Dokument-ID: 972283 | Wolfgang Steinberger |
Muster | Vertragsmuster

Asset Deal Agreement

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This Agreement is made on … by and between

X GmbH, a company incorporated and existing under the laws of
Germany registered with the Commercial Court having its business
address at … (the „Seller”); and

Y GmbH, a company incorporated and existing under the laws of
Austria registered with the Commercial Court Vienna under number …
having its business address at …, Austria (the
„Purchaser”)

(Seller and Purchaser hereinafter also referred to individually
as „Party” and collectively as
„Parties”)

1. Interpretation

In this Agreement unless the context otherwise requires, the
provisions of this Clause 1 apply:

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| 1.1 | DefinitionsDefined terms shall have the meaning ascribed or referenced to
them in Schedule 1.1. |
| 1.2 | Schedules etcReferences to this Agreement shall include reference to any
Schedules to it as well as to any agreements entered into or to be
entered into, pursuant to this Agreement. References to Clauses and
Schedules are to Clauses and Schedules to this Agreement.
Statements in Clauses or Schedules shall be deemed to have been
made also for the purposes of all other Clauses and Schedules. |

2. Sale and Transfer of Assets

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| 2.1 | Sale and Transfer of AssetsSubject of this contract is the enterprise …, which is
transferred to the Purchaser. With economic effect as of … local
time at the registered seat of Seller (herein „Effective
Date”), Seller hereby sells and transfers or assigns, as
the case may be, to Purchaser, and Purchaser hereby purchases and
accepts the transfer or the assignment by Seller, as the case may
be, of, all of Seller's Rights in, and to, (i) the Transferred
Intellectual Property Rights (which transfer is exclusively subject
to Clause 5 below), and (ii) any assets other than Intellectual
Property Rights to the extent legally or economically exclusively
or predominantly relating to the Business on the Effective Date,
((i) and (ii) collectively herein „Assets”),
including, but not limited to, Seller's Rights in, and to:

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| 2.1.1 | all Non-Current Assets exclusively or predominantly used in the
Business, including but not limited to

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| (i) | real estate listed in Schedule 2.1.1 (i): |
| (ii) | encumbrances of real estate in favour of Seller listed in
Schedule 2.1.1 (ii); |
| (iii) | tangible fixed assets, including technical equipment, (e.g.
machines, tools, IT hardware, office equipment, vehicles and assets
under construction) (the „Tangible Assets“) listed
in Schedule 2.1.1 (iii); |
| (iv) | participations in other companies listed in Schedule
2.1.1 (iv); |
| (v) | securities (excluding participations in other companies referred
to in Clause 2.1.1 (iv) above) listed in Schedule 2.1.1
(v), and |
| (vi) | use of standard software listed (including number of licenses)
in Schedule 2.1.1 (vi) granted by third parties
under (group) software license agreements which are not to be
transferred under Clause 3.1.1 (viii); |

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| 2.1.2 | all Current Assets exclusively or predominantly used in the
Business, including but not limited to

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| (i) | raw materials, spare parts and work in progress listed in
Schedule 2.1.2 (i). |
| (ii) | other inventories including finished goods and merchandise
listed in Schedule 2.1.2 (ii): |
| (iii) | participations in other companies belonging to the X Group not
being qualified as Non-Current Asset pursuant to Clauses 2.1.1 (iv)
or 2.1.1 (v) above listed in Schedule 2.1.2 (iii):
and |
| (iv) | participations in other companies not belonging to the X Group
and securities to the extent not being qualified as Non-Current
Asset pursuant to Clauses 2.1.1 (iv) or 2.1.1 (v) above listed in
Schedule 2.1.2 (iv): |

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| 2.1.3 | all rights in connection with guarantees, warranties,
representations, bonds, or other sureties in respect of goods
and/or services supplied to Seller in the course of the
Business; |
| 2.1.4 | the right to the benefit of all restrictive covenants and
confidentiality obligations given by any former employee of the
Business or any other person to the extent for the benefit of the
Business; |
| 2.1.5 | all claims to the extent relating to the Business (including the
Transferred Intellectual Property Rights and claims resulting from
open customer orders) and not relating to an Excluded Asset or an
Excluded Liability existing as at the Effective Date; and |
| 2.1.6 | all books of account, income and expenditure records, stock and
other invoices, shipping records, databases, information relating
to customers, price lists, promotional and advertising literature,
supplier list and tax records, correspondence and other documents,
records and files, in each case (i) to the extent exclusively or
predominantly relating to the Business, (ii) unless constituting,
containing, or relating to Intellectual Property Rights, and (iii)
as to electronic and/or physical data set out in the Data
Segregation and Access Agreement, in the way and to the extent only
as set out in the Data Segregation and Access Agreement;but in any event excluding the following Assets (each an
„Excluded Asset” and jointly the „Excluded
Assets”; the Assets excluding the Excluded Assets shall be
the „Transferred Assets”). |
| 2.1.7 | any cash and cash equivalents (including cheques, deposits with
and financial receivables against banks and other financial
institutions), liquid assets, bank- accounts, intercompany payables
and receivables including any amounts owed to Seller under the
intragroup financing of X Group based on contracts or arrangements
for, in connection with, or relating to, the X Group’s cash
management, the intercompany accounts, the cash pooling, term loans
or term deposits (in particular the master loan agreements and all
individual loan agreements concluded thereunder); |
| 2.1.8 | any claims in connection with taxes and social security
contributions; |
| 2.1.9 | trade accounts receivables towards customers existing as of the
Effective Date (the „Customer Accounts
Receivables”); |
| 2.1.10 | [intentionally left blank] |
| 2.1.11 | goods in transit; |
| 2.1.12 | participations in other companies other than those listed in
Schedule 2.1.1 (iv), Schedule 2.1.2 (iv) and Schedule 2.1.2
(iii); |
| 2.1.13 | securities which serve as collateral for partial retirement
benefits, pension benefits or similar employee benefits (which
transfer is subject to (a) separate agreement(s)); |
| 2.1.14 | assets exclusively or predominantly used in the X Business;
and |
| 2.1.15 | any claims resulting from hedging agreements; and |
| 2.1.16 | recourse and regress claims of Seller vis-à-vis third parties
resulting from or in connection with the warranty claims not
transferred pursuant to Clause 6.1.14. |

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| 2.2 | Consummation of Transfer, Transfer of RiskThe Parties undertake to do all acts, and sign, execute and
deliver any documents, to the extent necessary or appropriate to
effect the transfer, conveyance and setting-over to Purchaser of
the relevant Sellers Rights in, and to, the Transferred Assets.
Risk of loss, the benefits of, and the charges or similar costs
associated with Sellers Rights in, and to, the Transferred Assets
shall pass and transfer from Seller to Purchaser with effect as of
the Effective Date. |
| 2.3 | Transfer of PossessionAt the Transfer Date or as soon as reasonably practicable
thereafter, Seller shall grant to Purchaser and Purchaser shall
assume physical possession of physical assets being qualified as
Transferred Assets. If the Transferred Assets are in the possession
of a third party, the Parties hereby agree to notify such third
party to hold the Transferred Assets on behalf of Purchaser. From
the Transfer Date until physical possession has been transferred to
Purchaser, Seller shall hold the Transferred Assets on behalf of
Purchaser. |
| 2.4 | Third Party ConsentSubject always to the terms of any conflicting provisions of
this Agreement relating to the obtaining of third party consent to
the transfer of specific classes of Transferred Assets, if and to
the extent the transfer of any of Sellers Rights in, and to, any of
the Transferred Assets is subject to (i) the consent of a third
party, (ii) any agreement with a third party, or the waiver of any
objection right of, or the lapse of any objection period for, a
third party (collectively herein „Third Party
Consent”), the relevant transfer shall not take effect
until the Third Party Consent has been obtained and Seller and the
Purchaser shall each use their respective commercially reasonable
efforts (which shall not, for the avoidance of doubt, include the
giving of a performance guarantee) to obtain the Third Party
Consent as soon as possible after the date of this Agreement, and
with respect to licenses in standard software in any event prior to
the Effective Date. After the Effective Date, until the Third Party
Consent is obtained, Seller shall, to the extent legally
permissible, be deemed to hold the respective Transferred Asset for
the benefit and burden of Purchaser. Upon a required Third Party
Consent being obtained for any Transferred Asset, any contractual
arrangements between the Parties due to the fact that a required
Third Party Consent for such Transferred Asset had not been
obtained at the Effective Date, if any, shall automatically
terminate or be discontinued, as the case may be. |
| 2.5 | Additional Software LicensesShould, within twelve (12) months after the Effective Date, the
Purchaser identify that, in addition to the licenses in standard
software set out in Schedule 2.1.1 (vi), it requires (i) a higher
number of licenses, and/or (ii) licenses in standard software not
set out in Schedule 2.1.1 (vi), then the Seller shall, subject to
Clause 2.4, transfer such additional licenses to the Purchaser to
the extent available at the Seller and not needed by the Seller.
For the granting of such licenses, the Purchaser shall pay the
Seller (in addition to potenzial fees the third party software
vendor may claim under Clause 2.4) the book value of such licenses
plus a handling fee of 0.5 % of such book value. |

