

ABILJO EXCAVATOR SERVICES LIMITED

Terms and Conditions of Sale

1 INTERPRETATION

1.1 The definitions and rules of interpretation in this condition apply in these conditions.

Abiljo	Abiljo Excavator Services Limited.
Contract	any sale contract between Abiljo and the Customer for the sale and purchase of the Goods and where applicable, the supply of the Services, incorporating these conditions and any express term specified in the Contract.
Customer	the person, firm or company who purchases the Goods and/or Services from Abiljo.
Goods	the excavator buckets and attachments and spare parts produced by Abiljo and where applicable, any Services agreed in the Contract to be supplied to the Customer by Abiljo (including any part or parts of them).
International Supply Contract	a contract as is described in Section 26(3) of the Unfair Contract Terms Act 1977.
Services	the repair, refurbishment and conversion services of excavator buckets and attachments by Abiljo under the Contract together with any other services which Abiljo provides, or agrees to provide to the Customer.

1.2 A reference to a law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.3 Words in the singular include the plural and in the plural include the singular.

1.4 Condition headings do not affect the interpretation of these conditions.

2 APPLICATION OF TERMS

- 2.1 Subject to any variation under condition 2.2 the Contract shall be on these conditions to the exclusion of all other terms and conditions. No terms or conditions endorsed on, delivered with or contained in the Customer's purchase order, request for a quotation, tender documentation, specification or other document shall form part of the Contract simply as a result of such document being referred to in the Contract.
- 2.2 These conditions apply to all Abiljo's sales and any variation to these conditions and any representations or recommendations about the Goods shall have no effect unless expressly agreed in writing and signed by a director of Abiljo. The Customer acknowledges that it has not relied on any recommendation, statement, promise or representation made or given by or on behalf of Abiljo which is not set out in the Contract. Nothing in this condition shall exclude or limit Abiljo's liability for fraudulent misrepresentation.
- 2.3 Each order or acceptance of a quotation for Goods by the Customer from Abiljo shall be deemed to be an offer by the Customer to buy Goods subject to these conditions. The Customer shall ensure that the terms of its orders are complete and accurate.
- 2.4 No order placed by the Customer shall be deemed to be accepted by Abiljo until a Contract is issued by Abiljo by way of an acknowledgement of the Customer's order or (if earlier) Abiljo delivers the Goods to the Customer.
- 2.5 Any quotation is given on the basis that no Contract shall come into existence except in accordance with condition 2.4. Any quotation is valid for a period of 14 days only from its date, provided that Abiljo has not previously withdrawn it.

3 DESCRIPTION AND SPECIFICATION

- 3.1 The quantity and description of the Goods shall be as set out in Abiljo's Contract.
- 3.2 All samples, drawings, descriptive matter, specifications and advertising issued by Abiljo and any descriptions or illustrations contained in Abiljo's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Goods described in them. They shall not form part of the Contract and this is not a sale by sample. The Customer assumes sole responsibility for the performance of the Goods, their proper installation and safe operation at the Customer's premises.

- 3.3 If Goods are made to a specification, instruction or design supplied by the Customer or any third party on behalf of the Customer then:
- 3.3.1 the suitability and accuracy of that specification, instruction or design will be the Customer's responsibility;
 - 3.3.2 the Customer will indemnify Abiljo against any infringement or alleged infringement of any third party's intellectual property rights including but not limited to patent, design right, registered design, trademark, trade name or copyright and any loss, damage or expense (including, without prejudice to the generality of the foregoing, legal costs on a full indemnity basis) which it may incur by reason of any such infringement in any country; and
 - 3.3.3 the Customer will indemnify Abiljo against any loss, damage or expense in respect of any liability arising in any country by reason of the Goods being made to such specification, instruction or design.

4 DELIVERY

- 4.1 Unless otherwise agreed in writing by Abiljo in the Contract and except in respect of International Supply Contracts, Abiljo shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (Delivery Location) at any time after Abiljo notifies the Customer that the Goods are ready.
- 4.2 Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location. The Customer shall provide at its expense adequate and appropriate equipment and manual labour for unloading the Goods at the Delivery Location.
- 4.3 If the Contract is an International Supply Contract it shall be deemed to incorporate the latest edition of Incoterms current at the date of the Contract save that in the event of any inconsistency between Incoterms and any express term detailed in the Contract the latter shall prevail. Unless stipulated to any other effect in the Contract delivery shall be ex-works Abiljo's premises and all risk passing to the Customer upon delivery by Abiljo at Abiljo's premises. All delivery, freight and insurance costs shall be for the sole account of the Customer.
- 4.4 Any dates specified by Abiljo for delivery of the Goods are intended to be an estimate and time for delivery shall not be made of the essence by notice. If no dates are so specified, delivery shall be within a reasonable time.

