

Donald Ward Limited

Conditions of Sale - International

1 General

1.1 In these Conditions, unless the context otherwise requires:

Balance means the Price less any Deposit paid.

Bill of Lading means any bill of lading issued or to be issued in connection with the transportation or delivery of Material under or in connection with the Contract.

Business Day means any day of the week except Saturday and Sunday and any national public holiday in England.

Company means Donald Ward Limited trading as Ward Recycling.

Conditions means these Conditions of Sale.

Contract means any contract between the Company and the Purchaser for the sale and purchase of the Material which shall consist of the Company's standard form contract (as referred to in **Clause 2.1**). Any Contract shall be subject to these Conditions.

Delivery Date means the delivery date stated in the Contract or, where a range of dates is stated, the earliest of them (save as otherwise indicated).

Delivery Point means the point at which the Company's obligation to deliver the Material is discharged in accordance with INCOTERMS, and "deliver" or any derivative thereof shall be construed accordingly.

Deposit means any deposit to be paid by the Purchaser against the full price of the Material in the manner specified in the Contract.

Excluded Loss means loss or deferment of profit, loss of revenue, loss of use, business interruption, loss of contract, loss of reputation, credit or goodwill, loss of opportunity and (except where specifically provided to the contrary elsewhere in the Contract) costs resulting from non-operation or increased expense of construction, operation or maintenance, cost of finance and cost of purchased or replacement equipment or systems howsoever caused including negligence or breach of duty and whether direct or indirect or consequential.

Final Payment Date means the date by which the Purchaser is to pay the Balance which date shall be:

- (a) the date specified in the Contract;
- (b) if no date is specified in the Contract, the date which is calculated by reference to the payment terms set out in the Contract; or
- (c) if the date cannot be determined in accordance with (a) or (b) above, the date which is 7 days after the date on which the Material is loaded on board the carrying vessel.

Fully Indemnified means fully indemnified from and against all actions, costs, claims, demands, expenses (including expenses and the cost of internal management time and legal fees on a full indemnity basis), liabilities, losses (including but not limited to Excluded Losses), fines, penalties, sanctions and

proceedings in respect of the matter concerned and the term “Fully Indemnify” shall be construed accordingly.

INCOTERMS means the International Commercial Terms as published by the International Chamber of Commerce, 2010 edition or any successor thereto.

Impurities means;

- Where the Material is ferrous scrap, those foreign materials that are identified in paragraph 1.2 of Annex I of Council Regulation (EU) No 333/2011 of 31 March 2011 establishing criteria determining when certain types of scrap metal cease to be waste (“the Scrap Metal Regulation”);
- Where the Material is non-ferrous scrap, those foreign materials that are identified in paragraph 1.2 of Annex II of the Scrap Metal Regulation;

Inspection Certificates has the meaning specified in **Clause 6.2** of these Conditions.

Letter of Credit has the meaning specified in **Clause 7.4** of these Conditions.

Loading Date shall mean the date on which Material is loaded for onward transportation at the Company’s premises.

Margin has the meaning specified in **Clause 5** of these Conditions.

Material means the materials specified in the Contract.

Material Breach has the meaning specified in **Clause 15.1** of these Conditions.

Other Contract shall mean any contract other than the Contract continuing in existence between the Company and the Purchaser for the sale of Material which remains to be performed in whole or in part.

Price means the price of the Material for the material which is the subject of the Contract and calculated in accordance with **Clause 7.12** of these Conditions.

Purchaser shall mean the person, firm or company to whom the Company agrees to sell Material on the terms set out in this Contract.

Relevant Legislation shall mean all legislation, regulations, rules and/or other requirements in relation (directly or indirectly) to the Material, including (but not limited to) the provision, transportation, export, importation and/or recovery of the Material, including those in force in the country for which the Material is destined and including the Shipments of Waste Regulation.

Shipments of Waste Regulation shall mean Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

1.2 References to an Article or Articles shall, unless the contrary is otherwise expressly stated, be to an Article or Articles of the Shipments of Waste Regulation.

1.3 References in **Clause 12** of these Conditions to recovery shall have the meaning prescribed by Article 2 of the Shipments of Waste Regulation.

1.4 The Purchaser warrants to the Company that it has fully familiarised itself with these Conditions which are deemed and agreed to have been the subject of individual negotiation jointly between the parties for all purposes including but not limited to (and without prejudice to **Clause 1.6** below) the Unfair Contract Terms

Act 1977, and the *contra proferentem* rule or other analogous rule of construction shall not apply.

1.5 The Purchaser agrees that it has taken all necessary legal advice prior to entering into this Contract and acknowledges and agrees that it is aware of and understands the legal effect of the Contract and these Conditions.

1.6 The parties hereby agree and warrant to the other that this Contract is an international supply contract for the purposes of and within the meaning of section 26 of the Unfair Contract Terms Act 1977.

2 **Contract Formation**

2.1 No order or request submitted by the Purchaser shall be considered or deemed to be accepted by the Company unless and until confirmed in writing by the Company on the Company's standard form of contract for the sale of the Material, whereupon a contract shall be concluded on the terms of the Contract and in accordance with these Conditions.

2.2 If the Company delivers any Material, or any instalments of the Material, and the Purchaser accepts delivery of such Material before the Company has accepted an order in the manner provided in **Clause 2.1**, the Company shall not be considered or deemed to have accepted the Purchaser's purported order or request and the Company shall not be bound by the terms of such purported order or request and shall not be obliged without limitation to make any further deliveries of the material unless and until a Contract is created in accordance with the provisions set out in **Clause 2.1**.