3. Sale and Transfer of
Contracts

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| 3.1 | Assumed Contracts

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| 3.1.1 | With economic effect as of the Effective Date, Seller hereby
sells and transfers, and Purchaser hereby purchases and accepts the
transfer of, all rights and obligations under all contracts,
offers, orders, undertakings, arrangements, agreements, expressions
of interest or similar institutes, irrespective whether they are
legally binding or subject to any dispute, and which are
unperformed (wholly or partly, relating to the main obligation,
secondary obligations or any other obligation) on or before the
Effective Date (collectively herein „Contracts“) to which Seller is
a party and to the extent relating exclusively to the Business on
the Effective Date, including but not limited to

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| (i) | the guarantees and sureties (e.g. bonds, guarantees, letters of
comfort or other sureties, including sureties issued in favour of
customers, consortium partners, suppliers or other third parties)
listed in Schedule 3.1.1 (i); |
| (ii) | joint venture agreements or other cooperation agreements listed
in Schedule 3.1.1 (ii); |
| (iii) | asset lease agreements listed in Schedule 3.1.1
(iii) (the „Transferred Asset Lease
Contracts”); |
| (iv) | contracts over delivery or service with customers listed in
Schedule 3.1.1 (iv); |
| (v) | contracts over delivery or service with suppliers listed in
Schedule 3.1.1 (v); |
| (vi) | agreements with sales representatives listed in Schedule 3.1.1
(vi); |
| (vii) | license agreements with respect to Intellectual Property Rights
listed in Schedule 3.1.1 (vii); and |
| (viii) | license agreements and related software support agreements with
respect to standard software listed in Schedule 3.1.1
(viii) (the „Software Licenses”); |

(as amended from time to time collectively referred to herein as
„Assumed Contracts”), but in any event excluding
the following contracts, rights, and obligations:

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| (ix) | guarantees or sureties not listed in Schedule 3.1.1 (i); |
| (x) | insurance contracts |
| (xi) | contracts relating to employees (e.g. employment contracts) and
pensions related contracts which transfer is exclusively subject to
Clause 7 below; |
| (xii) | lease contracts under which Seller is the tenant which transfer
is exclusively subject to Clause 4.1 below; |
| (xiii) | shareholder loan agreements and any other financing agreements
with any other X Group company; |
| (xiv) | agreements on bank accounts or other banking services |
| (xv) | asset lease agreements other than those listed in Schedule 3.1.1
(iii); |
| (xvi) | contracts over delivery or services with customers other than
those listed in Schedule 3.1.1 (iv); |
| (xvii) | contracts over delivery or service with suppliers other than
those listed in Schedule 3.1.1 (v); |
| (xviii) | license agreements with respect to Intellectual Property Rights
other than those listed in Schedule 3.1.1 (vii); |
| (xix) | license agreements and support agreements with respect to
standard software other than those listed in Schedule 3.1.1
(viii); |
| (xx) | contracts not documented in written form or by way of electronic
data exchange; |
| (xxi) | overdraft facilities agreements, deposit agreements with banks
or financial institutions; and |
| (xxii) | external and internal hedging agreements. |

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| 3.1.2 | Subject to Clause 3.2 below, the Purchaser shall from the
Effective Date onwards:

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| (i) | perform all of the obligations and assume all liabilities, save
for warranty claims which are not transferred pursuant to Clause
6.1.14, under, and will be entitled to the benefit (subject to the
burden) of, each Assumed Contract (whether to be performed before
or after the Effective Date or any transfer or novation of the
Assumed Contract to the Purchaser) in accordance with the terms of
such Assumed Contract; |
| (ii) | be responsible for any liabilities arising from or relating to
breaches of or defaults under the Assumed Contracts, save for
warranty claims which are not transferred pursuant to Clause
6.1.14; and |
| (iii) | be liable for or entitled to (as the case may be) any payment in
respect of the price or cost of any product, service or other
benefit provided or to be provided under each Assumed Contract. |

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| 3.2 | Consummation of Transfer, Third Party
Consent

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| 3.2.1 | If an Assumed Contract cannot be transferred to the Purchaser
except by a transfer made with a Third Party Consent or by a
novation agreement, the Parties shall each use their commercially
reasonable efforts (which shall not, for the avoidance of doubt,
include the giving of any performance guarantee) to obtain the
Third Party Consent to the transfer, or achieve the novation, of
the relevant Assumed Contract or to arrange for the Purchaser to
enter into a replacement contract on substantially equivalent terms
to replace the relevant Assumed Contract as soon as possible after
the date of this Agreement, and with respect to Software Licenses
in any event prior to the Effective Date. Any such Assumed Contract
shall qualify as „Pending Contract” until a
required Third Party Consent has been obtained or novation been
achieved. |
| 3.2.2 | With respect to each Pending Contract the following shall apply
between the Parties from the Effective Date onwards:

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| (i) | Purchaser shall obtain full benefit of all contractual rights,
benefits and claims arising out of, or in connection with, the
Pending Contract, whether arising before, on or after the Effective
Date; |
| (ii) | Purchaser shall be responsible to the Seller for any liabilities
(excluding any Excluded Liabilities) relating to such Assumed
Contract and, to the extent legally permissible, carry out, perform
and complete all the obligations (including contingent obligations)
of Seller under, or in relation to, the Pending Contract; |
| (iii) | the Parties shall reasonably cooperate to enforce the rights
and, in case it is prohibited by law for Purchaser to fulfil its
obligations under Clause 3.2.2 (ii) above, to fulfil the
obligations, under, or in relation to, the Pending Contract; |
| (iv) | Purchaser shall (i) provide access to Seller to all relevant
books, records and other documents and information in relation to
each Pending Contract as Seller may reasonably require and (ii)
provide Seller upon Sellers request, a report listing obtained and
outstanding Third Party Consents as well as novations achieved; |
| (v) | Purchaser shall diligently and in due course make all
correspondence relating to the Pending Contracts, provided (i) that
Purchaser shall neither be entitled (a) to act in the name of
Seller nor (b) make any material correspondence relating to the
Pending Contracts without the prior consultation of Seller,
respectively, and (ii) that Seller shall reasonably support
Purchaser; and |
| (vi) | each Party shall forward without undue delay to the other Party
a copy of all correspondence, notice or any other document or items
received, or sent, with respect to the Pending Contract and provide
reasonable information about any other communication relating to
the Pending Contract. |

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| 3.2.3 | If a required Third Party Consent has not been obtained or a
novation has not been achieved within six (6) months after the
Transfer Date, the Parties shall agree the most appropriate steps
to take in relation to a Pending Contract which may, if legally
permissible, include the termination of such Pending Contract. |

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| 3.3 | Shared Contracts

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| 3.3.1 | In case of a contract to which Seller is a party, in each case,
which pertains not exclusively but partially to the Business and
would constitute an Assumed Contract, if it was exclusively
pertaining to the Business (herein „Shared
Contract”), the Parties shall use their commercially
reasonable efforts to obtain the consent of the other party or
parties to the relevant Shared Contract to the transfer of, or to
achieve the novation of, an amendment to or other arrangement in
respect of the Shared Contract as soon as possible after the date
of this Agreement, and with respect to license agreements and
support agreements in standard software in any event prior to the
Effective Date, so as to (i) transfer to the Purchaser the benefit
of that part of the relevant Shared Contract that relates to the
Business and (ii) have assumed by the Purchaser the burden and the
Assumed Liabilities with respect to that part of the Shared
Contract that relates to the Business. Upon any such consent being
obtained or agreement to the novation or other such amendment or
arrangement being achieved, the Parties shall enter into any
agreement or arrangement necessary to transfer that part of the
Shared Contract that relates to the Business. Clause 3.2.3 above
shall apply mutatis mutandis with respect to the obtaining of the
third party consent referred to in this Clause 3.3.1. |
| 3.3.2 | Until consent (express or implied) is obtained or agreement to
such novation or other such amendment or arrangement is achieved as
referred to in Clause 3.3.1 all contractual rights and obligations
relating to the Shared Contract shall legally remain with Seller,
however, the Seller and the Purchaser will, between themselves,
treat each other as if the Third Party Consent had been obtained or
the novation agreement or other such amendment or arrangement had
been agreed with effect as of the Effective Date, in
particular:

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| (i) | Purchaser shall obtain full benefit of all contractual rights,
benefits and claims arising out of, or in connection with such part
of the Shared Contract that relates to the Business, whether
arising before, on or after the Effective Date; |
| (ii) | Purchaser shall be responsible to Seller for any liabilities
(excluding any Excluded Liabilities) relating to that part of the
Shared Contract that relates to the Business and shall, to the
extent legally permissible, carry out, perform and complete all
obligations (including contingent obligations) relating to that
part of the Shared Contract that relates to the Business (the
„Performance of Obligations”) and shall bear its
own costs and any expenses, as the case may be, for the Performance
of Obligations if such costs or expenses are not to be borne by the
contractual partner of the relevant Shared Contract; |
| (iii) | Purchaser shall indemnify and keep indemnified the Seller in
respect of any costs, claims, demands, expenses, proceedings,
losses and liabilities arising out of and relating to the period
from and including the Transfer Date resulting from a breach of the
Performance of Obligations by the Purchaser; and |
| (iv) | Seller and Purchaser shall reasonably cooperate to enforce the
rights and, in case it is prohibited by law for the Purchaser to
fulfil such obligations, to fulfil the obligations relating to that
part of the Shared Contract that relates to the Business. |

