

## **CONDITIONS OF SALE (UK ONLY)**

### **1. DEFINITION**

In these conditions unless the context otherwise requires:-

"Seller" means M & L A Kirby Limited;

"Buyer" means the person, firm or company with whom a contract of sale is entered into by the Seller;

"Goods" means the goods which are the subject of the contract of sale between the Seller and the Buyer;

"Conditions" means these conditions of sale;

"Contract" means a contract of sale for the Goods governed by these conditions.

### **2. LIMITATION OF SELLER'S LIABILITY**

Except as otherwise expressly provided for in these conditions the Seller shall have no liability of any kind whatsoever (save where and to the extent that such liability cannot lawfully be excluded by express provision to that effect) to the Buyer in respect of any loss or damages (whether direct, indirect or consequential) suffered by the Buyer or his servants or agents whether in contract or otherwise howsoever and whether for loss or damage to property or for death or bodily injury or otherwise howsoever in respect of the Goods (or for any work done or services rendered by the Seller in connection with the Goods).

Claims in respect of any alleged defect in the quality of Goods must be notified within 24 hours of delivery thereof. If any fault in the Goods is proved by the Buyer to have been occasioned before the Goods were despatched from the Seller's premises, the Seller will, at the Seller's sole option, either replace the Goods or give credit for the invoiced price thereof to the Buyer. The above subject always to the following:-

1. The Seller will accept no responsibility fault in or failure of goods due to using unsuitable applications or to the handling, treatments or methods of placing adopted by the Buyer after the Goods are delivered to sites or loaded into any vehicle or receptacle provided by the Buyer.

2. The Buyer must satisfy itself as to the condition of all Goods on delivery and before use. Under no circumstances will the Seller accept liability for any defects whatsoever after being used, unless reported within 48 hours of delivery, confirmation to be made in writing within 3 days.

### **3. WARRANTIES**

- 3.1 The Seller shall not be bound by an oral warranty purported to be given by the Seller or on the Seller's behalf unless it is confirmed in writing such confirmation being signed by the Seller or by a person duly authorised on behalf of the Seller to give such warranty and who is actually known by the Buyer to have such authority.
- 3.2 Any implied condition or warranty (statutory or otherwise) as to the quality of the Goods including (but without prejudice to the generality of the foregoing) any such warranty or condition as to merchantability or merchantable condition of the Goods or their fitness for any particular purpose or as to their correspondence with or to description or sample given by or on behalf of the Seller are hereby excluded (insofar as to the extent that such exclusion is permitted by law).

### **4. DESCRIPTION OF GOODS**

All descriptions and illustrations of the Goods contained in any catalogues, price lists, advertising matter and other literature of the Seller are intended merely to present a general idea of the Goods described or shown therein and none of them shall form part of the contract between the Seller and the Buyer.