- 4.5 Subject to the other provisions of these conditions Abiljo shall not be liable for any direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and similar loss), costs, damages, charges or expenses caused directly or indirectly by any delay in the delivery of the Goods (even if caused by Abiljo's negligence), nor shall any delay entitle the Customer to terminate or rescind the Contract.
- 4.6 If for any reason the Customer fails to accept delivery of any of the Goods when they are ready for delivery, or Abiljo is unable to deliver the Goods on time because the Customer has not provided appropriate instructions, documents, licences or authorisations:
- 4.6.1 risk in the Goods shall pass to the Customer (including for loss or damage caused by Abiljo's negligence);
- 4.6.2 the Goods shall be deemed to have been delivered; and
- 4.6.3 Abiljo may store the Goods until delivery, whereupon the Customer shall be liable for all related costs and expenses (including, without limitation, storage and insurance).
- 4.7 If after a period of not less than 30 days from the date of the Abiljo's notice that the Goods are either ready for delivery and the Customer has failed to take delivery or Abiljo is unable to deliver the Goods on time because the Customer has not provided appropriate instructions, documents, licences or authorisations, Abiljo shall have the right to:
- 4.7.1 dispose of the Goods to a third party; and
- 4.7.2 recover from the Customer, in addition to the costs referred to in condition 4.6, the amount if any by which the disposal proceeds are less than the sale price under the Contract together with any expenses incurred by the Company in negotiating and completing the disposal of the Goods.
- 4.8 If Abiljo's performance of the Services or supply of Goods under the Contract is prevented or delayed by any act or omission of the Customer, its agents, subcontractors, consultants or employees, Abiljo shall not be liable for any costs, charges or losses sustained or incurred by the Customer arising directly or indirectly from such prevention or delay.
- 4.9 The Customer shall be liable to pay to Abiljo, on demand, all reasonable costs, charges or losses sustained or incurred by Abiljo (including, without limitation, any direct, indirect

or consequential losses, loss of profit and loss of reputation, loss or damage to property and those arising from injury to or death of any person and loss of opportunity to deploy resources elsewhere) arising directly or indirectly from the Customer's fraud, negligence, failure to perform or delay in the performance of any of its obligations under the Contract, subject to Abiljo confirming such costs, charges and losses to the Customer in writing.

5 NON-DELIVERY

- 5.1 The quantity of any consignment of Goods as recorded by Abiljo on despatch from Abiljo's place of business shall be conclusive evidence of the quantity received by the Customer on delivery unless the Customer can provide conclusive evidence proving the contrary.
- 5.2 Abiljo shall not be liable for any non-delivery of Goods (even if caused by Abiljo's negligence) unless the Customer gives written notice to Abiljo of the non-delivery within 7 days of the date when the Goods would in the ordinary course of events have been received.
- 5.3 Any liability of Abiljo for non-delivery of the Goods shall be limited to replacing the Goods within a reasonable time or issuing a credit note at the pro rata Contract rate against any invoice raised for such Goods.

6 RISK/TITLE

- 6.1 Save in the case of International Supply Contracts and subject to any express term in the Contract, the Goods are at the risk of the Customer from the time of delivery.
- 6.2 Ownership of the Goods shall not pass to the Customer until Abiljo has received in full (in cash or cleared funds) all sums due to it in respect of:
- 6.2.1 the Goods; and
- 6.2.2 all other sums which are or which become due to Abiljo from the Customer on any account.
- 6.3 Until ownership of the Goods has passed to the Customer, the Customer shall:
- 6.3.1 hold the Goods on a fiduciary basis as Abiljo's bailee;
- 6.3.2 store the Goods (at no cost to Abiljo) separately from all other goods of the Customer or any third party in such a way that they remain readily identifiable as Abiljo's property;