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| 3.4 | Handling of Customer Complaints and Returns and of Bonus
Payments to Customers

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| 3.4.1 | Handling of Customer Complaints and ReturnsSchedule 3.4.1 describes the process that shall
apply between the Parties with respect to Complaints and Returns
(both as defined below) by customers relating to products which
were sold and delivered by the Seller prior to the Effective
Date.A „Complaint” in the aforementioned sense means
a complaint by a customer relating to a product which is based on
(i) defects in a product, (ii) transport damage or loss, and/or
(iii) commercial reasons (as specified in Schedule
3.4.1).A „Return” in the aforementioned sense means
the return by a customer of a product that the customer (i) is
entitled to return under its contract with a Party and/or (ii)
wants to return on a voluntary basis without the product being
defective. |
| 3.4.2 | Handling of Bonus Payments to CustomersSchedule 3.4.2 describes the treatment between
the Parties of open bonus payments payable to customers (the
„Bonus Customers”) under existing customer bonus
agreements (the „Bonus Agreements”) for sales made
under such Bonus Agreements to such Bonus Customers before the
Effective Date. |

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4. Leased Premises

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| 4.1 | Transferred Lease ContractsIt is stated, that § 12a MRG (Austrian Rent Act) is not
applicable. With the economic effect as of the Effective Date,
Seller hereby sells and transfers, and Purchaser hereby purchases
and accepts the transfer of all Contracts under which Seller is the
tenant with respect to leased premises exclusively or predominantly
used for the purpose of the Business and/or listed in
Schedule 4.1 (i) (each a „Transferred
Lease Contract” and collectively the „Transferred
Lease Contracts”) but, in any event, except for the lease
Contracts listed in Schedule 4.1 (ii). |
| 4.2 | Consummation of Transfer, Third Party
Consent

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| 4.2.1 | Clauses 3.2.1 and 3.2.2 above shall apply mutatis mutandis,
provided that the Purchaser agrees to enter into such covenants and
agreements and provide such additional security as may be necessary
to secure the Third Party Consent where reasonably required. |
| 4.2.2 | If a required Third Party Consent is not obtained, Seller, with
effect as of the Effective Date, shall permit Purchaser to use and
occupy the premises leased under the Transferred Lease Contracts
(the „Transferred Leased Premises”) for the period
from the Effective Date until the date the Third Party Consent is
obtained in the same manner it would be permitted to do if the
Transferred Lease Contracts thereof had been transferred to the
Purchaser (the „Sublease”) subject to the
following terms and conditions of this Clause 4.2.2:

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| (i) | Purchaser will occupy the Transferred Leased Premises as
licensee only of Seller and no tenancy or other interest shall be
vested or deemed to be vested in Purchaser in relation to the
Transferred Leased Premises; and |
| (ii) | Purchaser will observe and perform all the obligations on the
part of the tenant under the respective Transferred Lease Contracts
for each Transferred Leased Premises (including the payment of all
rents and outgoings) and Purchaser shall indemnify and keep
indemnified Seller in respect of any costs, claims, demands,
expenses, proceedings, losses and liabilities arising and relating
to the period from and including the Effective Date resulting from
a breach of the Transferred Lease Contracts by the Purchaser. |

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| 4.2.3 | The transfer of the Transferred Lease Contracts shall be in such
form as is agreed by the parties of the relevant Transferred Lease
Contract having due regard to the nature of the Transferred Leased
Premises to be transferred and the matters affecting the
Transferred Leased Premises. |
| 4.2.4 | The Parties agree to execute all such necessary documents
required to effect the completion of the transfer of the
Transferred Lease Contracts from Seller to Purchaser. |
| 4.2.5 | On and after the Effective Date (and until the completion of the
transfer of the Transferred Lease Contract to Purchaser) Seller
shall act in accordance with the direction of Purchaser in
connection with any dealing, management or other matter relating to
or concerning the Transferred Leased Premises provided it does not
put Seller in breach of its obligations under the terms of any
Transferred Lease Contract. |

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| 4.3 | Shared Lease Contracts

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| 4.3.1 | In case of a Contract under which Seller is the tenant with
respect to leased premises and which neither pertains exclusively
nor predominantly but partially to the Business and would
constitute a Transferred Lease Contract if it was exclusively or
predominantly pertaining to the Business, including but not limited
to the lease contracts listed in Schedule 4.3.1
(herein the „Shared Lease Contract”), Seller and
Purchaser shall enter into a sublease contract (the
„Sublease Contract”) under which Seller subleases
to Purchaser such part of the leased premises under the respective
Shared Lease Contract which is used by Purchaser (the
„Shared Leased Premises”). Clause 3.2.1 shall
apply mutatis mutandis. |
| 4.3.2 | The terms and conditions of the Sublease Contract shall be
substantially the same as the terms and conditions of the Shared
Lease Contract and shall further include, with respect to the
Shared Leased Premises, that:

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| (i) | Purchaser shall be responsible, to Seller for any liabilities
(excluding any Excluded Liabilities) and shall, to the extent
legally permissible, carry out, perform and complete all
obligations (including contingent obligations) and shall bear its
own costs and any expenses, as the case may be, with respect
thereto if such costs or expenses are not to be borne by the
contractual partner of the relevant Shared Lease Contract; |
| (ii) | Purchaser shall indemnify and keep indemnified Seller in respect
of any costs, claims, demands, expenses, proceedings, losses and
liabilities arising out of and relating to the period from and
including the Effective Date resulting from a breach of any
obligations; and |
| (iii) | Seller and Purchaser shall reasonably cooperate to enforce the
rights and, in case it is prohibited by law for Purchaser to fulfil
such obligations, to fulfil the obligations relating to the Shared
Leased Premises. |

 |
| 4.3.3 | With respect to the Shared Leased Premises, Clauses 4.2.2 and
4.2.5 shall apply mutatis mutandis, provided that Clause 4.2.2
shall be applicable until the date on which the respective Sublease
Contract is becoming effective. |

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5. Intellectual Property Rights

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| 5.1 | Sale and Assignment of Patents, Registered Design Rights
and Domains

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| 5.1.1 | With effect as of the Effective Date and always subject to
Clause 5.6, Seller hereby sells and assigns to Purchaser, and
Purchaser hereby accepts such sale and assignment of, the (i)
solely owned and co-owned Patents listed in Schedule 5.1
(i) („Transferred Patents”); to the
extent the Transferred Patents are co-owned with third parties and
the assignment requires the consent of such co-owner(s)
(„Transferred Co-Owned Patents”) the assignment,
however, is made upon the condition precedent that the respective
co-owner(s) consent to the assignment, (ii) registered Design
Rights listed in Schedule 5.1 (ii), and (iii)
Domains listed in Schedule 5.1 (iii) each
including all claims, in particular damage claims, against any
third parties (excluding Affiliates of Seller) in relation to an
infringement of such Intellectual Property Rights prior to the
Effective Date (collectively herein „Transferred Registered
IP”). |
| 5.1.2 | Seller shall use reasonable efforts to obtain the consent of the
other co-owner(s) of the Transferred Co-Owned Patents to the
assignment of the respective Transferred Co-Owned Patents to
Purchaser in due course after the Effective Date. In case such
consent is not granted within six (6) months after the Effective
Date, the respective Transferred Co-Owned Patents shall not form
part of the Transferred Patents and no transfer of such Transferred
Co-Owned Patents shall take place. |

 |
| 5.2 | Sale and Assignment of TrademarksWith effect as of the Effective Date, Seller hereby sells and
assigns to Purchaser, and Purchaser hereby accepts such sale and
assignment of, always subject to Clause 5.6.7, the Trademarks
listed in Schedule 5.2, including all claims, in
particular damage claims, against any third parties (excluding
Affiliates of Seller) in relation to an infringement of such
Trademarks in the … Business prior to the Effective Date (the
„Transferred Trademarks”). |
| 5.3 | Sale and Assignment of Know-how

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| 5.3.1 | With effect as of the Effective Date and always subject to
Clause 5.6, Seller hereby sells and assigns to Purchaser all
information (irrespective as to whether such information is
available in the form of documentation, orally or in electronic
format and irrespective of whether they are protected by Copyrights
or not), including business and trade secrets, and technical and
business information, inventions (including inventions made by
employee inventors), experience and expertise, all to the extent
that such information is not software or covered by Patents or
Design Rights (collectively herein „Know-how”)
which (i) exclusively pertains to the … Business on the Effective
Date, and (ii) Seller wholly or co-owns and is authorized to
dispose of on the Effective Date, including all claims, in
particular damage claims, against any third parties (excluding
Affiliates of Seller) in relation to a misappropriation of such
Know-how prior to the Effective Date (herein „Transferred
Know-how”). Purchaser hereby accepts the sale and
assignment of the Transferred Know-how. The Parties agree that (i)
the documentation in which the Transferred Know-how is embodied is
already available in the … Business and a separate handover of such
documentation is therefore not necessary, and that (ii) the
segregation of electronic and/or physical data set out in the Data
Segregation and Access Agreement shall exclusively be subject to
and be made in accordance with the Data Segregation and Access
Agreement. |
| 5.3.2 | Seller shall keep the Transferred Know-how confidential and
shall only disclose it to Permitted Licensees (as defined below in
Clause 5.6.3) or Acquirer of Divested Business (as defined below in
Clause 5.6.4), provided that such Permitted Licensee and Acquirer
of Divested Business are bound to adequate confidentiality
obligations. The aforementioned confidentiality obligations do not
apply to the extent such Transferred Know-how (i) is or has become
publicly known without Seller (or Permitted Licensees or Acquirer
of Divested Business, as the case may be) having violated its
confidentiality obligations, and/or (ii) is required to be
disclosed by Seller (or Permitted Licensee or Acquirer of Divested
Business, as the case may be) to comply with applicable laws or
governmental regulations, provided that Seller (or Permitted
Licensee or Acquirer of Divested Business, as the case may be)
promptly informs Purchaser of such disclosure and uses commercially
reasonable efforts to limit the disclosure to the minimum
necessary. |