### **5. RETENTION OF TITLE**

- 5.1 All Goods supplied by the Seller to the Buyer under a contract between the Seller and the Buyer shall remain the sole and absolute property of the Seller both in law and in equity until the Buyer shall have paid to the Seller the agreed price of the Goods together with the full price of any other goods supplied by the Seller to the Buyer pursuant to any other contract between them.
- 5.2 The Buyer acknowledges that it is in possession of the Goods solely as bailee of the Seller until the Buyer shall have paid to the Seller the contract price for the Goods together with such price in respect of any other goods supplied by the Seller to the Buyer pursuant to any other contract between the Seller and the Buyer which is wholly or partially outstanding.
- 5.3 Until such time as in accordance with the above provision the Buyer becomes the owner of the Goods the Buyer will store them on its premises separately from the Buyer's own Goods or those of any other person and in a manner which makes them readily identifiable as the Goods of the Seller.
- 5.4 The Buyer's right to take possession of the Goods shall cease if payment for the Goods is not made when due or if the Buyer becomes insolvent or does anything or fails to do anything which would entitle a receiver or sequestrator or trustee to take possession of any assets of or under the control of the Seller or which would entitle any person to invoke any procedure or take any proceedings (whether voluntary, administrative or compulsory) under the Insolvency Act 1986 or if the Buyer becomes subject to any procedure, order or proceedings (whether voluntary, administrative or compulsory) under the Insolvency Act 1986 and the Seller may thereupon enter upon any premises where the Goods are stored or where they are reasonably thought to be stored for the purpose or repossessing them (using reasonable force if necessary).
- 5.5 Notwithstanding the retention of property in the Goods by the Seller in accordance with the above provisions the Goods shall be at the risk of the Buyer as soon as they are delivered by the Seller to the Buyer's transport or to the Buyer's premises or otherwise to its order as the case may be.
- 5.6 Until such time as in accordance with the above provisions either the Buyer shall have ceased to have the right to retain possession of the Goods or shall have acquired the property in them the Buyer is licensed by the Seller to agree to sell the Goods on the Seller's behalf as agent of the Seller save that the Buyer shall not hold itself out as such but shall sell on its own account and shall hold the entire proceeds of sale as trustee for the Seller and shall pay them into a separate bank account opened for the purpose and approved by the Seller and shall ensure that in no circumstances are the proceeds mingled with other money or paid into an overdrawn bank account but are at all times identifiable as the Seller's money.
- 5.7 If the buyer has not received the proceeds of any such sale it will if called upon to do so by the Seller, assign to the Seller within seven days after being required in writing so to do by the Seller all rights against the person or persons by whom the proceeds are owned.
- 5.8 If the Buyer incorporates the Goods into other products (with the addition of the Buyer's goods or those of others) or uses such goods as material for other products (with or without such addition) the property in these other products shall upon such incorporation or use be automatically transferred to the Seller and the Buyer as bailee of them and the Buyer will store the same for the Seller in a proper manner without charge to the Seller; in the event of such incorporation or use as is envisaged by this paragraph the foregoing provisions of this clause shall where the context so admits apply mutatis mutandis to those other products in place of the Goods.

### **6. PRICE**

- 6.1 The price payable for the Goods shall be the relevant price shown in the Seller's price list current at the date of despatch of the Goods to which shall be added Value Added Tax and any applicable costs of insurance and carriage by land and/or sea and/or air (as appropriate) which under the provisions of conditions 10 and 11 below of these conditions is applicable.
- 6.2 Any price set out in any quotation given by the Seller shall be deemed to be solely for the information of the Buyer and shall not impose any obligation on the part of the Seller that he will deliver the Goods at that price.
- 6.3 The price of the Goods shall be paid in full in the currency specified in the order of the Goods by the end of the month following that in which the Goods were delivered or the Seller was notified that the Goods were available for collection.
- 6.4 The Buyer shall not be entitled to withhold payment for the Goods or part thereof as a result of any dispute concerning the Goods or other goods supplied by the Seller and shall not be entitled to exercise any right of set-off against the price payable for the Goods.
- 6.5 If the Buyer shall become unable to pay its debts (which shall be deemed to include any amount overdue from the Buyer to the Seller) or become insolvent or subject to any procedure, order or proceedings under the Insolvency Act 1986 the Seller shall have the right either to suspend or withhold delivery of the Goods until the full amount of the invoice price is paid to the Seller or to cancel the contract forthwith by giving written notice to the Buyer. The provisions in this paragraph shall apply without prejudice to any other rights or remedies the Seller may have against the Buyer.
- 6.6 Any Goods returned to the Seller by the Buyer for credit will be subject to a 20% handling charge.

### **7. PAYMENT**

Customers who do not have credit facilities shall pay in full for goods at the time of purchase.

Unless otherwise agreed by the Company in writing, payment of credit accounts shall be made in cash by the Buyer by the last day of the month following the month of the invoice. If the Buyer fails to make any payment on the due date then, without prejudice to any other right or remedy available to the Company it may:-

- cancel the contract or suspend any further deliveries to the Buyer.
- appropriate any payment made by the Buyer to such of the goods or services supplied by the Company under this or any other contract between the Company and the Buyer as the Company may think fit and despite any purported appropriation by the Buyer.
- charge to the Buyer interest (both before and after any judgement) on the amount unpaid, at the rate of 10% per annum above the base rate from time to time of National Westminster Bank Plc, calculated on a daily basis and compounded monthly from the date when payment was due until payment is made in full (and for this purpose a part of a month shall be treated as a full month for the purpose of calculating interest).
- charge to the Buyer (so that the Buyer shall fully indemnify the Company) all its costs of collection, including reasonable legal costs, whether or not proceedings are actually commenced.