- 6.3.3 not destroy, deface or obscure any identifying mark or packaging on or relating to the Goods; and
 - 6.3.4 maintain the Goods in satisfactory condition and keep them properly stored, protected and insured on Abiljo's behalf for their full price against all risks to the reasonable satisfaction of Abiljo. On request the Customer shall produce the policy of insurance to Abiljo.
- 6.4 The Customer's right to possession of the Goods shall terminate immediately if:
- 6.4.1 the Customer has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of the Customer or notice of intention to appoint an administrator is given by the Customer or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or a resolution is passed or a petition presented to any court for the winding-up of the Customer or for the granting of an administration order in respect of the Customer, or any proceedings are commenced relating to the insolvency or possible insolvency of the Customer; or
 - 6.4.2 the Customer suffers or allows any execution, whether legal or equitable, to be levied on his/its property or obtained against him/it, or fails to observe or perform any of his/its obligations under the Contract or any other contract between Abiljo and the Customer, or is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or the Customer ceases to trade; or
 - 6.4.3 the Customer encumbers or in any way charges any of the Goods.
- 6.5 Until ownership of the Goods has passed to the Customer (and provided the Goods (or any amount of them) are still in existence and identifiable) Abiljo shall be entitled at any time to require the Customer to deliver up the Goods (or any amount of them) to Abiljo and, if the Customer fails to do so forthwith, to enter upon the premises of the Customer or any third party where the Goods are stored and repossess the Goods.

6.6 Abiljo hereby authorises the Customer to use and/or sell the Goods in the ordinary course of the Customer's business. If the Customer:

6.6.1 sells the Goods prior to paying the full price for them the Customer shall hold the proceeds of sale on trust for Abiljo. Abiljo shall be entitled to call upon the Customer to assign all claims that the Customer may have against any party which has purchased the Goods; or

6.6.2 uses the Goods such that they are mixed with or converted into other material, Abiljo shall be entitled to an interest in such converted material to the value of the price of the Goods.

6.7 Abiljo shall be entitled to recover payment for the Goods notwithstanding that ownership of any of the Goods has not passed from Abiljo.

6.8 The Customer grants Abiljo, its agents and employees an irrevocable licence at any time to enter any premises where the Goods are or may be stored in order to inspect them, or, where the Customer's right to possession has terminated, to recover them.

6.9 Where Abiljo is unable to determine whether any Goods are the goods in respect of which the Customer's right to possession has terminated, the Customer shall be deemed to have sold all goods of the kind sold by Abiljo to the Customer in the order in which they were invoiced to the Customer.

6.10 The Customer shall indemnify Abiljo in respect of all costs any expenses incurred by Abiljo enforcing any right granted to Abiljo pursuant to this condition 6 and any costs and expenses arising out of any judgement in favour of Abiljo in respect of any invoice which remains unpaid by the Customer.

6.11 On termination of the Contract, howsoever caused, Abiljo's (but not the Customer's) rights contained in this condition 6 shall remain in effect.

7 PRICE

7.1 Unless otherwise agreed by Abiljo in writing, the price for the Goods and/or Services shall be the price set out in the Contract.

7.2 The price for the Goods shall be exclusive of any value added tax (where applicable) and all other taxes, duties, levies and government charges payable in respect of the Goods at the rate or rates prevailing when the taxable or chargeable event occurs even if a relevant law or regulation imposes such tax, duty, levy or charge solely on Abiljo.

The prices are exclusive of the costs of packaging, insurance and carriage of the Goods, which shall be paid by the Customer.

8 PAYMENT

8.1 Subject to condition 8.4, payment of the price for the Goods shall be made by the Customer in accordance with the payment terms and currency specified in the Contract or if not specified, payment shall be due in pounds sterling within 30 days of the end of the month in which the Goods are delivered by Abiljo.

8.2 Time for payment shall be of the essence.

8.3 No payment shall be deemed to have been received until Abiljo has received cleared funds.

8.4 All payments payable to Abiljo under the Contract shall become due immediately on its termination despite any other provision.

8.5 The Customer shall make all payments due under the Contract in full without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Customer has a valid court order requiring an amount equal to such deduction to be paid by Abiljo to the Customer. Abiljo may, without prejudice to any other rights it may have, set off any liability of the Customer to Abiljo against any liability of Abiljo to the Customer.