2.3 If the Company delivers any Material in the circumstances described in **Clause 2.2** and the Purchaser accepts such Material, the supply of the Material (or each instalment of the Material) shall be, without prejudice to the operation and effect of **Clause 2.2**, subject to the provisions set out in these Conditions. In particular, but without limitation, the price of such Material shall be the price determined by the Company (acting reasonably) and having reference to the prevailing market conditions, in accordance with **Clause 7.1** below.

2.4 No Contract may be cancelled by the Purchaser except with the agreement in writing of the Company and on terms that the Purchaser shall Fully Indemnify the Company against any loss (including Excluded Loss) incurred by the Company as a result of cancellation.

3 **Contract Terms**

3.1 The Company shall sell and the Purchaser shall purchase the Material in accordance with the terms of the Contract (including these Conditions). The Purchaser expressly accepts that these Conditions will govern any Contract made between the Purchaser and the Company to the exclusion of all others, whether express or implied, statutory or otherwise, or which the Purchaser purports to apply under any contract, purchase order, confirmation of order or other document.

3.2 The Purchaser acknowledges and agrees that, save for representations made to the Purchaser that are confirmed in writing with specific reference to this **Clause 3.2**:

3.2.1 The Company's employees or agents are not authorised to make any representations concerning the Material, the Contract, or the existence, status, meaning or effect of any of these Conditions;

- 3.2.2 Nothing said or done by the Company or its employees or agents whatsoever (whether said or done to the Purchaser or any third party) shall be considered or deemed to be a representation;
- 3.2.3 In entering into any Contract the Purchaser does not rely and has not relied on any alleged representations.
- 3.3 Any advice or recommendation given by the Company or its employees or agents to the Purchaser or its employees or agents as to the storage, quality, application or use of the Material is followed or acted upon entirely at the Purchaser's own risk, and accordingly the Company shall not be liable for any such advice or recommendation which is given.
- 3.4 No statement made by the Company or its employees or agents to any third party (including without limitation any regulatory or customs authority, and including in particular but without limitation any declaration provided under Annex VII of the Shipments of Waste Regulation) and/or any declaration provided under the Relevant Legislation shall be considered to be a representation, warranty or term of this Contract, or to be relevant to the construction of this Contract or any alleged implication of any term into this Contract. The Purchaser acknowledges and agrees that in entering into this Contract the Purchaser does not rely and has not relied on any statement made by the Company to the third party whatsoever and whether in writing or otherwise.
- 3.5 Save as expressly provided in these Conditions all other terms, whether conditions or warranties or otherwise, implied by statute or common law, and all other liabilities of the Company, are excluded to the fullest extent permitted by law.
- 3.6 The Contract and these Conditions taken together constitute the entire agreement between the parties and supersedes and distinguishes all previous drafts, agreements, arrangements, understanding and conventions between them, whether written or oral, relating to the subject matter of the Contract.
- 3.7 Subject to **Clause 3.2** above, the Purchaser acknowledges and agrees that nothing said (whether in writing or not) or done by the Company or its employees or agents, whether to the Purchaser or to any third party, shall amount or give rise to an actionable representation or warranty or any collateral contract whatsoever.
- 3.8 Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the Company shall be subject to correction without any liability on the part of the Company.
- 3.9 Subject to **Clause 3.8** above, the Purchaser warrants and agrees that the terms of the Contract (including these Conditions) reflect the parties' true intended bargain at the time of contracting and irrevocably waives any entitlement or claim to rectification of this Contract whether on grounds of mistake or otherwise.
- 3.10 Save as is expressly otherwise provided for in these Conditions, the Contract shall be subject to INCOTERMS. Where there is any discrepancy, difference or inconsistency between these Conditions and INCOTERMS, these Conditions shall prevail.
- 3.11 In the event of any inconsistency between the Contract and any other document in relation to the description of the Material (including, but not limited to the name given to it or any element of its specification) the description in the Contract shall be definitive

4 **Description and Quality**

- 4.1 The Company shall deliver to the Purchaser Material which materially corresponds with any standard (whether widely accepted within the scrap metal industry or specific to the Company) specified in the Contract (within common industry variations), save that the Company reserves the right to make any minor changes in the specification of the Material which do not materially affect its quality or performance.
- 4.2 Save as aforesaid, the Company gives no warranty and the Purchaser acknowledges and agrees that there is no other condition, warranty, term or representation (whether express or implied) as to the description, quality, condition, origin or source of the Material. Any other condition, warranty, term or representation whatsoever as to the source or origin, condition, description, quality or fitness for purpose of the Material, or the existence of any Impurities in the Material, express or implied (whether by statute or at common law), is hereby expressly excluded to the fullest extent permissible by law.
- 4.3 Save for under the circumstances outlined in clause 6, in the event that the Purchaser discovers any item is part of the Material which does not correspond with the standard specified in the Contract (as qualified in clause 4.1 above) or any other statement given by or on behalf of the Company the Purchaser's only remedy shall be a deduction in the Price proportionate to the weight of the non-conforming Material and any Material directly contaminated by such non-conforming Material.
- 4.4 In the event that the Company uses any of the following terms in any documentation, the use of such terms shall be qualified as detailed below:
- 4.4.1 any reference to "hazardous waste material" shall mean directly hazardous on handling or inhalation so as to cause significant cause to a human being;
- 4.4.2 "free from radiation" shall mean not exceeding the current levels of radiation allowed by English law;
- 4.4.3 "free from arms or ammunition" shall mean no live arms or ammunition or explosives.

5 **Quantity**

The Company shall take reasonable steps to deliver the quantity of Material specified in the Contract (if so specified) but shall be entitled to a margin of plus or minus 10 per cent for overs and shortages ("the Margin"), the same to be charged or deducted, as the case may be and the quantity so delivered shall be deemed to be the quantity ordered.

