defend the action.
- 14.3 Customer shall not do anything that might be prejudicial to any proceedings or actions. Customer shall do nothing which would or might vitiate any insurance which the Customer may have relating to any claimed infringement and shall use its best endeavors to claim costs, or damages awarded against the Customer under such insurance, which shall be offset against any settlement costs or damages to be paid by Phönix in accordance with this Article 14. Without prejudice to any duty of the Customer at common law, Customer shall take such steps as Phönix may require to mitigate or reduce any such settlement costs or damages to be paid by Phönix in accordance with this Article 14.
- 14.4 The Customer warrants that any design or instructions furnished by it do not and shall not cause Phönix to infringe any patent,

copyright, trademark, or other intellectual property of a third party.

## **15 TECHNICAL DATA AND INVENTIONS**

- 15.1 Except as provided for in Articles 6.1 and 6.2, the sale of Products and/or license of Software by Phönix confers on the Customer no right in, license under, access to, or entitlement of any kind to any of Phönix's technical data, including but not limited to design, process technology, software and drawings, or to Phönix's inventions (whether or not patentable) irrespective of whether any such technical data or invention or any portion of such technical data or invention arose out of work performed under an order placed by the Customer, and irrespective of whether the Customer has paid or is obligated to pay Phönix for any part of the design and/or development of the Products and/or Software.
- 15.2 Phönix shall not be obliged to safeguard or hold confidential any data, technical or other information, furnished by the Customer for Phönix's supply of Products and/or performance of Services unless (and only to the extent that) the Customer and Phönix have entered into a separate written confidentiality agreement.
- 15.3 All rights in any intellectual property created, designed, or conceived by Phönix in connection with or arising out of the performance of the Order by Phönix shall vest exclusively in Phönix and/or its suppliers. Except as agreed to in writing by Phönix, no work performed by Phönix shall be considered a work made for hire.

## **16 INJUNCTIVE RELIEF**

The unauthorized reproduction, disclosure or unauthorized use of Software or disclosure by the Customer of any of Phönix's Confidential Information or proprietary data supplied to the Customer may cause immediate and irreparable harm to Phönix and entitles Phönix to any and all rights and remedies available at law. Especially, Phönix shall be entitled to injunctive or other equitable remedies in all legal proceedings in the event of any threatened or actual reproduction, disclosure or use of Phönix's Confidential Information or proprietary data. The Customer shall be at liberty to prove that no or only minor damage has been incurred.

## **17 GOVERNING LAW AND JURISDICTION**

- 17.1 These Conditions shall be governed by and construed in accordance with the laws of Germany.
- 17.2 All disputes arising out of or in connection with these Conditions and each supply of Products, Software and/or Services by Phönix to the Customer other than a claim for monies due from the Customer to Phönix, but including its existence, validity or termination, shall be referred to and finally resolved in accordance with Article 18. All proceedings shall be conducted in the English language.
- 17.3 Nothing in this Article 17 shall restrict the jurisdiction of any court that would, apart from the provisions of Article 17 or 18, have jurisdiction over a dispute arising out of or in connection with these Conditions for the purpose of enforcing any right or remedy of either party by means of injunctive relief, specific performance or equivalent remedy which an arbitrator appointed pursuant to Article 18 is not empowered to grant.
- 17.4 The parties expressly agree to exclude from the Order the United Nations Convention on Contracts for the International Sale of Goods, 1980, and any successor thereto.

## **18 DISPUTE RESOLUTION**

- 18.1 If any dispute arises in connection with the Order, the parties' respective senior representatives will, within ten (10) days after receipt of a written request from either party to the other, in accordance with these Conditions, meet in a good faith effort to resolve the dispute without recourse to legal proceedings. If the parties fail to reach agreement within thirty (30) days after receipt of the written request, any dispute or difference may be referred for resolution in accordance with the following Articles.
- 18.2 Any dispute arising out of or relating to the Order or its breach shall be settled by arbitration in accordance with the International Chamber of Commerce ("ICC") Rules of Arbitration as in force at the commencement of the arbitration. If the dispute involves \$5 million or less, the arbitration shall be conducted by a sole arbitrator. Either party to the Order may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator. If within 30 days after receipt by a party of a proposal made in accordance with this paragraph the parties have not reached agreement on the choice of an arbitrator, the sole arbitrator shall be appointed by the ICC in accordance with its Rules. If the dispute involves more than \$5 million, the arbitration shall be conducted by a tribunal of three arbitrators, one arbitrator to be named by Phönix, one arbitrator to be named by Customer, and the third arbitrator (who shall serve as the chairperson of the tribunal) to be appointed by the two party-appointed arbitrators. If the two party-appointed arbitrators fail to appoint a third within 15 days of the appointment of the second of the two party-appointed arbitrators, then either party may request that the chairperson be appointed by the ICC in accordance with its Rules of Arbitration. The place of arbitration shall be Frankfurt/ Main, Germany.

Geschäftsführer: Thorsten Seefried,  
Gunter Wodara, Stefan Zubrod  
Amtsgericht Korbach  
HRB 1731  
UST-ID-Nr.: DE 273520841  
Steuer-Nr.: 026 24120590

Commerzbank AG, Fil. Wolfsburg  
BLZ: 269 410 53  
Kto. Nr.: 711 555 300  
SWIFT.: COBADEFFXXX  
IBAN: DE33 2694 1053 0711 5553 00

issue January 2023



Any arbitral tribunal constituted pursuant to the Order shall apply the law identified in Article 17.1 hereof to all disputes. The award of the arbitrator shall be final and binding upon the parties and may be entered and/or enforced in any court of competent jurisdiction. The parties acknowledge that the Order and any award rendered pursuant to it shall be governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

- 18.3 Notwithstanding the foregoing, Phönix may initiate suit in any jurisdiction for protection and enforcement of its intellectual property rights.