## **8. TERMINATION**

If:

- (1) any debt due from the Buyer to the Seller is unpaid within 7 days after becoming due:
- (2) the Buyer becomes insolvent or goes into liquidation (both of which expressions shall whenever they appear in these conditions be interpreted in accordance with the provisions of Section 247 of the Insolvency Act 1986) or has a receiver appointed over any of its assets:  
or
- (3) the Buyer fails to take delivery or collect the Goods within 7 days after the Buyer should have done so: or
- (4) the Buyer has failed to provide any letter of credit, bill of exchange or any other security required by the contract between the Seller and the Buyer in the terms of such requirement:
- (5) the Seller shall (without prejudice to any other rights the Seller may have) be entitled to cancel the contract and reclaim any of the Goods not paid for in full which have been delivered to the Buyer, and shall be entitled to claim for any direct or consequential loss to the Seller caused as a result of such cancellation.

## **9. SUB-CONTRACTS**

The Seller shall be entitled to sub-contract all or part of any contract for sale of the Goods.

## **10. DELIVERY**

- 10.1 The Seller will make every reasonable effort to deliver the goods as the contract may require on the day stipulated in or required by the contract between the Seller and the Buyer, the date of delivery shall not be of the essence of the contract and the Seller shall not be liable in damages for any delay in delivery.
- 10.2 If the Buyer refuses to take delivery of the Goods during normal business hours, then the Buyer shall be liable to the Seller for any expenses incurred by the Seller as a result.
- 10.3 Where delivery is made to a Buyer's site the Buyer shall provide and clearly indicate to the Seller's driver a route from the public highway to the site which is safe and reasonable and provides adequate turning space at the point of delivery. The Seller's driver may refuse to deliver if in his opinion the route or point of unloading is unsafe or likely to cause damage to the delivery vehicle. The Buyer shall indemnify the Seller (both for itself and as agents for any haulage contractor operating the vehicle) against any damage caused to such vehicle and all claims, costs, damages and expenses incurred by the Seller by reason of a default by the Buyer under this condition. Therefore the Seller accepts no responsibility for any damage caused by its vehicles or by any of its agents for damage caused by its vehicles to any part of the Buyer's site or anything erected or placed therein.
- 10.4 Deliveries will only be made directly to the rear or sides of the delivery vehicle, the Seller or the Seller's driver or agent will not be responsible for transferring deliveries beyond that point.
- 10.5 The Buyer must provide manual assistance with the off-loading of Goods when mechanical means are not available.
- 10.6 The delivery will be made during the Seller's normal working hours. All deliveries made on public holidays, Sundays or Saturday afternoons, or at any other time outside normal working hours will be charged for by the Seller and paid for by the customer as an increase to the quoted price or prices.
- 10.7 There will be an additional surcharge when bulk material deliveries of less than 10 tonnes are made at the Buyer's request.
- 10.8 The Seller shall accept that any person claiming to have the Buyer's authority to accept delivery shall have such deemed authority to execute the delivery note prior to the discharge of the materials from the delivery vehicle. Execution of the delivery note by an authorised agent shall be conclusive evidence of correct delivery.
- 10.9 Delivery of the Goods shall be effected and accepted by the Buyer within 30 minutes of the time of delivery on site, failing which the Seller shall be entitled to charge a waiting fee, provided always that if delivery is not effected and accepted by the Buyer within 30 minutes of the time of arrival on site of the delivery vehicle the Seller's driver may refuse delivery provided always that in the driver's sole opinion or that the Seller's delivery may not be affected and accepted within a reasonable period of time thereafter.
- 10.10 The Seller shall have the right to make part deliveries of an order. Each such delivery shall be deemed to be the subject matter of a separate contract and shall be paid for accordingly.

## **11. COLLECTED GOODS**

- 11.1 Where prices are quoted EX-WORKS the materials will be delivered into the Buyer's vehicle or vehicle on hire to the Buyer at a suitable delivery point at the works as directed by an employee of the Seller. The Goods will be delivered into the Buyer's vehicle or vehicles on hire with the utmost despatch but the Seller shall not in any event be liable for any delay in delivery of goods into the Buyer's vehicle or vehicle on hire to the Buyer or any consequential loss thereto.
- 11.2 Buyer's will be responsible for the condition and safety of the vehicles in which they collect the Goods whether owned or hired and the Seller shall not be liable for loss or contamination of the Goods resulting from the condition of these vehicles.
- 11.3 Nor shall the Seller be liable in any way whatsoever in the event of a Buyer's vehicle owned or on hire leaving the point of delivery at the works with a load in excess of the legal permitted limit from the time to time enforced.
- 11.4 Nor shall the Seller be responsible for any damage sustained by any vehicle owned or on hire to the Buyer whilst on the Seller's premises.