6 **Inspection**

- 6.1 The Company or the Purchaser may instruct a duly qualified independent surveyor to carry out an inspection of the Material prior to delivery. Any fees, expenses or disbursements charged by the independent surveyor shall be payable by the Purchaser.
- 6.2 The independent surveyor (if instructed) shall, following such inspections and surveys as he sees appropriate, issue to both parties certificates of quality and quantity covering the matters referred to in **Clauses 4 and 5** above, which shall (save in cases of fraud or manifest error) be final and conclusive as to the description, quality and quantity of the Material and binding on the parties in all respects ("the Inspection Certificates"), including for the avoidance of doubt the

level of any Impurities in the Material and whether or not the Material is hazardous waste. In the event that neither party elects to appoint an independent surveyor pursuant to **Clause 6.1** the weighbridge ticket of the Company shall, for the purposes of the remainder of this **Clause 6**, be considered to be the "Inspection Certificate".

6.3 Should the Inspection Certificates certify that the Material does not conform with the quality, condition or description set out in this Contract, or certify that the level of Impurities present in the Material exceeds that permitted under the Contract:

6.3.1 The Purchaser shall prior to loading and in any event within 48 hours of receiving such Inspection Certificates either:

(a) As its sole and exclusive remedy, reject the non-conformant Material by notice in writing, in which case the Company shall at its sole election be entitled to either (i) within a reasonable period of time and provided always that the Material has been returned to it, replace (at the Company's expense) that non-conformant Material with other Material that does conform with the Contract, or (ii) subject to **Clause 7.11**, refund to the Purchaser such of the Price as the Purchaser may have paid for the non-conformant Material without any further liability on the part of the Company; or

(b) Agree to accept delivery of the Material, in which case the Purchaser shall be taken at law to have irrevocably waived any non-compliance or alleged non-compliance of the Material with the Contract and shall be precluded from asserting any non-compliance or alleged non-compliance and no claim shall lie against the Company in respect of the same (whether pursuant to **Clause 4** or otherwise);

6.3.2 Should the Purchaser fail to make such election by the time of loading and in any event within 48 hours of receiving the Inspection Certificates, it shall be taken at law to have chosen to agree to accept delivery of the Material in which case the provisions of **Clause 6.3.1(b)** above are to apply;

6.3.3 Should the Purchaser reject the Material and the Company exercise its option to replace that with other Material, such other Material is provided under the terms of the Contract including these Conditions (including, but not limited to, this **Clause 6**).

6.4 Should the Inspection Certificates certify that the quantity of the Material deviates from the quantity specified in the Contract allowing for the Margin:

6.4.1 In the event that the quantity is certified as less than that specified in the Contract allowing for the Margin, the Company shall at its sole election either:

(a) Make good any shortfall by delivering additional Material up to the quantity stipulated in the Contract allowing for the Margin in which case the terms of the Contract shall apply to the additional Material; or

(b) Subject to **Clause 7.11**, refund to the Purchaser the relevant proportion of the Price paid, if any, without any further liability on its part whatsoever in relation to or arising out of the shortage;

and in either event the Company shall be under no further liability or obligation to the Purchaser, and the Purchaser shall have no further remedy whatsoever in relation to any shortage.

- 6.4.2 In the event that the quantity is certified as more than that specified in the Contract allowing for the Margin:
- (a) The Purchaser may, by notice in writing to the Company to be provided prior to loading and in any event within 48 hours of receipt of the Inspection Certificates, reject any Material in excess of the quantity stipulated in the Contract plus the Margin such excess to be returned to the Company promptly and at the Purchaser's cost and risk.
 - (b) If no such notice is given, the Company may at its election choose whether or not to deliver any Material in excess of the Contract quantity plus Margin, and if it chooses to deliver the additional Material the Purchaser shall pay for it at the Contract Price calculated in accordance with **Clause 7.1** below.
 - (c) The Purchaser shall have no further remedy and the Company shall have no further liability or obligations in relation to any excess Material.

7 **Price and Payment**

- 7.1 The Price shall be the price stated in the Contract or, where no price is stated in the Contract (or a price is no longer valid), the price determined by the Company (acting reasonably) and having reference to the prevailing market conditions.
- 7.2 The total Price payable shall be calculated by reference to the quantity of Material as set out in the Inspection Certificate first or the Company's weighbridge ticket second.
- 7.3 The Company reserves the right, by giving notice to the Purchaser at any time before delivery of the Material, or any part thereof, to increase the Price to reflect any increase in the cost to the Company which is due to any factor whatsoever beyond the control of the Company (such as, without limitation, any foreign exchange fluctuation, alteration of duties, significant increase in the costs of labour, materials or other costs of supply, any change in delivery dates, quantities or specifications for the Material which is requested by the Purchaser and agreed to by the Company or the failure by the Purchaser to give the Company adequate information or instructions).
- 7.4 If the Contract provides for payment to be by letter of credit, the Purchaser shall open an irrevocable letter of credit in such form as is satisfactory to the Company and have the same confirmed by a United Kingdom bank acceptable to the Company no later than the later of ten days prior to the relevant Loading Date or three working days after the Contract is executed ("the Letter of Credit"). The Letter of Credit shall be for not less than the Balance based on the quantity of Material corresponding to that set out in the Contract plus the Margin (together with any tax or duty); shall be valid until at least 45 days after the Loading Date; and shall be available for immediate cash payment on presentation to the confirming bank of the documents specified in the Contract. The Purchaser shall pay any and all costs of opening and confirming the Letter of Credit.
- 7.5 Any Deposit which is payable under the Contract shall be paid at the time specified in the Contract or if no such time is specified, no later than the later of five days prior to the Loading Date or on the next working day after the Contract is concluded. In the event that the Deposit is not paid when due the Company shall (without prejudice to any other rights it may under the Contract or at law) be entitled to recover the Deposit as a debt. The Deposit shall (except where the Contract is lawfully terminated by the Purchaser on account of a repudiatory breach of the Contract by the Company, or the Purchaser becomes entitled to a

reimbursement of the Price pursuant to these Conditions) not be refundable in any circumstances.