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| 5.4 | Sale and Assignment of SoftwareWith effect as of the Effective Date and always subject to
Clause 5.6, Seller hereby sells and assigns to Purchaser all rights
of use and exploitation, including all copyrights, in the object
code and in the source code of software individually created by or
for Seller, including the corresponding documentation, (hereinafter
„Software”) (i) which exclusively pertains to the
… Business on the Effective Date, and (ii) provided that Seller has
ownership rights (subject only to moral rights of the authors) in
such Software and Seller is entitled to assign such Software on the
Effective Date, including but not limited to the Transferred
Software listed in Schedule 5.4, including all
claims, in particular damage claims, against any third parties
(excluding Affiliates of Seller) in relation to an infringement of
the rights in such Software prior to the Effective Date (herein
„Transferred Software”). For the avoidance of
doubt, Seller does not sell and assign any components or elements
comprising part of, or as are otherwise included, in the
Transferred Software which are owned by third parties and therefore
cannot be sold and assigned by Seller, in particular open source
software elements, and Purchaser shall be fully responsible to
comply with all requirements resulting from the transfer of the
Transferred Software to, and its use by, Purchaser. Purchaser
hereby accepts the sale and assignment of rights in the Transferred
Software. The Parties agree that data carriers with the Transferred
Software and the respective documentation are already available in
the … Business and a separate handover of data carriers and
documentation is therefore not necessary. |
| 5.5 | Sale and Assignment of other Intellectual Property
RightsWith effect as of the Effective Date and always subject to
Clause 5.6, Seller hereby sells and assigns to Purchaser all
unregistered Design Rights and Copyrights, each to the extent it
(i) exclusively pertains to the … Business on the Effective Date,
and (ii) is wholly or co-owned by Seller and Seller is authorized
to dispose of it on the Effective Date, each including all claims,
in particular damage claims, against any third parties (excluding
Affiliates of Seller) in relation to an infringement of such
Intellectual Property Rights prior to the Effective Date (herein
together „Transferred Other Intellectual Property
Rights”). Purchaser hereby accepts the sale and assignment
of the Transferred Other Intellectual Property Rights. The Parties
agree that the documentation in relation to the Transferred Other
Intellectual Property Rights is already available in the … Business
and a separate handover of such documentation is therefore not
necessary. |
| 5.6 | Retained Rights of Seller and Third Party
Rights

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| 5.6.1 | Except for the Transferred Trademarks (for which Sellers rights
are further governed by the Trademark License Agreements) and the
Domains listed in Schedule 5.1 (iii), the Transferred Intellectual
Property Rights are sold and assigned always subject to a retained
non-exclusive, worldwide, irrevocable and perpetual, fully paid-up,
unlimited in scope, right of Seller to use the Transferred
Intellectual Property Rights, including but not limited to use the
Transferred Intellectual Property Rights to develop, have
developed, make or have made, purchase, sell, and offer to sell,
import and export products and corresponding services. For the
avoidance of doubt, the term Transferred Intellectual Property
Rights as used in this Clause 5.6 shall include all Patents and
other Intellectual Property Rights arising out of the Transferred
Intellectual Property Rights after the Effective Date. In relation
to the Transferred Trademarks the Seller retains a right to
continue to use such Trademarks on business papers, brochures, and
in other advertising (including in the internet) already produced
or otherwise existing on the Effective Date, for a transitional
period of one (1) year after the Effective Date. |
| 5.6.2 | In addition to the retained right of Seller to use the
Transferred Intellectual Property Rights pursuant to Clause 5.6.1,
Purchaser with effect as of the Effective Date grants to Seller a
non-exclusive, worldwide, irrevocable and perpetual, fully paid-up
license, unlimited in scope, under all Transferred Intellectual
Property Rights, except for the Transferred Trademarks (for which a
license is partially granted to Seller pursuant to the Trademark
License Agreements) and the Domains listed in Schedule 5.1 (iii).
The license includes the right to use such Transferred Intellectual
Property Rights to develop, have developed, make or have made,
purchase, sell, and offer to sell, import and export products and
corresponding services. |
| 5.6.3 | Seller may grant licenses under the retained rights pursuant to
Clause 5.6.1, respectively may grant sublicenses under its license
to the Transferred Intellectual Property Rights pursuant to Clause
5.6.2, to (i) any of its Affiliates, which (sub)license may, upon
Sellers choice, continue even if such Legal Entity to which the
(sub)license has been granted ceases to qualify as an Affiliate of
Seller, (ii) purchasers of any of Sellers or Sellers Affiliates
products for the use for, or in connection with, such product,
irrespective of whether such purchaser is a direct or indirect
customer of Seller or Sellers Affiliate, (iii) partners of joint
research, development or other technology cooperations, (iv)
contractors of Seller or Sellers Affiliates who manufacture any of
Sellers or Sellers Affiliates products on their behalf, and (v) any
Acquirer of Divested Business (as defined below), which may, upon
Sellers choice, include the right of such Acquirer of Divested
Business to grant further sublicenses to its Affiliates ((i) to
(iv) herein „Permitted Licensees“). |
| 5.6.4 | Irrespective of, and in addition to, the right to grant licenses
pursuant to Clause 5.6.3, Seller may assign its retained rights
pursuant to Clause 5.6.1 (in whole or in part) and the license
under any of the Transferred Intellectual Property Rights pursuant
to Clause 5.6.2 (in whole or in part) to a third party acquirer of
Seller's business or any part of such business (herein „Acquirer of
Divested Business”). |
| 5.6.5 | With effect as of the Effective Date, Purchaser hereby grants to
Seller a usufruct as an in rem right in the Transferred
Intellectual Property Rights except for the Transferred Trademarks,
and Seller hereby accepts such usufruct. The usufruct shall be in
force until the last of such Transferred Intellectual Property
Right expires and the last part of the Transferred Know-how becomes
publicly known, and shall automatically cease to exist thereafter.
No payment of Seller shall be due for the usufruct granted by
Purchaser hereunder. As a result of the usufruct, Seller shall
without limitation be entitled to use the Transferred Intellectual
Property Rights (except for the Transferred Trademarks) and grant
licenses thereunder, subject only to the limitations contained in
Clause 5.6.3. The usufruct granted hereunder shall not restrict
Purchaser's rights to use the Transferred Intellectual Property
Rights and to transfer or otherwise dispose of them in accordance
with this Agreement. |
| 5.6.6 | Seller shall have the right to register the license and the
usufruct granted to it and the licenses and sublicenses granted by
it to its Permitted Licensees under Clauses 5.6.2, 5.6.3 and 5.6.5
with the respective intellectual property offices. Purchaser shall
sign and execute all such documents and conduct all acts as are
reasonably necessary for the registration of the license and the
usufruct granted to Seller under such Transferred Intellectual
Property Rights. Seller shall bear all costs related to the
registration of the license and/or the usufruct. |
| 5.6.7 | Purchaser agrees and acknowledges that (i) the Transferred
Intellectual Property Rights may be subject to Third Party Rights
granted by Seller, Purchaser or any of their predecessors or
Affiliates to third parties, (ii) such Third Party Rights continue
to exist after the Effective Date, (iii) it shall inform any
acquirer or transferee of any or all of the Transferred
Intellectual Property Rights prior to the transfer that (a) Third
Party Rights may exist, and (b) Seller has retained rights and is
granted a license and usufruct under such Transferred Intellectual
Property Rights, and (iv) shall safeguard that the transferee
acknowledges and observes such Third Party Rights and the rights
retained by, and the licenses and usufruct granted to, Seller,
inter alia by agreeing on provisions substantially similar to the
provisions contained in this Clause 5.6.7. |
| 5.6.8 | Clauses 5.6.2 to 5.6.7 shall apply mutatis mutandis for the
Intellectual Property Rights owned on the Effective Date by any
other Legal Entity the shares of which Purchaser acquires from
Seller in connection with the Transaction, and Purchaser shall
procure such acquired Legal Entity immediately after the Effective
Date to (i) grant to Seller the license stipulated in Clause 5.6.2
and the usufruct stipulated in Clause 5.6.5, and (ii) provide
Seller with a written confirmation of such entity that such license
and usufruct is granted. |

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| 5.7 | Surrender of Documents