8.6 If the Customer fails to pay Abiljo any sum due pursuant to the Contract, the Customer shall be liable to pay interest to Abiljo on such sum from the due date for payment at the annual rate of 5% above the base lending rate from time to time of the National Westminster Bank PLC, accruing on a daily basis until payment is made, whether before or after any judgment. Abiljo reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998.

9 QUALITY

9.1 Abiljo warrants that (subject to the other provisions of these conditions) on delivery, the Services shall be provided with reasonable skill and care and the Goods shall be free from material defects in design, material and workmanship for a period of six months from the date of delivery by Abiljo.

- 9.2 Abiljo shall not be liable for a breach of the warranty in condition 9.1 unless:
- 9.2.1 the Customer gives written notice of the defect to Abiljo, and, if the defect is apparent upon inspection within 7 days of delivery and in the case of a latent defect, within 7 days of the defect becoming apparent within the six month period; and
 - 9.2.2 Abiljo is given a reasonable opportunity after receiving the notice of examining such Goods or the goods upon which the Services have been performed and the Customer (if asked to do so by Abiljo) returns them to Abiljo's place of business at Abiljo's cost for the examination to take place there.
- 9.3 Abiljo shall not be liable for a breach of the warranty in condition 9.1 if:
- 9.3.1 the Customer fails to give notice of rejection in accordance with condition 9.2.1, or
 - 9.3.2 the Customer makes any further use of such Goods or goods upon which the Services have been performed after giving such notice; or
 - 9.3.3 the defect arises because the Customer failed to follow Abiljo's oral or written instructions as to the storage, installation, maintenance or use of the Goods or (if there are none) good trade practice; or
 - 9.3.4 the defect arises as a result of Abiljo following any drawing, design or Goods specification supplied by the Customer; or
 - 9.3.5 the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions or use in contravention of any user conditions or build specification; or
 - 9.3.6 the Customer alters or repairs such Goods or goods upon which the Services have been performed without the written consent of Abiljo.
- 9.4 Subject to condition 9.2 and condition 9.3, if any of the Goods do not conform with the warranty in condition 9.1 Abiljo shall at its option repair or replace such Goods (or the defective part) or re-perform the defective Services or refund the price of such Goods at the pro rata Contract rate provided that, if Abiljo so requests, the Customer shall, at Abiljo's expense, return the Goods or the part of such Goods which is defective to Abiljo.
- 9.5 If Abiljo complies with condition 9.4 it shall have no further liability for a breach of the warranty in condition 9.1 in respect of such Goods.

10 LIMITATION OF LIABILITY

10.1 Subject to condition 4, condition 5 and condition 9, the following provisions set out the entire financial liability of Abiljo (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:

10.1.1 any breach of these conditions;

10.1.2 any use made or resale by the Customer of any of the Goods, or of any product incorporating any of the Goods or of any goods upon which the Services have been performed; and

10.1.3 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

10.2 All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.

10.3 Nothing in these conditions excludes or limits the liability of Abiljo:

10.3.1 for death or personal injury caused by Abiljo's negligence; or

10.3.2 under section 2(3), Consumer Protection Act 1987; or

10.3.3 for any matter which it would be illegal for Abiljo to exclude or attempt to exclude its liability; or

10.3.4 for fraud or fraudulent misrepresentation.

10.4 Subject to condition 10.2 and condition 10.3:

10.4.1 Abiljo's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to the Contract price; and

10.4.2 Abiljo shall not be liable to the Customer for loss of profit, loss of business, or depletion of goodwill in each case whether direct, indirect or consequential, or any claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the Contract.

11 CONFIDENTIAL INFORMATION

The Customer shall keep in strict confidence all technical or commercial know-how, specifications, designs, drawings, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Customer by Abiljo, its employees, agents, consultants or subcontractors and any other confidential information concerning Abiljo's business or its products which the Customer may obtain.

12 ASSIGNMENT

12.1 Abiljo may assign the Contract or any part of it to any person, firm or company.

12.2 The Customer shall not be entitled to assign the Contract or any part of it without the prior written consent of Abiljo.