- 7.6 Without prejudice to **Clause 7.5** above, the Deposit is paid as an earnest for the due fulfilment by the Purchaser of its obligations under the Contract and shall be forfeit in the event that the Contract is terminated on grounds of the Purchaser's default (including but not limited to any termination for Material Breach or termination on grounds of repudiatory breach at common law, and including for the avoidance of doubt where the Contract is terminated on account of the Purchaser's Material Breach of any Other Contract pursuant to the provisions of **Clause 15.2**).
- 7.7 If the Purchaser fails to pay the Deposit when it falls due or open and confirm the Letter of Credit in accordance with **Clause 7.4**, the Company shall, notwithstanding any terms as to payment in the Contract and without prejudice to any other rights the Company may have (whether under the Contract or at common law or in equity), be entitled to require payment of the Price in full prior to and as a condition precedent to delivery of the Material.
- 7.8 Where payment is to be made otherwise than by Letter of Credit, the Balance shall be paid by no later than the Final Payment Date.
- 7.9 Punctual payment of the Price or any parts thereof (including for the avoidance of doubt any Deposit and the Balance) is of the essence of the Contract and if payment is not made the Company (without prejudice to any other rights the Company may have (whether under the Contract or at common law or in equity)) shall be entitled to charge interest at the rate of 8% above the HSBC Bank plc base rate for the period between the due date and the date for payment. The Company shall further be entitled to claim compensation pursuant to section 5A of the Late Payments of Commercial Debts (Interest) Act 1998 or any statutory re-enactment or successor thereto and the parties hereby that this Contract is one with a significant connection to the United Kingdom for the purposes of and within the meaning of section 12(1)(a) of the said Act.
- 7.10 No deduction shall be made from any payment due to the Company in respect of any counterclaim or any set-off howsoever arising and whether legal or equitable without the prior agreement of the Company in writing.
- 7.11 The Company may at any time or times, without notice to the Purchaser, set off any liability of the Purchaser to the Company against any liability of the Company to the Purchaser, whether any such liability is present or future (whenever arising), liquidated or unliquidated, under the Contract or not and irrespective of the currency of its denomination. If the liabilities to be set off are expressed in different currencies, the Company may convert either liability at the market rate of exchange for the purpose of set off. Any exercise by the Company of its rights under this Clause shall be without prejudice at any other rights or remedies available to it under the Contract or otherwise.
- 7.12 In the event that the Company is holding a deposit or other sums paid by the Purchaser under any one Contract it may, at its discretion, apply such sums against any payments due under another Contract which shall not, for the avoidance of doubt, reduce the overall liability of the Purchaser to the Company nor be considered to extend or grant any credit period to the Purchaser.
- 7.13 Once any document (including, for the avoidance of doubt, the bill of lading and/or letter of credit) is agreed between the parties any subsequent changes (including translation) of such documents shall be for the cost of the Purchaser and the Company shall not be obliged to release any such document to the Purchaser (or

its agent) nor comply with any of its other obligations under the Contract until such cost is paid by the Purchaser (whether to the Company directly or to any third party nominated by the Company). The Company's standard charges for such changes shall be \$500 plus any third party costs for each instance. Notwithstanding this the Company reserves the right to charge such fees in the currency of its choosing.

8 Bills of Lading and Export and Import Documents

- 8.1 Subject to the Purchaser fulfilling its obligations under **Clause 8.2** and subject to **Clause 8.3**, the Company shall use reasonable endeavours to provide to or procure for the Purchaser such export documents as are necessary for the export of the Material and which the Purchaser is itself unable to procure without the Company's assistance.
- 8.2 In any circumstances in which the Company is required to procure Bills of Lading in connection with the shipping of Material under a Contract, the Purchaser shall:
- 8.2.1 not later than five days following the date of the Contract or (if earlier) three days prior to loading provide to the Company all details which the Company reasonably requires in order to procure the Bills of Lading; and
- 8.2.2 review any draft Bills of Lading that may be provided to it promptly following receipt and notify the Company of any errors or omissions in the draft Bills of Lading. If the Purchaser does not notify the Company of any such errors or omissions within 48 hours following receipt by the Purchaser of the draft Bills of Lading, the Purchaser shall be deemed to have approved the draft Bills of Lading.
- 8.3 Nothing in **Clause 8.2** shall oblige the Company to provide draft Bills of Lading to the Purchaser or amend any such draft Bills of Lading as the Company chooses to provide to the Purchaser to reflect the Purchaser's response (if any) to such draft(s).
- 8.4 The Company (or its appointed carrier) shall not be obliged to provide the Purchaser with export documents or Bills of Lading in the event of a Material Breach by the Purchaser as defined in **Clause 15.1**.
- 8.5 The Purchaser is responsible for obtaining, at its own cost, such import licences and other consents in relation to the Material as are required from time to time and, if required by the Company, the Purchaser shall make those licences and consents available to the Company prior to shipment. The Purchaser shall Fully Indemnify the Company in respect of any loss or damage arising out of the Purchaser's failure to obtain the said import licences and consents.
- 8.6 If the Purchaser fails to take delivery of the Material at the time for delivery (or during the period for delivery) specified in the Contract, or if delivery or discharge is prevented, delayed or hindered for whatsoever reason other than breach of this Contract by the Company, including without limitation any act or omission of the Purchaser, its agents, subcontractors, consultants or employees, or any governmental, quasi-governmental or other organisation or any third party:
- 8.6.1 the Company shall be entitled (but not obliged) to at its sole option:
- (a) arrange storage at the Purchaser's expense pending delivery or discharge (as appropriate) and the Purchaser shall pay any expenses incurred by the Company, or
- (b) terminate the Contract and re-sell the Material to a third party without any liability to the Purchaser whatsoever;