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| 5.7.1 | Seller shall surrender to Purchaser within sixty (60) days of
the Effective Date in electronic or written form at least the
material documents in its possession regarding the Transferred
Registered IP and the Transferred Trademarks, including application
and prosecution documents and registration certificates, to the
extent available. Seller shall be entitled to retain copies of such
documents. In relation to the Transferred Co-Owned Patents this
shall only apply upon the co-owner(s) of the respective Transferred
Co-Owned Patent having granted consent to the assignment. |
| 5.7.2 | Upon written request of Purchaser and at Purchasers costs,
Seller shall use reasonable efforts to provide Purchaser with
copies of any missing documents in Seller’s possession relating to
Transferred Intellectual Property Rights (including object codes
and source codes of any Transferred Software) as specified by
Purchaser and as already existing on the Effective Date. The same
shall apply mutatis mutandis in relation to copies of any missing
documents in Purchasers possession in relation to the Transferred
Intellectual Property Rights (including object codes and the source
codes of any Transferred Software) requested by Seller from
Purchaser. The obligations of the Parties under this Clause 5.7.2
shall cease one (1) year after the Effective Date. |

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| 5.8 | Recordal of Assignment; Maintenance

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| 5.8.1 | Purchaser shall use reasonable efforts to record the change of
ownership to the registered Transferred Intellectual Property
Rights in the respective intellectual property registries not later
than within two (2) years after the Effective Date, unless agreed
otherwise between the Parties. In relation to the Transferred Co-
Owned Patents this shall only apply upon the co-owner(s) of the
respective Transferred Co-Owned Patent having granted consent to
the assignment. |
| 5.8.2 | The Parties shall execute separate short form assignment
agreements to the extent necessary or useful to record or
effectuate the assignment of the registered Transferred
Intellectual Property Rights. Seller shall sign and execute all
documents and conduct all acts as are reasonably necessary for the
assignment of the Transferred Intellectual Property Rights to
Purchaser and the registration of Purchaser as the new owner of the
registered Transferred Intellectual Property Rights in the
respective public registers. Purchaser shall bear all costs related
to the registration of the assignment of the Transferred
Intellectual Property Rights from Seller to Purchaser. In relation
to the Transferred Co-Owned Patents this shall only apply upon the
co-owner(s) of the respective Transferred Co-Owned Patent having
granted consent to the assignment. |
| 5.8.3 | Seller shall bear all costs of the prosecution, maintenance and
defense of the Transferred Intellectual Property Rights arising up
and until the Effective Date, and Purchaser shall bear all such
costs arising after the Effective Date. In relation to the
Transferred Co-Owned Patents Seller shall bear all costs of the
prosecution, maintenance and defense of the Transferred
Intellectual Property Rights arising up and until the date the
co-owner(s) of the respective Transferred Co-Owned Patent have
granted consent to the assignment, and Purchaser shall bear all
such costs arising thereafter. |
| 5.8.4 | Seller shall be free to abandon any of the solely owned
Transferred Registered IP in the usual course of business up and
until the Effective Date, and in relation to the Transferred
Co-Owned Patents up and until the date the co-owner(s) of the
respective Transferred Co-Owned Patent have granted consent to the
assignment. |

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| 5.9 | Compensation for Employee InventorsSeller shall be responsible for all remuneration claims of its
existing or former employees relating to the use and other
exploitation of any and all employee inventions and corresponding
Patents forming part of the Transferred Intellectual Property
Rights prior to the Effective Date, and in relation to the
Transferred Co-Owned Patents prior to the date the co-owner(s) of
the respective Transferred Co-Owned Patent have granted consent to
the assignment. Purchaser shall be responsible for all remuneration
claims of employees (including employees of Seller, employees who
already left Seller prior to the Effective Date and employees of
Seller who transfer to the Purchaser) relating to the sale,
transfer, use and other exploitation of any and all employee
inventions and corresponding Patents forming part of the
Transferred Intellectual Property Rights on and after the Effective
Date (in relation to the Transferred Co-Owned Patents on and after
the date the co-owner(s) of the respective Transferred Co-Owned
Patent have granted consent to the assignment), including lump sum
payment obligations towards Sellers existing and former employees
resulting from the sale and transfer of such inventions and
corresponding Patents or the divestiture of the Purchaser from the
X Group. Seller shall indemnify and hold harmless Purchaser against
any and all remuneration claims relating to the use or other
exploitation of such employee inventions and corresponding Patents
forming part of the Transferred Intellectual Property Rights prior
to the Effective Date (respectively in relation to the Transferred
Co-Owned Patents prior to the date the co-owner(s) of the
respective Transferred Co-Owned Patent have granted consent to the
assignment), and Purchaser shall indemnify and hold harmless Seller
against any and all remuneration claims relating to the sale,
transfer, use or other exploitation of such employee inventions and
corresponding Patents forming part of the Transferred Intellectual
Property Rights on the Effective Date and thereafter (respectively
in relation to the Transferred Co-Owned Patents on the date the
co-owner(s) of the respective Transferred Co-Owned Patent have
granted consent to the assignment and thereafter), including lump
sum payment obligations towards Sellers existing and former
employees resulting from the sale and transfer of such inventions
and corresponding Patents or the divestiture of the Purchaser from
the X Group. |
| 5.10 | Termination of previous licensesThe Parties agree that all licenses under any of Sellers or its
Affiliates own Intellectual Property Rights granted by Seller and
its Affiliates to Purchaser and its Affiliates before the Effective
Date shall terminate on the Effective Date, except for the licenses
explicitly granted under the Trademark License Agreements and the
IP License Agreements. Purchaser hereby, on its own behalf and on
behalf of its Affiliates, irrevocably waives any and all of its and
their rights under such licenses previously granted to it and its
Affiliates by Seller and its Affiliates with effect as of the
Effective Date, and shall procure that its Affiliates waive any and
all of their rights under such previously granted licenses. |

6. Assumption of Liabilities

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| 6.1 | Assumed LiabilitiesWith economic effect as of the Effective Date, Purchaser hereby
assumes all risks, obligations, commitments and liabilities of
Seller to the extent arising from or relating to the Business
(collectively herein „Liabilities”), and, whether
known or unknown, fixed or contingent, including, in each case if
exclusively arising from or relating to the Business:

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| --- | --- |
| 6.1.1 | save for Clause 6.1.14, all Liabilities arising out of, or in
connection with, the Assumed Contracts, the Transferred Lease
Contracts or open customer orders; |
| 6.1.2 | save for Clause 6.1.14, all Liabilities for penalty, liquidated
damages, reimbursement, indemnification and damages; |
| 6.1.3 | all Liabilities arising out of, or in connection with, the
Transferred Intellectual Property Rights; |
| 6.1.4 | all Liabilities arising out of, or in connection with, the use
(including infringement) of third party Intellectual Property
Rights; |
| 6.1.5 | all bonds, guarantees or other sureties, including sureties
issued in favor of customers and suppliers of the Business and for
the benefit of third parties listed in Schedule
6.1.5 subject to any relevant customer and supplier
agreements which shall prevail; |
| 6.1.6 | save for Clause 6.1.14, all Liabilities for damages caused by
any product sold or any service rendered; and |
| 6.1.7 | all Liabilities arising out of statutory or contractual warranty
claims of third parties existing as of the Effective Date due to
defective products belonging to the Business, if (i) any such claim
amounts to at least EUR 100.000,– (in words: one hundred
thousand Euro) in the individual case or (ii) the total amount of a
series of such claims all resulting from the same serial damage
amounts to at least EUR 100.000,– (in words: one hundred
thousand Euro);but in any event excluding the following Liabilities (each an
„Excluded Liability” and jointly the
„Excluded Liabilities“; the Liabilities excluding
the Excluded Liabilities are the „Assumed
Liabilities”). |
| 6.1.8 | trade accounts payables towards suppliers existing as of the
Effective Date (the „Supplier Accounts
Payables”); |
| 6.1.9 | all Liabilities vis-à-vis financial institutions existing as of
the Effective Date; |
| 6.1.10 | all payables due resulting from hedging transactions; |
| 6.1.11 | all Liabilities to the extent exclusively relating to an
Excluded Asset; |
| 6.1.12 | Liabilities towards employees subject to the terms and
provisions in Clause 7; and |
| 6.1.13 | any Liabilities in connection with taxes and social security
contributions, and |
| 6.1.14 | Liabilities arising out of any warranty claims other than those
transferred pursuant to Clause 6.1.7. |