13 TERMINATION

13.1 Without prejudice to any other rights or remedies which the parties may have, either party may terminate the Contract without liability to the other immediately on giving notice to the other if:

13.1.1 the other party fails to pay any amount due under the Contract on the due date for payment and remains in default not less than seven days after being notified in writing to make such payment; or

13.1.2 the other party commits a material breach of any of the terms of the Contract and (if such a breach is remediable) fails to remedy that breach within 30 days of that party being notified in writing of the breach; or

13.1.3 the other party repeatedly breaches any of the terms of the Contract in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of the Contract; or

13.1.4 the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 **OR** (being a natural person) is deemed either unable to pay its debts or as having not reasonable prospect of doing so, in either case, within the meaning of section 268 of the Insolvency Act 1986 or (being a partnership) has any partner to whom any of the foregoing apply; or

- 13.1.5 the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies of the solvent reconstruction of that other party; or
 - 13.1.6 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
 - 13.1.7 an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the other party; or
 - 13.1.8 a floating charge holder over the assets of that other party has become entitled to appoint or has appointed an administrative receiver; or
 - 13.1.9 a person becomes entitled to appoint a receiver over the assets of the other party a receiver is appointed over the assets of the other party; or
 - 13.1.10a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days; or
 - 13.1.11 any event occurs or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that is equivalent or similar to the events listed in conditions 13.1.4 to 13.1.10 (inclusive); or
 - 13.1.12 the other party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business; or
 - 13.1.13 there is a change of control of the other party (as defined in section 574 of the Capital Allowances Act 2001).
- 13.2 On termination of the Contract for any reason:
- 13.2.1 the Customer shall immediately pay to Abiljo all of Abiljo's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, Abiljo may submit an invoice, which shall be payable immediately on receipt; and

13.2.2 the accrued rights and liabilities of the parties as at termination and the continuation of any provision expressly stated to survive or implicitly surviving termination, shall not be affected.

14 FORCE MAJEURE

14.1 Abiljo reserves the right to defer the date of delivery or to cancel or suspend the Contract or reduce the volume of the Goods ordered by the Customer (without liability to the Customer) if it is prevented from or delayed in the carrying on of its business due to:

14.1.1 circumstances beyond the reasonable control of Abiljo including, without limitation, acts of God, governmental actions or restriction, prohibition, enactment or regulation of any kind, war or national emergency, acts of terrorism, protests, riot, civil commotion, fire, explosion, flood, epidemic, lock-outs, strikes or other labour disputes (whether or not relating to either party's workforce), trade disputes or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable good, materials and/or services; or

14.1.2 non-delivery by Abiljo's supplier or damage to or destruction of the whole or any part of the Goods.

15 GENERAL

15.1 Each right or remedy of Abiljo under the Contract is without prejudice to any other right or remedy of Abiljo whether under the Contract or not.

15.2 If any provision of the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions of the Contract and the remainder of such provision shall continue in full force and effect.

15.3 Failure or delay by Abiljo in enforcing or partially enforcing any provision of the Contract shall not be construed as a waiver of any of its rights under the Contract.

15.4 Any waiver by Abiljo of any breach of, or any default under, any provision of the Contract by the Customer shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of the Contract.

- 15.5 The parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not a party to it.
- 15.6 The Contract shall be governed by English law and the parties submit to the exclusive jurisdiction of the English courts.

16 COMMUNICATIONS

- 16.1 All communications between the parties about the Contract shall be in writing, in English and delivered by hand or sent by pre-paid first class post, airmail requiring signature on delivery or sent by fax:
- 16.1.1 (in case of communications to Abiljo) to its registered office or such changed address as shall be notified to the Customer by Abiljo; or
- 16.1.2 (in the case of the communications to the Customer) to the registered office of the addressee (if it is a company) or (in any other case) to any address of the Customer set out in any document which forms part of the Contract or such other address as shall be notified to Abiljo by the Customer.
- 16.2 Communications shall be deemed to have been received:
- 16.2.1 if sent by pre-paid first class post, two days (excluding Saturdays, Sundays and bank and public holidays) after posting (exclusive of the day of posting); or
- 16.2.2 if delivered by hand, on the day of delivery; or
- 16.2.3 if sent by airmail, 9.00am on the fifth working day of posting; or
- 16.2.4 if sent by fax on a working day prior to 4.00 pm, at the time of transmission and otherwise on the next working day.
- 16.3 Communications addressed to Abiljo shall be marked for the attention of a director of Abiljo.