- 8.6.2 the Company shall not be liable for any costs, charges, fines, sanctions or losses sustained or incurred by the Purchaser or any third party arising directly or indirectly from such prevention or delay;
- 8.6.3 the Purchaser shall Fully Indemnify the Company against any liability that the Purchaser may incur, including to any third party, either directly or indirectly from such prevention or delay including but not limited to any claim for demurrage, return freight, port charges, towage and pilotage, and any other handling and storage costs;
- 8.6.4 the provisions of this **Clause 8.6** are without prejudice to the rights and remedies exercisable by the Company should the Purchaser's acts or omissions amount to a Material Breach within the meaning of **Clause 15.1**.

9 **Delivery**

- 9.1 Save as set out in this Clause, Delivery shall take place in accordance with the terms of the Contract and INCOTERMS. Should the Purchaser request a change of Delivery Point, such change shall be at the Company's sole discretion and the Purchaser shall be liable on demand to reimburse the Company for any additional expenses incurred by the Company as a result of such change. The Company shall, giving the Purchaser reasonable notice, be entitled to change the Delivery Point at its sole discretion.
- 9.2 The Company may deliver the Materials by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the Contract.
- 9.3 Each instalment of Materials shall be deemed a separate contract and no cancellation or termination of any one contract relating to an instalment shall entitle the Purchaser to repudiate or cancel any other contract or instalment.
- 9.4 Where the Delivery Date specified in the Contract is stated to be an estimate, such estimate is given in good faith but without guarantee.
- 9.5 The Company shall use its reasonable endeavours to deliver the Material by the latest Delivery Date (or latest estimated Delivery Date) or, if no such Delivery Date (or estimated Delivery Date) is specified in the Contract, within a reasonable time.
- 9.6 Time for delivery shall not be of the essence of the Contract.
- 9.7 The Material may be delivered by the Company to the Purchaser in advance of the Delivery Date upon giving reasonable advance notice to the Purchaser.
- 9.8 Should the Company fail to deliver the Material by the latest Delivery Date, or (where there is no Delivery Date) within a reasonable time, or fail to exercise reasonable endeavours to deliver by the Delivery Date, estimated Delivery Date or within a reasonable time (as appropriate), the Purchaser's sole remedy shall be to cancel the Contract and claim reimbursement of any of the Price which relates to the undelivered Material that has been paid. The Purchaser acknowledges and agrees the adequacy of such remedy. Subject to **Clause 17.1**, under no circumstances will the Company be liable for any loss suffered by the Purchaser as a result of delay in delivery or non-delivery of the Material.
- 9.9 In no case shall the Company be under any liability whatsoever for any default or delay on the part of the carrier after delivery has taken place.

10 **Transfer of Risk**

- 10.1 The risk of damage to or loss of the Material shall pass to the Purchaser upon delivery.
- 10.2 The Purchaser undertakes to procure, on behalf of and to the benefit of both parties and with both parties to be named as co-assureds and beneficiaries:
- 10.2.1 in all cases save where the Material is sold on CIF terms or the Company has otherwise expressly undertaken to insure the Material during shipment whether under the Contract or by reference to INCOTERMS, cargo insurance from a first class insurer on terms not less favourable than the Institute Cargo Clauses (A) 2009 such insurance to incept not later than from the point referred in **Clause 10.1** above and to be maintained at all times until the Material is received at the Purchaser's premises or other final destination;
- 10.2.2 in all cases whatsoever, all risks insurance from a first class insurer from the point and time when the Material is received at the Purchaser's premises or other final destination until such time as full title to the Material has passed to the Purchaser pursuant to the terms of **Clause 11**.
- 10.3 Should any insurance procured by the Purchaser in accordance with **Clause 10.2** be avoided or invalidated, or any claim made under the said insurance declined by the underwriters, by reason of any non-disclosure, breach of warranty or condition precedent, or other action or omission by the Purchaser or its employees or agents, the Purchaser shall (without prejudice to any other right or remedy available to the Company whether under the terms of the Contract or at common law or in equity) Fully Indemnify the Company in respect of any loss or damage suffered as a result.

11 **Transfer of Ownership**

- 11.1 Notwithstanding section 12 of the Sale of Goods Act 1979, if the Company has informed the Purchaser in writing that the Company has limited title to the Material then the Purchaser will only acquire under this **Clause 11** such title to the Material as the Purchaser has. In the event that a third party makes a claim to title in the Material, the Company's maximum liability to the Purchaser will be to refund the Purchaser a sum equal to the difference between the Price and the sum paid by the Company when it purchased the Material.
- 11.2 Notwithstanding delivery and passing of risk in the Material or any other provision of these Conditions, ownership of the Material shall remain with the Company until full payment has been made in cash or cleared funds for all sums payable under the Contract or any Other Contract between the Company and the Purchaser for which payment is then due (referred to hereafter as "Such Payment").
- 11.3 Until Such Payment has been made:
- 11.3.1 the Purchaser shall store and identify the Material in such a way that it can be readily identified as the Company's Material;
- 11.3.2 the Purchaser shall keep the Material properly stored, protected and insured (such insurance to be effected in accordance with the provisions of **Clause 10.2.2**, and subject to the provisions of **Clause 10.3**) and shall maintain the Company as a co-assured and beneficiary under such policy of insurance;