## 19 ENFORCEABILITY

If any provision of these Conditions is or becomes invalid, the validity of the remaining provisions shall not be affected. In this case, the parties shall replace the invalid clause with a valid one that comes as close as possible to the economic purpose and intention of the invalid clause.

## 20 NOTICES

- 20.1 Any notice to be given under these Conditions shall be in writing and may be hand-delivered (including delivery by courier service such as FedEx or DHL). In the case of the Customer, notice may be sent to its principal place of business or such other address or fax number as the Customer may have provided to Phönix for this purpose. In the case of Phönix, notices should be sent to Phönix at the Phönix address stated on the Order, marked for the attention of "General Manager".
- 20.2 Unless the contrary shall be proved, notice shall be deemed to have been given, if by hand delivery (including courier) during working hours on a working day, when left at the relevant address, and otherwise on the next working day after delivery.

## 21 MISCELLANEOUS

- 21.1 Neither the Customer nor Phönix may assign these Conditions in whole or in part without the prior written consent of the other party.
- 21.2 No amendment to the Order shall be effective unless in writing and signed on behalf of both parties.
- 21.3 No failure by either Party to enforce, at any time or for any period, any one or more of the terms or conditions of the Order shall be construed as a waiver of them or of the right at any time subsequently to enforce all terms and conditions of the Order.
- 21.4 Unless otherwise agreed in writing, all documentation provided in connection with any Order and any communications between the parties shall be in the English language.

## 22 ENTIRE AGREEMENT AND THIRD PARTIES

- 22.1 These Conditions supersede all previous communications, transactions, and understandings, whether oral, or written, and constitute the sole and entire agreement between the parties pertaining to any Order. No modification or deletion of, or addition to these Conditions or any Order shall be binding on either party unless made in writing and signed by a duly authorized representative of both parties.
- 22.2 No contract between the parties for the supply of Product or Services shall confer any right upon any third party. In particular, but without limiting the generality of the preceding sentence, the Software Warranty provided to Customer shall not confer any benefit or right of any kind on any sublicensee of the Customer.

## 23 INTERPRETATION

- 23.1 In these Conditions:
- "Affiliate" means, in respect of a Person, another Person that controls the first Person or is controlled by the first Person, or is controlled by the same Person that controls the first Person;
- "Conditions" means the standard terms and conditions of sale set out in this document;
- "Confidential Information" means all information concerning or relating to the business and affairs of Phönix or any of its Affiliates including, but not limited to, its technology, products, prices, marketing practices, customers, licensees, suppliers and business plans and including all information contained in any Quotation, technical proposal, specification or scope of work;
- "Customer" means the Person who issues an Order acceptable to Phönix for the purchase of Products, Software and/or supply of the Services;
- "Phönix" means Phönix Armaturen-Werke Bregel GmbH, Daume Regelarmaturen GmbH, Strack GmbH, Solent & Pratt Phönix Ltd and affiliates;
- "Equipment Warranty" shall have the meaning given to that term by Article 7.1;
- "Force Majeure" shall have the meaning given to that term by Article 8.4;
- "Incoterms" means the rules for the interpretation of international trade terms of the International Chamber of Commerce,

as revised from time to time;

“Order” means the agreement in writing concluded between Phönix and Customer, including any specifications, and other drawings and documents that are expressly incorporated into it, and incorporating these Conditions;

“Person” means individual, partnership, limited partnership, sole proprietorship, company or corporation with or without share capital, public or private association, public utility, legal personal representative, regulatory or governmental agency or body, or other legal entity however designated or constituted;

“Products” means all goods, Software, articles, documents or other materials, and any data or other information which are stated in the Order to be supplied by Phönix to the Customer pursuant to these Conditions or any other agreement or contract between them;

“Quotation” means a written offer by Phönix to the Customer to supply any Products and/or Services

“Services” means any services to be supplied by Phönix to the Customer pursuant to these Conditions; “Services Warranty” shall have the meaning given to that term by Article 7.2;

“Software” means any software programs which Phönix is to license to the Customer pursuant to these Conditions or any other agreement or contract between Phönix and the Customer;

“Software Warranty” shall have the meaning given to that term by Article 7.3; and

“Warranty Period” means unless otherwise agreed in writing, the period:

(a) in respect of Products commencing on the date of delivery of the Products and expiring in respect of Products (except for Software) twelve months after delivery and in respect of Software twelve months after delivery; and

(b) in respect of Services commencing on the date on which Phönix has determined that the performance of the Services has been completed and expiring twelve months thereafter.

- 23.2 For the purposes of these Conditions (and, in particular, the definition of “Affiliate” in Article 23.1), a Person shall be deemed to control another Person where the first Person has any direct or indirect influence that, if exercised, would give the first Person the power to manage the affairs of the second Person, including (but without limiting the generality of the foregoing) ownership of more than half of the capital or business assets or the right to exercise more than half of the voting rights or the power to appoint more than half of the members of the board of directors or supervisory board of the second Person.
- 23.3 Unless the context otherwise requires, any term or expression which is defined in or given any particular meaning by the provisions of the Incoterms shall have the same meaning in these Conditions.
- 23.4 Any reference in any agreement, order, acknowledgement or other communication between Phönix and the Customer to CW-1’s standard terms and conditions shall be deemed to be a reference to these Conditions.
- 23.5 The term “and/or” denotes a reference to both of the adjoining terms and of them individually.
- 23.6 Any reference the term “writing”, or cognate expressions, includes communications effected by e-mail.