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| 6.2 | Third Party Claims with respect to Assumed
LiabilitiesIn the event a third party is asserting claims or files a
lawsuit or any other proceeding against the Seller due to any of
the Assumed Liabilities, the Seller shall promptly notify the
Purchaser in writing, giving reasonable details of any such third
party claim. Following such notification, the provisions of Clause
8.2 below shall apply mutatis mutandis. |
| 6.3 | Release from Assumed Liabilities, Third Party
ConsentThe Parties shall use their respective commercially reasonable
efforts to procure the release and discharge of Seller from each
Assumed Liability. If and to the extent a Third Party Consent is
required to effect the assumption of any Assumed Liability, Clause
3.2 above shall apply mutatis mutandis. |
| 6.4 | Shared LiabilityIn case of a Liability which pertains only partially (and not
exclusively) to the Business and would constitute an Assumed
Liability if it was exclusively pertaining to the Business, (herein
„Shared Liability”) Purchaser shall assume the portion of the
Shared Liability pertaining to the Business (herein „Assumed Shared
Liability”). Seller shall indemnify and hold harmless Purchaser
against all claims with respect to the portion of the Shared
Liability not comprising the Assumed Shared Liability. Purchaser
shall indemnify and hold harmless Seller against all claims with
respect to the portion of the Shared Liability comprising the
Assumed Shared Liability. |
| 6.5 | Transfer of Provisions and AccrualsSubject to anything stated to the contrary in this Agreement, in
case of provisions or accruals to be shown in Seller’s balance
sheet as of the Effective Date, if such balance sheet was drawn up,
and exclusively or predominantly relating to the Business, in
particular but not limited to the provisions and accruals listed in
Schedule 6.5. Purchaser hereby assumes all underlying uncertain
liabilities, but in any event save for provisions, accruals and
underlying uncertain liabilities relating to tax issues, customer
rebates, warranty claims not transferred pursuant to Clause 6.1.14,
goods or services received but not invoiced from third parties, the
Transferred Litigation or Pending Oppositions and Nullity Actions,
and allowances for doubtful accounts on receivables. Clauses 6.2,
6.3 and 6.4 shall apply mutatis mutandis. |

7. Transfer of Employees and Pension
Obligations

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| 7.1 | The Parties acknowledge and agree that the employment
relationships with the employees listed in Schedule 7.1 shall be
transferred from the Seller to the Purchaser with effect as of the
Effective Date. Schedule 7.1 further contains information on job
titles. |
| 7.2 | Legal procedure of the Transfer

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| 7.2.1 | SituationThe Parties are performing a Carve-Out of the … Business from
the Seller to the Purchaser effective as of the Effective Date. |
| 7.2.2 | Legal RequirementsThe legal procedure of the transfer is based on the statutory
principle of sec. 3 of the Austrian Employment Contracts Adjustment
Act (Arbeitsvertragsrechtsanpassungsgesetz – AVRAG). Sec 3 AVRAG
constitutes the handling of the employee relationships as well as
the rights and obligations of the Seller and the Purchaser caused
by the transfer. |
| 7.2.3 | Transfer of EmployeesThe Parties acknowledge and agree that the sale and purchase
under this Agreement constitutes a transfer of business by
operation of law within the meaning of sec. 3 AVRAG. The Parties
therefore acknowledge that the employment relationships of the
employees listed in Schedule 7.1 will transfer with all rights and
obligations pursuant to sec. 3 AVRAG from the Seller to the
Purchaser as at the Effective Date. |
| 7.2.4 | Notification ObligationThe Seller has informed the works council established at the
Seller duly and completely about the transfer pursuant to sec. 108
(2) of the Austrian Employee Participation Act
(Arbeitsverfassungsgesetz – ArbVG) on (i) the respective transfer
of business, (ii) the planned Effective Date of the transfer, (iii)
the reason for the transfer, (iv) the legal, economic and social
consequences of the transfer for the employees, and (v) the
measures that are being considered with regard to the
employees. |
| 7.2.5 | ObjectionsSince the employees transfer with all rights and duties and no
changes will occur as stipulated in sec. 3 (4) AVRAG, the Parties
assume that no objection rights exist. However, The Parties shall
immediately inform each other in writing of any objection by an
employee. If such an objection is deemed to be legally grounded (to
the best knowledge of the Parties, limited to employees which are
works council members), both the Seller and the Purchaser shall
inform the respective other Party of such objection. One month
after the Effective Date of the transfer and based on the
comprehensive lists of all objecting employees under sec. 7.2.5
para. 1 and promptly thereafter, the Seller provides an updated
(final) version of Schedule 7.1 which then becomes an integral part
of this Agreement. |

 |
| 7.3 | Handling of the benefits by the PartiesSince the employment relationships of the employees will
transfer with all rights and obligations by law (pursuant to sec. 3
AVRAG) from the Seller to the Purchaser, this also relates to any
employee benefits. |
| 7.4 | Pension ObligationsA description of the treatment of the applicable pension
scheme(s) (including liabilities) is provided in the Transfer
Concepts in Schedule 7.4.The Parties shall immediately take all necessary actions and
make all necessary declarations to ensure the transfer of pensions
in compliance with the procedures and principles as described in
Schedule 7.4.The Parties acknowledge that there are no other pension schemes
(including liabilities) to be transferred besides the Pension
Scheme(s) provided in Schedule 7.4. |
| 7.5 | Liabilities

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| 7.5.1 | The Seller is jointly and severally liable together with the
Purchaser for duties pursuant to sec. 6 (1) AVRAG to the extent
that they arose prior to the date of transfer and become due after
the Effective Date, within the time limits provided by sec. 6 (2)
AVRAG, where applicable. If such duties become due after the
Effective Date, the Seller is only liable for the pro-rated amount
as determined in sec. 6 (2) AVRAG, where applicable. However, all
this applies only in relation to the transferred employees listed
in Schedule 7.1 while the internal liabilities between the Parties
shall be governed exclusively by the following provisions. |
| 7.5.2 | Within the internal relationship of the Parties, the Seller
remains only liable with respect to any wages (including any
withholding payments) owed to the transferred employees listed in
Schedule 7.1 that are outstanding up to the Effective Date as these
obligations remain on the balance sheet of the Seller.In case one Party fulfils or has to fulfil liabilities in
relation to third parties under sec. 6 para. 1 AVRAG which were
allocated to the other Party under sec. 7.5.2, the other Party
shall fully indemnify the first Party. |

 |
| 7.6 | Tax and Social Security ContributionsThe Seller assures that all taxes and social security
contributions up to the Effective Date with respect to the
transferred employees listed in Schedule 7.1 will be duly and
thoroughly paid. |
| 7.7 | Personnel FilesThe personnel files of the transferred employees listed in
Schedule 7.1 shall be provided by the Seller to the Purchaser
electronically or via hard-copy with due respect to the local laws
and regulations and where reasonable due to the transfer of the
employees. Thereafter, the Purchaser will provide the Seller with
any information thereof which the Seller requires to fulfil its
obligations under any statutory laws and regulations. |
| 7.8 | DefinitionsDefinitions that are being made in sec. 7 shall apply
exclusively to this section. The definitions shall not bear any
implications to other sections and/or provisions of this
Agreement. |

8. Transfer of Litigation

|  |  |
| --- | --- |
| 8.1 | Transferred LitigationWith economic effect as of the Effective Date, Seller hereby
transfers to Purchaser, and Purchaser hereby accepts the transfer
of, all of Sellers rights, benefits and obligations in connection
with, and arising from, any court or administrative proceedings,
litigation and arbitral proceedings, to which the Business is
subject, including labor disputes and those listed in
Schedule 8.1 Part 1 (collectively herein
„Transferred Litigation”). |
| 8.2 | Replacement of Party

|  |  |
| --- | --- |
| 8.2.1 | The Parties shall make commercially reasonable efforts to
achieve (i) a release of Seller from all rights and obligations
under such Transferred Litigation and (ii) the assumption of such
rights and obligations by Purchaser. In particular, as soon as
possible after the Effective Date, the Parties shall use their
respective commercially reasonable efforts to effect the
replacement of Seller by Purchaser as party in each Transferred
Litigation in accordance with applicable law (herein
„Replacement of Party”) |
| 8.2.2 | For the period from the Effective Date until the date at which
the Replacement of Party has taken effect, Clauses 3.2.2 and 3.2.3
above shall apply accordingly for each Transferred Litigation,
provided that, in the relevant Transferred Litigation, Seller
shall:

|  |  |
| --- | --- |
| (i) | continue to participate in the Transferred Litigation in its own
name; |
| (ii) | within a reasonable period of time, give notice to the Purchaser
of any developments in relation to the Transferred Litigation and
shall consult with the Purchaser with respect to the Transferred
Litigation and keep the Purchaser reasonably informed of all
developments in relation thereto; |
| (iii) | take any action and institute any proceedings, and give any
information and assistance, as the Purchaser may reasonably request
to:(a) dispute, resist, appeal, compromise, defend, remedy or
mitigate the matter; or(b) enforce against a person the rights of the Seller in
relation to the matter; |
| (iv) | if the Purchaser requests, allow the Purchaser the exclusive
conduct of the proceedings (including any compromise, settle or
abandonment of action); |
| (v) | not admit liability in respect of, or compromise or settle, the
matter without prior approval of the Purchaser; and |
| (vi) | forward to Purchaser any and all benefits received due to the
relevant Transferred Litigation, |

but all internal and external costs resulting from such
Transferred Litigation including reasonable external attorney’s
fees shall be borne by Purchaser. |

 |
| 8.3 | Oppositions and Nullity ActionsAs of the Effective Date, (i) Seller has submitted oppositions
or nullity actions against third-party owned Intellectual Property
Rights which are or could exclusively or predominantly be applied
in the Business and which are still pending as listed in
Schedule 8.1 Part 2, and (ii) third parties have
submitted oppositions or nullity actions which are still pending
against Transferred Intellectual Property Rights as listed in
Schedule 8.1 Part 3 (jointly the „Pending
Oppositions and Nullity Actions“). With respect to the
Pending Oppositions and Nullity Actions Clauses 8.1 and 8.2 shall
apply mutatis mutandis. |