- 11.3.3 the Purchaser will be entitled to sell or use the Material in the ordinary course of business but shall account to the Company for any proceeds of sale and shall keep all such proceeds separate from any money or property of the Purchaser;
- 11.3.4 the Purchaser shall hold the Material and any proceeds of sale of the same as fiduciary agent for the Company; and
- 11.3.5 the Purchaser shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Material which remains the property of the Company, but if the Purchaser does so all monies owing by the Purchaser to the Company shall (without prejudice to any other right or remedy of the Company) forthwith become due and payable.
- 11.4 Until Such Payment the Company may at any time (without prejudice to any of its other rights but provided the Material is still in existence and has not been resold or used) recover or resell the Material or any of it and the Purchaser hereby irrevocably grants the Company a licence to enter upon the Purchaser's premises by its employees or agents for those purposes. The Purchaser shall Fully Indemnify the Company of any and all costs associated with the exercise of any of the Company's rights under this Clause.
- 11.5 Without prejudice to any other right or remedy which the Company may have, where the Company resells Material after repossessing the same it may charge the Purchaser for any shortfall between the Price and the amount received by the Company on resale of the Material after deduction of all costs and expenses in connection with such resale (including, but not limited to, the costs referred to in **Clause 11.4** above and any transport, storage, insurance or other costs incurred after repossession and prior to such resale). The shortfall shall be paid within 14 days of receipt by the Purchaser of the Company's commercial invoice in respect thereof.

12 Relevant Legislation

- 12.1 The Purchaser will comply with the requirements of the Shipments of Waste Regulation and all Relevant Legislation.
- 12.2 The Purchaser will ensure that the Material is recovered (within the meaning set out in the Shipments of Waste Regulation) without endangering human health and in an environmentally sound manner.
- 12.3 Without prejudice to the generality of **Clause 12.1**, the parties shall be obliged to deal in the manner required by Articles 18, 22 and 24 of the Shipments of Waste Regulation with any Material the recovery of which cannot be completed as intended or the shipment of which is illegal.
- 12.4 In the event that the Company is obliged, by virtue of the Shipments of Waste Regulation or other Relevant Legislation, to take back the Material or ensure its recovery in an alternative way or store it in the meantime:
 - 12.4.1 The Purchaser shall not take any action in relation to the Material without the prior written consent of the Company;
 - 12.4.2 The Purchaser shall at its own expense take such steps to facilitate the take back of the Material as the Company may direct and shall provide the Company with all reasonable assistance and shall follow the reasonable instructions of the Company in relation to the Material until such time as the Material is loaded ready for return to the Company;

- 12.4.3 If title in the Material has passed to the Purchaser pursuant to **Clause 11** it shall remain vested in the Purchaser, but upon loading of the Material ready for the return to the Company, possession in the Material shall be deemed to re-vest (or, as may be, remain vested) in the Company and any carrier (whether such carriage is by sea or over land) shall be deemed to be an agent for the acceptance of the Material by the Company. Risk shall remain with the Purchaser at all times until the Material is re-sold to a third party;
- 12.4.4 The Company's liability shall be limited as set out in **Clause 13.7** below;
- 12.4.5 The Purchaser will Fully Indemnify the Company in respect of any and all costs and expenses incurred by the Company in compliance with such obligations (including but not limited to return freight (and if appropriate demurrage), insurance, storage and handling costs, agent's fees, any charges and fees payable to any regulatory or public body, costs of recovery and costs of disposal), and shall on demand provide the Company with such funds as may be required by the Company to discharge its obligations under the Relevant Legislation;
- 12.4.6 The Company shall be entitled to a contractual lien over the Material, and the Purchaser agrees to pledge and charge the Material to the Company, in respect of and as security for any sums due under **Clause 12.4.5**.
- 12.4.7 If required by the Company, the Purchaser shall, within 7 days of notice by the Company, provide a financial guarantee or equivalent insurance in such amount as the Company shall reasonably estimate as the likely costs and expenses of and associated with complying with the take-back obligation and the Company shall be entitled to call upon such guarantee or insurance in relation to such costs and expenses.
- 12.5 The Purchaser will Fully Indemnify the Company in respect of any failure by the Purchaser to comply with the Shipments of Waste Regulation or any other Relevant Legislation and in respect of any failure by it to recover the Material in an environmentally sound manner.
- 12.6 The Purchaser confirms that it is aware of all Relevant Legislation and the Company shall have no liability in relation to any failure by the Purchaser to comply with such requirements which, except as otherwise set out in this **Clause 12** or required by law, shall be the Purchaser's sole responsibility once the Material has been delivered.
- 12.7 The Purchaser warrants that the provision and/or delivery and/or importation of the Material in accordance with these Conditions or in the manner otherwise agreed in writing between the parties shall comply with all Relevant Legislation and the Purchaser shall Fully Indemnify the Company in respect of any breach of this warranty.

13 **Warranties and Liability**

- 13.1 The Purchaser warrants that it has given or will give the Company all information necessary for the Company to perform the Contract in accordance with its terms. The Company shall be under no liability for any failure to perform this Contract whatsoever and howsoever arising where such failure has been caused by the Purchaser's breach of the aforesaid warranty.
- 13.2 The Company shall be under no liability whatsoever in respect of any breach of **Clause 4** or **Clause 5** save as provided for in **Clause 6**.