## **12. INDEMNITY/INDUSTRIAL PROPERTY**

The Buyer shall indemnify the Seller in respect of any claim by third parties against the Seller for breach of any industrial property rights which arise out of manufacture or sale of the Goods in accordance with the Buyer's instructions or their sale to the Buyer.

## **13. FORCE MAJEURE**

In the event of war, invasion acts of foreign enemies hostilities (whether war is declared or not) civil war, rebellion, revolution, insurrection or military or usurped power, the Seller shall be relieved of all liability incurred under the contract between the Seller and the Buyer wherever and to the extent to which the fulfilment of such obligation is prevented, frustrated or impeded as a consequence of any such event or by any statutes, rules, regulations, orders or requisitions by any government department, council or other duly constituted authority, or strikes, lock-outs, breakdown of plant, snow, fog or any other adverse weather or traffic conditions or any other cause (whether or not of a like nature) beyond the Seller's control.

## **14. VARIATIONS**

Neither the Seller nor the Buyer shall be bound by any variation, waiver of, or addition to these conditions except as expressly agreed by both the Seller and the Buyer in writing and signed by both of them or by persons duly authorised to sign on their behalf and actually known by the other party to have such authority.

## **15. PURPOSE**

The Buyer shall satisfy itself as to the suitability of the Goods for the purpose for which the Buyer requires them, and the Buyer shall not be entitled to rely on recommendations or suggestions in any of the Seller's literature as statements of fact or representations. To the extent permitted by law the condition implied by Section 14 (3) of the Sale of Goods Act 1979 is hereby excluded.

## **16. ALTERATION IN LAW**

In the event of any change in the proper law of the contract between the Seller and the Buyer or in the laws of the country where the contract is to be performed (in whole or in part) then if such change renders the contract and/or performance thereof unlawful (in whole or in part), or increases the cost of performance of the contract to the Seller, then the contract shall thereupon be void and of no effect save that the Buyer shall forthwith pay to the Seller the price of all the Goods delivered to or collected by the Buyer which have not then been paid for. Provided that, in the case of an increase in the costs of performance of the contract, the Seller shall have the option to affirm the contract in which event the preceding part of this provision shall not apply.

**17. ENTIRE CONTRACT**

These conditions contain the entire obligations entered into between the Seller and the Buyer and in the case of any inconsistency between any letter, quotation or form of contract sent by one party to the other (whatever their respective dates) these conditions shall prevail.

**18. TIME FOR PERFORMANCE**

18.1 Subject as provided in this condition and to other conditions herein contained the Goods shall be delivered on the date or dates specified in writing by the Seller when the Buyer's order is accepted.

18.2 Specified delivery dates are subject to:

- (a) receipt by the Seller of all information required for the manufacture of the Goods, and
- (b) production of delivery of the Goods being hindered or prevented by any cause whatsoever beyond the control of the Seller and in particular in the circumstances mentioned in condition (15) above of these conditions.

18.3 The time for performance of the contract by the Seller shall not be of the essence of the contract.

**19. DEFECTIVE GOODS – INSTALMENTS**

Where the Goods are to be delivered by instalments any defect in any instalment shall not be a ground for the cancellation of the remainder of the instalments and the Buyer shall be bound to accept delivery thereof.

**20. ARBITRATION**

20.1 Any dispute or difference between the Seller and the Buyer in connection with or relating to the sale of the Goods shall be referred to and determined by a sole arbitrator ("the Arbitrator") such arbitration to be held in accordance with the Arbitration Act 1950.

20.2 The Arbitrator shall be appointed by agreement in writing between the Seller and the Buyer and in default of such agreement by (here set out appointing authority).

20.3 The procedure to be followed in connection with the arbitration shall be agreed by the Seller and the Buyer or in default of agreement between them by the Arbitrator.

20.4 In the event of default by either party in respect of any procedural order made by the Arbitrator, the Arbitrator shall have power to proceed with the arbitration in the absence of the party in default and to deliver his award.

**21. PROPER LAW AND JURISDICTION**

21.1 The contract between the Seller and the Buyer shall be governed by English Law in every particular including formation and interpretation and shall be deemed to have been made in England.

21.2 Each party submits to the exclusive jurisdiction of the English Courts.