9. Exclusion of liability pursuant
to Section 38 Act on Enterprises (Österreichisches
Unternehmensgesetzbuch – öUGB)

Seller and Purchaser herewith agree

|  |  |
| --- | --- |
| 9.1 | that all legal relationships to the extent exclusively or
predominantly relating to the Business (referred to herein as
„Legal Relationships”) shall be transferred to
Purchaser under Section 38 of the Act on Enterprises and that
Seller shall indemnify and hold Purchaser harmless from any claim
having its cause before, and that Purchaser shall indemnify and
hold Seller harmless from any claims having its cause after, the
Effective Date; |
| 9.2 | that, by way of derogation from Section 38 para 1 of the Act on
Enterprises, the legal relationships exclusively or predominantly
used in the X Business shall not be transferred to Purchaser and
Purchaser shall not be liable for such relationships and Seller
shall indemnify and hold Purchaser harmless from and against any
claims under such relationships; |
| 9.3 | that the Legal Relationships shall be transferred to Purchaser
but, by way of derogation from Section 38 para 1 of the Act on
Enterprises, Purchaser shall have no liability for claims already
existing as of the Effective Date (referred to herein as
„Existing Liabilities“ –
Altverbindlichkeiten); |
| 9.4 | that both Purchaser and Seller shall inform by means of a joint
written communication forthwith after Signing all natural and legal
persons about the transfer under Section 38 of the Act on
Enterprises; |
| 9.5 | that in the case of an objection to the transfer of any legal
relationship there shall be no claim whatsoever between Seller and
Purchaser, in particular any right of rescission of the contract
and any purchase price reduction shall be waived. |

10. Permits

|  |  |
| --- | --- |
| 10.1 | Required PermitsSchedule 10.1 contains a non-exhaustive list of
permits, licenses, consents, approvals, certificates,
qualifications, specifications, registrations or other
authorizations or filings of a notification, reports or assessments
as required or requested by any governmental authority with respect
to the conduct of the Business prior to the Effective Date
(collectively referred to as the „Required
Permits”). |
| 10.2 | Transfer of PermitsSeller hereby transfers to Purchaser, and Purchaser accepts the
transfer of, all legally transferable Required Permits held by
Seller and necessary for the Business as of the Effective Date (the
„Transferred Permits”). With respect to Required
Permits not being Transferred Permits and save for any services or
support provided under any applicable Local Services Agreement(s),
Purchaser shall without undue delay seek to obtain on its own
behalf and account, and Seller shall use commercially reasonable
efforts to assist Purchaser in obtaining, all Required Permits. |

11. Wrong Pocket Assets

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 11.1 | Purchaser Wrong Pocket Assets and
Liabilities

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 11.1.1 | If, at or after the Transfer Date, any Transferred Asset (but
not any Excluded Assets) has not been transferred to, or is not
legally and beneficially owned by or vested in Purchaser (a
„Purchaser Wrong Pocket Asset“) or any Assumed
Liability (but not any Excluded Liabilities) has not been fully
assumed by Purchaser (a „Purchaser Wrong Pocket
Liability”):

|  |  |
| --- | --- |
| (i) | Seller shall transfer, or procure the transfer of, such
Purchaser Wrong Pocket Asset, together with any benefit or sum paid
or accruing since the Effective Date as a result of holding such
Purchaser Wrong Pocket Asset, as soon as reasonably practicable, to
Purchaser or any other transferee nominated by it for no
consideration; |
| (ii) | Purchaser shall, or shall procure that any other transferee
nominated by it will, assume such Purchaser Wrong Pocket Liability,
together with any losses accruing to Seller as a result of holding
such Purchaser Wrong Pocket Liability since the Effective Date, as
soon as reasonably practicable for no additional consideration or
compensation; |
| (iii) | Seller shall as soon as practicable (at Sellers expense) execute
or do all such documents and things as may be necessary to validly
effect the transfer or assumption and to vest the relevant
Purchaser Wrong Pocket Asset or Purchaser Wrong Pocket Liability in
or by the Purchaser or any other transferee (nominated by
Purchaser); and |
| (iv) | Purchaser shall (at the sole expense of Seller) provide such
assistance to Seller, as the case may be, reasonably required for
the purposes of effecting the transfer or assumption of the
Purchaser Wrong Pocket Asset or assumption of the Purchaser Wrong
Pocket Liability in accordance with this Clause 11.1.1 including
making or procuring to be made any payment as may be necessary to
ensure the transfer or assumption is lawful. |

 |
| 11.1.2 | This provision shall remain in full force and effect for a
period of twelve (12) months following the Effective Date. |

 |
| 11.2 | Seller Wrong Pocket Assets and Liabilities

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 11.2.1 | If, at or after the Transfer Date, any Excluded Asset is owned
by or vested in the Purchaser (a „Seller Wrong Pocket Asset”) or
any Excluded Liability has been assumed by the Purchaser (a „Seller
Wrong Pocket Liability”):

|  |  |
| --- | --- |
| (i) | Purchaser shall transfer, or procure the transfer of, such
Seller Wrong Pocket Asset, together with any benefit or sum paid or
accruing as a result of holding such Seller Wrong Pocket Asset, as
soon as reasonably practicable, to Seller or any other transferee
nominated by it for no consideration. |
| (ii) | Seller shall, or shall procure that any other transferee
nominated by it will, assume such Seller Wrong Pocket Liability,
together with any losses accruing to the Purchaser as a result of
holding such Seller Wrong Pocket Liability, as soon as reasonably
practicable for no consideration or compensation; |
| (iii) | Purchaser shall as soon as practicable (at Sellers expense)
execute or do all such documents and things as may be necessary to
validly effect the transfer or assumption and to vest the relevant
Seller Wrong Pocket Asset or Seller Wrong Pocket Liability in or by
the Seller or any other transferee (nominated by Seller); and |
| (iv) | Seller, shall (at Sellers expense) provide such assistance to
Purchaser as is reasonably required for the purposes of effecting
the transfer of the Seller Wrong Pocket Asset or assumption of the
Seller Wrong Pocket Liability in accordance with this Clause
11.2.1, including making or procuring to be made any payment as may
be necessary to ensure the transfer or assumption is lawful. |

 |
| 11.2.2 | This provision shall remain in full force and effect for a
period of twelve (12) months following the Effective Date. |

 |
| 11.3 | Wrong Pocket PaymentsIf, at or after the Transfer Date, a Party receives payments
(the „Receiving Party”) which are attributed to
the respective other Party pursuant to the terms of this Agreement
(the „Wrong Pocket Payments”):

|  |  |
| --- | --- |
| 11.3.1 | For the period ending twelve (12) months following the Effective
Date (the „Forwarding Period”), the Receiving
Party shall forward to the other Party any Wrong Pocket Payments in
the respective currency received from a third party after the
Effective Date which are attributed to the respective other Party
pursuant to the terms of this Agreement. The payments are to be
forwarded at least once a month by wire transfer into the bank
accounts denominated by the respective Party. It is understood that
Seller and Purchaser shall pay and receive any payments made by or
to them under this Clause 11.3.1 for themselves with discharging
effect. If a Party is obliged under relevant law to repay payments
received from a third party and which have been forwarded to the
other Party, the other Party shall promptly, following its receipt
of the written demand of the repaying Party, reimburse in full to
the repaying Party such repayments and directly related interest,
reasonable costs and reasonable expenses. |
| 11.3.2 | After the Forwarding Period, each Party will re-transfer
payments received from a third party to such third party with an
explanation that the relevant payment has been credited to the
wrong recipient account. |

 |

12. Transfer Date

Notwithstanding the Effective Date, any legal title and/or
position in whatsoever form shall only transfer in rem under this
agreement at the date of this Agreement but in any event not
earlier than on the Effective Date (the „Transfer Date”).

13. Consideration, Payment

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| --- | --- | --- | --- | --- | --- |
| 13.1 | Consideration

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| --- | --- |
| 13.1.1 | The preliminary consideration for the sale and transfer of the
Business shall be EUR … (in words: … Euro) (the
„Consideration”). |
| 13.1.2 | The consideration is subject to an adjustment in accordance with
the below:Within a period of 45 (forty-five) days from the Effective Date,
Purchaser shall determine the value according to IFRS as applied by
the X Group of the net assets actually transferred under this
Agreement. If the value of the net assets actually transferred is
higher or lower than the value of the net assets on the basis of
which the preliminary consideration pursuant to Clause 13.1.1 was
calculated, the preliminary consideration pursuant to Clause 13.1.1
shall be adjusted by an amount being equal to such delta. The
preliminary consideration pursuant to Clause 13.1.1 was derived
from a valuation according to general valuation principles and
local requirements and determined on the basis of a net asset value
of the assets to be transferred in the amount of EUR … (in
words: … Euro).Purchaser shall notify Seller within five (5) days after the
determination pursuant to Clause 13.1.2 (i) of the value of the net
assets which have been actually transferred but in any event no
later than 50 (fifty) days after the Effective Date about (i) the
value of the net assets which have been actually transferred and
(ii) the adjustment amount of the preliminary consideration
pursuant to Clause 13.1.1. If Seller objects to the value of the
net assets or the adjustment amount of the preliminary
consideration as notified pursuant to sentence 1 of this Clause
13.1.2 (ii) within a period of five (5) days as from delivery of
the notification pursuant to sentence 1 of this Clause 13.1.2 (ii),
the preliminary consideration pursuant to Clause 13.1.1 shall be
adjusted in accordance with a settlement agreed between the
Parties. If they do not reach an agreement on a settlement within a
period of 10 (ten) days as from the date on which Sellers objection
pursuant to sentence 2 of this Clause 13.1.2 (ii) has been
delivered to Purchaser, the preliminary consideration pursuant to
Clause 13.1.1 shall become the final consideration under this
Agreement.The adjustment amount according to this Clause 13.1.2 shall
become final and binding at the earlier of (i) the lapse of the
objection period pursuant to sentence 2 of Clause 13.1.2 (ii) if no
notification of objection is delivered by Seller to Purchaser by
that date pursuant to said Clause or (ii) the date on which the
Parties agree on an adjustment amount pursuant to sentence 3 of
Clause 13.1.2 (ii). |