- 13.3 The Company shall be under no liability in respect of any damage or loss to the Material or any other property arising from failure to follow the Company's instructions (whether oral or in writing).
- 13.4 The Company shall be under no liability under this Contract whatsoever unless the total Price for the instalment or instalments of the Material which is said to be defective has been paid by the date of any claim relating to such Material, payment of the Price being a condition precedent for any liability to arise against the Company.
- 13.5 The Purchaser warrants that any Material shipped following acceptance of the same by the Purchaser after inspection can be lawfully imported into the country of destination pursuant to all Relevant Legislation.
- 13.6 The Purchaser hereby agrees to Fully Indemnify the Company for all loss, expense, fines and damage whatsoever and howsoever incurred in respect of any delay or failure in delivery arising from any legal or regulatory inability, impediment or obstacle in the importation of the Material into the country of destination whether such inability, impediment or obstacle arises out of the actions or omissions of any national, regional or local governmental, quasi-governmental or regulatory authorities (including but not limited to environmental authorities) or otherwise.
- 13.7 Subject to **Clause 17.1** the Company shall not be liable to the Purchaser by reason of any representation, or any implied warranty, condition or other term, whether arising under statute or otherwise, or any duty at common law, or under the express terms of the Contract for:
- 13.7.1 any Excluded Loss which arise out of or in connection with the supply of the Material or its use or resale by the Purchaser;
- 13.7.2 any sums exceeding the Price (or that part of the Price as relates to the quantity of Material as any claim by the Purchase relates to); or
- 13.7.3 in the case of a claim which relates specifically to any particular instalment or instalments of the Material under the Contract, that proportion of the Price paid by the Purchaser for the Material the subject of, or giving rise to, such claim.
- 13.8 Save as is expressly agreed by the parties (including by reference to INCOTERMS), the Purchaser agrees to be responsible for all costs, expenses, fines and other outgoings arising in relation to the Material after delivery (including, but not limited to, the cost of storing or returning the Material if it is detained, delayed or rejected by governmental or regulatory officials in the country for which the Material is destined). The Purchaser shall, if so instructed by the Company:
- 13.8.1 pay the relevant payee directly in respect of any sums that may be payable, or
- 13.8.2 on demand, provide to the Company either in cash or in the form of an on-demand first class bank guarantee in a form acceptable to the Company such sums as the Company may estimate shall be payable to the relevant payee;
- 13.9 If, whether by virtue of any Relevant Legislation or otherwise, the Material cannot be delivered as intended, or delivery would be illegal, and the Company is obliged to take it back, the Company's sole obligation to the Purchaser shall be either to refund to the Purchaser the Price paid or to pay to the Purchaser a sum equivalent to the amount for which the Company is able to resell the Material to an alternative buyer, whichever is the lesser amount, in either case subject to **Clause 7.11** and after deduction of all costs and expenses and any losses of whatsoever nature incurred by the Company as a result of being obliged to take back the Material. The

Company shall not be obliged to pay any sums pursuant to this **Clause 13.9** unless and until it has resold the Material to an alternative Purchaser and received payment for the Material.

- 13.10 The Company shall have no liability for, and makes no warranty or representation as to, the accuracy of any information provided (whether orally or in writing (including for the avoidance of doubt by e-mail)) by any third party in relation to the Material whether requested by the Purchaser or not.

14 **Force Majeure**

The Company will make every reasonable effort to carry out its obligations under any contract with the Purchaser but if it is prevented, delayed or hindered (directly or indirectly) from making delivery of the Material agreed to be sold or performing or completing any of its obligations by reason of any cause whatsoever outside its reasonable control the Company shall be under no liability whatsoever to the Purchaser and shall be entitled at its option (to be notified to the Purchaser in writing) either to cancel the Contract (or any instalment of the Contract) whereupon it will be relieved of all its liabilities to the Purchaser or to extend the time of its performance by a reasonable period.

15 **Material Breach by the Purchaser**

- 15.1 The occurrence of any of the following shall be a Material Breach by the Purchaser:
- 15.1.1 the Purchaser makes any voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) becomes subject to an administration order or goes into liquidation (otherwise than for the purposes of amalgamation or reconstruction); or
 - 15.1.2 an encumbrancer takes possession of, or a receiver is appointed in respect of, any of the property or assets of the Purchaser; or
 - 15.1.3 the Purchaser ceases, or threatens to cease to carry on business; or
 - 15.1.4 the Purchaser is in breach of any of its obligations pursuant to these Conditions and in particular (without prejudice to the generality of the foregoing) if:
 - (a) the Purchaser fails to pay any part of the Price which has fallen due (including for the avoidance of doubt any Deposit and the Balance) when due; or
 - (b) the Purchaser fails to open a Letter of Credit in accordance with **Clause 7.4**; or
 - (c) fails to take delivery of the Material, or in any way directly or indirectly prevents, hinders or delays the delivery or discharge of the Material; or
 - (d) the Purchaser fails to procure the insurance required by **Clause 10.2**; or
 - (e) the Purchaser fails to satisfy its obligations in respect of the Material once delivered under **Clause 11.3**; or
 - (f) the Purchaser fails to discharge its obligations under **Clause 12** including but not limited to any obligation to Fully Indemnify the Company under **Clause 12.4.5**;

