The revised Orgalim SI 24 conditions:
An overview of the major changes

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Revision of the Orgalim SI 14 Conditions

The Orgalim Legal Affairs Working Group (consisting of lawyers representing the national member associations of Orgalim) has updated the conditions of SI 14 to take account of legal developments and experiences in dealing with supply contracts in the engineering industries.

The SI 14 Conditions have been reviewed in detail. The Orgalim Legal Affairs Working Group unanimously concluded that this edition has been widely accepted and endorsed in international business and meets the parties' needs and expectations. Therefore, the outcome of the review work must be considered to be only an update of the SI 14 conditions.

Some material changes have been applied, new texts have been inserted and existing texts have been amended to clarify the meaning. However, these amendments have not changed the well-balanced nature of the conditions.

Amendments

The most important material changes of SI 24 compared with SI 14 are listed below:

- ***Terminology***

  For a better understanding, the terminology has been changed for some words. The object to be supplied was called "Plant", but has in SI 24 been replaced by "Product". "Tests before shipment" have been replaced by "factory acceptance tests" and "taking-over tests" by "site acceptance tests", to align with the common use in practice of FAT and SAT.

- ***Clause 2 (Definitions)***

  For the sake of clarity, the definition of "Contract Price" has been slightly changed, also suggesting to the parties that they may consider agreeing on a price revision clause.

  The definition of "Gross Negligence" has been changed to make it very clear that the behaviour must be deliberate or reckless, which corresponds with the internationally recognised understanding of

gross negligence by legal experts. This change is only meant to clarify the meaning, to avoid any discussions. In substance, the old definition was already meant to imply the elements of deliberateness and recklessness.

- ***Clause 4 (Product Information/Instructions)***

  It is now explicitly stated that the purchaser has a right to one paper copy, but also to electronic transmission of information necessary for the use of the product. The requirement for a paper copy is meant to take European and national, worldwide legislation into account which often demands that such paper copy is provided.

- ***Clause 5 and Clause 6 (Intellectual Property and Confidentiality)***

  A specific clause on intellectual property (Clause 5) has been included in the conditions. In general, the clause assigns the intellectual property rights to the contractor. The purchaser is licensed the rights necessary for the use of the product.
  It also clarifies that there is no obligation to disclose the source code. The clause also applies if a product or software has been developed specifically for the purchaser. This should answer a frequently discussed question in practice. As regards software updates, a contractual obligation to provide these is excluded, but in using the words "unless ..... required by law", possible mandatory requirements in this respect are taken into account.

  The scope of the confidentiality clause has been broadened to include all information, regardless of whether it is technical, commercial or financial in nature and regardless of whether it is contained in drawings, technical documents etc. or communicated orally.

  The former Clause 4 ("Drawings and technical information") has been integrated into the Clauses 5 and 6 and could therefore be deleted.

- ***Clause 14 (Preparatory work and working conditions; permits)***

  As an additional condition, SI 24 foresees in Clause 14 item h) that all permits and authorisations needed for the installation work which can only be obtained by the purchaser must be made available by the purchaser.

- ***Clause 19 (Preparatory work and working conditions; site register)***

  SI 24 provides that the contractor keeps a site register in which he shall note all occurrences relevant to the fulfilment of his contractual obligations. The aim of this instrument is to facilitate the collaboration between the parties by recording evidence of such occurrences.

- ***Clause 28 (Variations)***

  SI 14 provided for a procedure for agreeing on the price and other consequences of variations requested by the purchaser. Where the parties could not agree on these consequences, the contractor was not obliged to carry out a variation. In practice, this could lead to a lot of delay and uncertainty for the parties. In SI 24, the contractor must present a quotation for each variation, including a final date for acceptance thereof. If not accepted by the purchaser at this final date, the execution of the contract shall continue without implementing the requested variation.

  This new procedure leads to a clear-cut result of the request for the variation. The parties are however not prevented from continuing discussions on the consequences of variations, if they like.

- ***Clause 29 (Passing of risk)***

  Under SI 14, the risk for the product passed to the purchaser on FCA delivery, whereas the risk for the works (excluding the product) would only pass to the purchaser after taking-over. In SI 24, the risk for the product still passes to the purchaser on FCA delivery, but the risk for the works (excluding the product) rests with the purchaser from the very beginning of the execution of the contract.

  The reason for this change is that normally all works will be carried out at the site of the purchaser. Where it comes to protecting against risks and mitigating the consequences when risks occur, the purchaser is the most appropriate person. In Clause 29 of SI 24, an exception is made for situations where damage is the result of the contractor's negligence.

- ***Clause 36 (Taking-over)***

  According to Clause 37 of SI 14, where the parties have agreed not to carry out taking-over tests, taking-over was considered to take place when the purchaser had received a contractor's notice that the works had been completed, provided that the works were as required for taking-over according to the contract. The situation could arise that it would prove after many weeks or even months that the works were indeed not in accordance with the contract. This could create a lot of legal uncertainty.

  For this reason, the provision for this situation in Clause 36 of SI 24 is that taking-over shall be considered to take place if the contractor sends a notice to the purchaser that the works have been completed, unless the purchaser within 7 days thereafter substantiates that the works are not as required for taking-over according to the contract.

- ***Clause 45 (Payment; former Clause 46)***

  The payment terms have been simplified for both a time-based and a lump-sum contract price. If payment has been agreed on a time basis, it is now provided that one third of the contract price will

be invoiced at the time of formation of the contract and the remaining part at the time of delivery. This eliminates the question of when exactly a product is ready for delivery (decisive under SI 14).

If the price for the installation work is included in the lump sum of the contract price, 30% will be invoiced at the time of formation of the contract, 60% on delivery and the remaining part on taking-over.

- ***Clause 53 (Damage to the works)***

Although the contractor will normally not be liable for damage to the works (unless the damage is due to his negligence, please see Clause 29), the purchaser is dependent on the contractor to remedy the damage, as the purchaser will normally not have specific expertise as regards the technical aspects of the works. For this reason, Clause 53 of SI 24 provides for an obligation of the contractor to remedy the damage at the purchaser's request. The contractor shall in such case of course be entitled to charge the purchaser for any time spent and costs made.

- ***Clauses 70 – 74 (Liability for infringement of intellectual property rights)***

The conditions now also regulate the liability for infringement of intellectual property rights by the contractor. This is a clarification and not an extension of the contractor's liability. Already under SI 14, a claim against the contractor for infringement of intellectual property rights was possible, based on faulty design. In SI 24, this situation is explicitly covered by specific provisions and not left to interpretation.

An important aspect is the liability of the contractor to indemnify the purchaser in case of third party claims and the fact that liability for infringement of intellectual property rights is limited to the purchaser's country. In addition, specific remedies are mentioned. If the contractor cannot remedy the infringement, the purchaser has the same rights as if the product is defective for other reasons (decrease of contract price or termination of contract).

- ***Clause 80 (Consequential losses)***

Clause 80 has been slightly changed in the wording. Gross negligence is explicitly mentioned as triggering liability. This addition already applied to the previous versions because, as a rule, background law does not permit the exclusion of liability for gross negligence.