 |
| 13.2 | Payment

|  |  |
| --- | --- |
| 13.2.1 | The Consideration shall be due and payable by Purchaser on the
Transfer Date, but in any event not earlier than on … |
| 13.2.2 | Any adjustment of the preliminary consideration in accordance
with Clause 13.1.2 shall be due and payable by Seller or Purchaser,
as the case may be, on the date on which the adjustment amount
becomes final and binding pursuant to Clause 13.1.2 (iii), but in
any event not earlier than on … |

 |

14. Representations and
Warranties

To the extent legally permissible, the Parties acknowledge and
agree that no representation and warranties are given in this
Agreement by the Seller in relation to the Business or any parts of
it and that all remedies that would otherwise be available to
Purchaser under applicable law or otherwise are hereby excluded and
waived.

15. Local Service Agreement(s)

The Parties intend to enter into (a) separate local service
agreement(s) under the framework agreement between X GROUP and Y
GmbH (the/a „Local Services Agreement(s)”) with
effect as of the Effective Date to cover the provision by a Party
of certain transitional and/or long term services required by the
other Party to continue the operation of its business after the
Effective Date as conducted on the Effective Date.

16. Miscellaneous

|  |  |
| --- | --- |
| 16.1 | Confidential Information, AnnouncementsEach Party shall keep confidential, and not disclose to any
third party, the contents of this Agreement and any confidential
information regarding the other Party disclosed in connection with
this Agreement or its implementation, except as expressly agreed
upon in writing by the other Party. |
| 16.2 | The confidentiality obligation as per Clause 16.1 above shall
not apply (i) to information which the respective Party can
demonstrate (a) is available to the public through no breach of
this Agreement, (b) was in its possession prior to any
confidentiality obligation, (c) is independently developed by the
respective Party without using confidential information, or (d) is
imposed to be disclosed by law or the rules of any governmental
organization provided that in such event the Party which is obliged
to disclose shall use its reasonable efforts to consult with the
other Party in advance as to its form, content and timing and (ii)
vis-à-vis a third party in connection with a partial or complete
sale of the Business in whatsoever form (e.g. asset deal, share
deal) provided that such third party is subject to a non-disclosure
agreement customary for such kind of transactions. |
| 16.3 | VAT, Transfer Taxes, Costs and Expenses

|  |  |
| --- | --- |
| 16.3.1 | All sums payable by one Party to another Party under or pursuant
to this Agreement are exclusive of any applicable VAT. Subject to
Clause 16.3.2 below, if any VAT is or becomes mandatorily
chargeable on any transaction between the Parties under or pursuant
to this Agreement, the recipient shall, subject to the receipt of a
valid VAT invoice, pay to the supplier (in addition to any other
consideration under or in connection with this Agreement) an amount
equal to such VAT, except the reverse charge mechanism applies. |
| 16.3.2 | For VAT purposes, the Parties agree the following: Seller and
Purchaser intend and will use all reasonable endeavors to ensure
that the sale of the Business under this Agreement is treated as a
transfer of a going concern under Directive 2006/112/EC and/or the
corresponding provisions in the applicable VAT law in the relevant
jurisdictions, and will not be treated as a supply of goods nor a
supply of services for VAT purposes. |
| 16.3.3 | Any transfer taxes, stamp duties and comparable taxes caused by
the transfer of the Business or in connection with any of the
transactions contemplated by this Agreement shall be borne by the
Seller unless only either Seller or Purchaser owe such transfer
taxes, stamp duties and comparable taxes, in which case they shall
be borne by the relevant debtor. To the extent legally permissible,
the Parties shall cooperate to mitigate any such transfer taxes,
stamp duties and comparable taxes arising out of, or in connection
with, any of the transactions contemplated by this Agreement. |
| 16.3.4 | Except as explicitly provided otherwise in this Agreement,
Seller shall pay the costs and expenses that may arise in
connection with the execution of this Agreement and each document
referred to in, or relating to the transactions contemplated by,
this Agreement, such as notarization fees, court fees,
administration fees or stamp duties. Apart from those costs which
are to be borne by Seller as specified by this Clause 16.3.4, each
Party shall bear its own costs and taxes and the costs of its
advisors connected with, or resulting from, the execution and
consummation of this Agreement. |

 |
| 16.4 | Governing LawThis Agreement (including the arbitration agreement contained in
it) and any non-contractual obligations arising out of or in
connection with it shall be subject to the laws of Austria
excluding any conflict-of-laws rules. The United Nations Convention
on Contracts for the International Sale of Goods (CISG) of 11 April
1980 shall not be applicable. |
| 16.5 | Dispute Resolution

|  |  |
| --- | --- |
| 16.5.1 | If a dispute arises in connection with this Agreement, the
responsible representatives of the Parties shall attempt, in fair
dealing and good faith, to settle such dispute. Upon request of a
Party, a senior management representative of each Party shall
participate in the negotiations. Each Party shall be entitled to
terminate these negotiations by written notification to the other
Party at any time. |
| 16.5.2 | To the extent not settled between the Parties pursuant to Clause
16.5.1, any dispute, controversy or claim arising from or in
connection with this Agreement including, without limitation, any
question regarding its existence, validity, performance, breach,
interpretation or termination shall be finally settled by
arbitration under the Rules of Arbitration of the International
Chamber of Commerce (the „ICC”) (the
„Rules”). The International Bar Association Rules
on the taking of evidence in international arbitrations shall not
apply but the rules of §§ 577 ff ZPO (Code of Civil Procedure)
shall apply. |
| 16.5.3 | The number of arbitrators shall be three (3). The arbitrators
shall be appointed in accordance with the Rules. |
| 16.5.4 | The seat, or legal place, of arbitration shall be Vienna,
Austria. The language of the arbitral proceedings shall be German,
provided however, that the Parties shall be entitled to submit
written evidence in other languages (in which case a German
translation shall be provided by the Party submitting such written
evidence). |
| 16.5.5 | The Parties shall keep confidential all ICC proceedings
(including information received from any other Party during the
course of preparation for such proceedings), any decision rendered
at any ICC proceeding and any preceding, antecedent and subsequent
discussions and correspondence unless the disclosure is required by
applicable law or the information is to any tax authorities to the
extent such disclosure is reasonably required for the purposes of
the tax affairs of any of the Parties. |

 |
| 16.6 | Notices

|  |  |
| --- | --- |
| 16.6.1 | A notice or other communication under, or in connection with,
this Agreement (herein „Notice”) shall be (i) in
writing, (ii) in the German language or with a German language
translation, (iii) delivered personally, by courier, sent by
registered mail or by fax. |
| 16.6.2 | A Notice to Seller shall be sent to such Party at the following
address, or such other person or address as Seller may notify the
Purchaser from time to time: … |
| 16.6.3 | A Notice to Purchaser shall be sent to such Party at the
following address, or such other person or address as Purchaser may
notify the Seller from time to time: … |

 |
| 16.7 | Entire Agreement, Amendments. ConflictThis Agreement comprises the entire agreement between the
Parties concerning the subject matter hereof and supersedes and
replaces all oral and written declarations of intention made by the
Parties in connection with the contractual negotiations. Changes
and amendments to this Agreement shall be valid only if made in
writing and signed by or on behalf of each of the Parties. This
shall also apply to any change of this Clause 16.7. |
| 16.8 | InterpretationIn this Agreement, the headings are inserted for convenience
only and shall not affect the interpretation of this Agreement. The
terms „including“, „include“ and „in particular“ shall always mean
„including, without limitation”, „include, without limitation“ and
„in particular, without limitation“, respectively. Words such as
„hereof, „herein” or „hereunder” refer, unless otherwise required
by the context, to this Agreement as a whole and not to a specific
provision of this Agreement. |
| 16.9 | ReferencesIn this Agreement, a reference to a statutory provision (except
where stated otherwise) includes a reference to the statutory
provision as applicable as at the date of this Agreement. |
| 16.10 | Partial InvalidityShould any part or provision of this Agreement be held to be
invalid or unenforceable by any competent arbitral tribunal, court,
governmental or administrative authority having jurisdiction or
should an unintended gap in this Agreement become evident, the
other provisions of this Agreement shall nonetheless remain valid.
In such case, the Parties hereto agree to recognize and give effect
to such valid and enforceable provision or provisions, which
correspond as closely as possible with the commercial intent of the
Parties. |

Place …, date …