- 15.1.5 the Purchaser exceeds the credit limit under its account (if any) with the Company or has failed to pay any amount to the Company when due under the Contract or any other contract or arrangement; or
- 15.1.6 any credit insurance required by the Company in relation to its dealings with the Purchaser is cancelled, suspended or otherwise withdrawn; or
- 15.1.7 the Company reasonably apprehends that any of the events mentioned above is about to occur in relation to the Purchaser and notifies the Purchaser accordingly; or
- 15.1.8 the Purchaser otherwise conducts itself in such a way as to amount to a repudiation or renunciation of the Contract at common law.
- 15.2 In the event of a Material Breach by the Purchaser, and without prejudice to any other right or remedy available to the Company at law, the Company shall be entitled at its sole discretion to exercise any or all of the following rights, whether separately or cumulatively:
 - 15.2.1 terminate the Contract without any liability to the Purchaser, and, at its election:
 - (a) claim from the Purchaser the full price for any Material delivered (if applicable) immediately notwithstanding any previous agreement or arrangement to the contrary; or
 - (b) repossess any Material which has been delivered in which case title to the Material shall immediately re-vest in the Company (if it has otherwise passed to the Purchaser) and the Purchaser shall be liable to the Company for all costs and expenses associated with such repossession;
 - 15.2.2 terminate without liability any Other Contract on written notice to the Purchaser;
 - 15.2.3 sell to any third party the Material the subject of the Contract or any such Other Contract at the best price reasonably attainable (as determined by the Company at its sole discretion) and charge the Purchaser for any shortfall below the price payable under the Contract or any such Other Contract (to the extent such shortfall exceeds any Deposit which is retained by the Company);
 - 15.2.4 suspend delivery of any further consignments of any material agreed to be sold whether under the Contract or an Other Contract and without incurring any liability to the Purchaser for any delay;
 - 15.2.5 arrange storage and insurance of and take such other steps as the Company shall, in its sole discretion, consider appropriate in relation to any Material the subject of this Contract or any Other Contract at the Purchaser's expense pending re-sale and the Purchaser shall pay any additional costs incurred by the Company as a result (including, but not limited to, the costs of any storage and insurance),
 - 15.2.6 require the Purchaser to Fully Indemnify the Company against any loss, damage or expense arising out of the Material Breach or any consequent termination of the Contract or any Other Contract, including but not limited to any legal or other costs associated with the Company's enforcement of its rights under this Contract or any Other Contract at law;
 - 15.2.7 in the event that title in the Material, or any material deliverable under any Other Contract, has passed to the Purchaser, and without prejudice to the Company's rights to take back title under **Clause 15.2.1(b)** the Company shall be entitled to exercise:

- (a) a contractual right of stoppage of the material in transit, corresponding to that set out in sections 44 to 46 of the Sale of Goods Act 1979 as though it were an unpaid seller within the meaning and for the purposes of those provisions and whether or not the Purchaser is insolvent;
- (b) a contractual right of lien over the material and/or any Bills of Lading or other documents of title in respect of the same, corresponding to that set out in section 41 of the Sale of Goods Act 1979 as though it were an unpaid seller within the meaning and for the purposes of that provision;
- (c) notwithstanding the provisions of section 43 of the Sale of Goods Act 1979, the lien referred to in **Clause 15.2.7(b)** above shall arise at any time that the Material (or any material deliverable under any Other Contract) is in the possession of the Company or its agents and shall not be extinguished to delivery to the Purchaser or its agents;
- (d) the said rights of stoppage in transit and lien shall subsist so long as there are any sums due under this Contract (including any sums that may fall due pursuant to this **Clause 15.2**) or any Other Contract from the Purchaser by the Company;

15.2.8 hold any and all sums paid by the Purchaser (whether as a Deposit or the balance of the Price or otherwise) under the Contract or any Other Contract, as security for any and all claims by the Company against the Purchaser, whether such claims arise under this Contract or any Other Contract or otherwise (including in tort or any other cause of action) and including any claim for interest and costs, to the full value of those claims as estimated by the Company in its sole and absolute discretion;

15.3 The Company shall be under no liability whatsoever to the Purchaser for any loss or damage arising out of the exercise or purported exercise of any of its rights under **Clause 15.2** should it be later determined that the Company was not entitled to so act, so long as that exercise or purported exercise by the Company of its rights was made honestly and in good faith.

16 **Notice**

Notice given under the Contract shall be in writing, sent for the attention of the person, and to the address or email address, given in the Contract (or such address, email address or person as the relevant party may notify to the other party) and shall be delivered personally, sent by email or sent by pre-paid, first class post or recorded delivery. A notice is deemed to have been received, if delivered personally, at the time of delivery, in the case of email, at the time of transmission, in the case of pre-paid first class post or recorded delivery, 48 hours from the date of posting and, if deemed receipt under this **Clause 16** is not within the business hours (meaning 8:30am to 5:30pm Monday to Friday on the day that is a Business Day), at 8:30am on the first Business Day following delivery. To prove service, it is sufficient to prove that the notice was transmitted by email, to the email address of the party or, in the case of post, that the envelope containing the notice was properly addressed and posted.

17 **General**

17.1 Nothing in these Conditions limits or excludes the liability of the Company:

17.1.1 for death or personal injury resulting from negligence; or

- 17.1.2 for any damage or liability incurred by the Purchaser as a result of fraud (including fraudulent misrepresentation) or
- 17.1.3 for any liability incurred by the Purchaser which cannot be limited or excluded by the Company in law.
- 17.2 The Purchaser shall not be entitled to assign or declare a trust in any interest in the Contract or any part of it without the prior written consent of the Company.
- 17.3 No variation of the Contract or these Conditions shall be valid unless it is in writing and signed by or on behalf of each of the parties.
- 17.4 A waiver of any right arising under or in relation to the Contract, whether pursuant to its terms or by operation of law, is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given. No waiver by the Company of any breach of the Contract by the Purchaser shall be considered as a waiver of any subsequent breach of the same or any other provision.
- 17.5 Unless specifically provided otherwise, rights arising under the Contract are cumulative and do not exclude rights provided by law.
- 17.6 If any provision (or part of a provision) of the Contract is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the said provision shall be severed from this Contract and the other provisions will remain in force.
- 17.7 The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns and is not intended to benefit, or be enforceable by, anyone else. For the avoidance of doubt, any rights otherwise arising under the Contracts (Rights of Third Parties) Act 1999 are expressly excluded.
- 17.8 The Contract and any dispute or claim arising out of or in connection with it or its subject matter, shall be governed by, and construed in accordance with, the law of England and Wales.
- 17.9 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract or its subject matter and irrevocably agree to waive any right to assert that proceedings ought not be brought in England and Wales on grounds of *forum non conveniens*, save that the Company may commence proceedings in any other jurisdiction it deems appropriate.