

## **TERMS AND CONDITIONS OF SALE**

### **1. INTERPRETATION**

#### 1.1 In these Conditions:-

“Buyer”	means the customer named overleaf;
“Contract”	means the contract for the purchase and sale of the Goods subject to these Conditions;
“Conditions”	means the terms and conditions set out below;
“Goods”	means the goods (including any instalments or parts) which Malosa is to supply;
“Incoterms”	means the international rules for the interpretation of trade terms of the International Chamber of Commerce as in force at the date when the Contract is made;
“Seller”	means Malosa Limited (registered in England & Wales under number 4206780); and

#### 1.2 In these Conditions:-

- 1.2.1 any gender includes any other gender;
- 1.2.2 headings shall not affect interpretation;
- 1.2.3 any reference to a statutory provision includes a reference to any modification or re-enactment of the provision from time to time in force;
- 1.2.4 references to “the Goods”, “the Contract”, or any payment includes any part of any of them.

### **2. BASIS OF THE SALE**

- 2.1 Malosa shall sell and the Buyer shall buy the Goods subject to these Conditions, which supersede any other terms and which govern the Contract to the exclusion of any terms and conditions which the Buyer purports to apply or which are implied by trade, custom or course of dealing.
- 2.2 No terms or conditions endorsed upon, delivered with or contained in the Buyer’s order or other document will form part of the Contract simply as a result of such document being delivered to Malosa or referred to in the Contract.
- 2.3 Any variation to these Conditions is of no effect unless agreed in writing by an authorised representative of Malosa.
- 2.4 These Conditions constitute the entire agreement between Buyer and Seller for the supply of the Goods.
- 2.5 Malosa’s employees or agents are not authorised to make any representation concerning the Goods unless confirmed by Malosa in writing, and the Buyer

acknowledges that it does not rely on, and waives any claim for breach of, any such unconfirmed representation (unless such representation is made fraudulently).

- 2.6 Any advice or recommendation given by Malosa or its employees or agents to the Buyer as to the storage, application or use of the Goods which is not confirmed in writing by Malosa is followed or acted upon entirely at the Buyer's own risk.
- 2.7 Any typographical, clerical or other error or omission in any document or information issued by Malosa shall be subject to correction without any liability on the part of Malosa.

### 3. **QUOTATIONS, ORDERS AND SPECIFICATIONS**

- 3.1 A quotation by Malosa is not an offer. Quotations are valid for 30 days only and subject to withdrawal or revision at any time before acceptance of the Buyer's order by Malosa.
- 3.2 Each order for Goods and/or Services by the Buyer is an offer by the Buyer to purchase the Goods and/or Services subject to these Conditions.
- 3.3 No order submitted by the Buyer by whatever means is accepted by Malosa until Malosa confirms its written acceptance on Malosa's acknowledgement of order form or (if earlier) Malosa delivers the Goods or supplies the Services to the Buyer.
- 3.4 The Buyer shall ensure that the terms of any order (including any specification) are complete and accurate and that it gives to Malosa any necessary information relating to the Goods within a sufficient time to enable Malosa duly to perform the Contract.
- 3.5 Where the Goods are manufactured or where standard goods of Malosa are altered in either case in accordance with information, drawings or instructions supplied by the Buyer:-
  - 3.5.1 no guarantee or warranty is given by Malosa as to the practicability, efficiency, safety or otherwise of the Goods;
  - 3.5.2 the Buyer shall indemnify Malosa against all liability incurred by Malosa as a result of:-
    - (a) the Goods infringing any intellectual property right (including patents, trade marks whether registered or otherwise, unregistered or registered design rights and copyright) or any statutory provision;
    - (b) any impracticability, inefficiency, lack of safety or defect in the Goods where any of these is due wholly or partly to faults or omissions in any such information, drawings or instructions;
  - 3.5.3 all work (including design drawings) and any idea, invention or improvement made by or on behalf of Malosa pursuant to the Buyer's commission and all intellectual property rights therein (including any design right in a design created by Malosa) belong to Malosa; and
  - 3.5.4 Malosa shall not be liable to the Buyer in respect of any loss, damage or claim incurred by or made against the Buyer if any Goods infringe any

intellectual property right (including patents, trade marks whether registered or otherwise, registered and unregistered design rights and copyright).

- 3.6 Malosa reserves the right to make any changes in the specification of the Goods which are required for the Goods to conform with any applicable safety or other statutory or EU requirements or, where the Goods are to be supplied to the Buyer's specification, which do not materially affect their quality or performance.

#### 4. **DESCRIPTION**

- 4.1 All descriptions, samples and illustrations issued by Malosa are intended merely to present a general idea of the Goods described and do not form part of the Contract.
- 4.2 Whilst every effort will be made to supply the Goods in accordance with the quality of samples submitted or quoted for, this cannot be guaranteed and no condition or warranty to this effect shall be implied.

#### 5. **CANCELLATION AND DELAY**

- 5.1 No order may be cancelled by the Buyer except with Malosa's written agreement and on terms that the Buyer shall indemnify Malosa against all loss (including loss of profit), costs, (including the cost of all labour and materials used), damages, charges and expenses incurred by Malosa as a result of cancellation.
- 5.2 If the Buyer extends or delays the Contract or fails to take delivery of any Goods at the agreed time or (if no time is agreed) within a reasonable time then the Buyer shall indemnify Malosa against all loss (including loss of profit), costs (including the cost of storage and all labour and materials used), damages, charges or expense incurred by Malosa as a result of such extension, delay or failure.
- 5.3 Malosa reserves the right to defer the date of delivery or performance, to cancel the Contract or reduce the volume of Goods ordered without liability to the Buyer if it is prevented from or delayed in carrying on its business by any cause beyond Malosa's reasonable control. In such circumstances, the Buyer may also give written notice to cancel the Contract if the cause in question continues for a continuous period in excess of [180] days but in any event shall remain liable to pay for Goods or Services delivered or supplied prior to such cancellation by Malosa or the Buyer.

#### 6. **PRICE**

- 6.1 The price of the Goods is Malosa's quoted price or, where no price has been quoted (or a quoted price is no longer valid), the price listed in Malosa's published price list current at the date of delivery or supply. Where the Goods are supplied for export from the United Kingdom, Malosa's published export price list applies.
- 6.2 Malosa reserves the right at any time before delivery or performance to amend the price of the Goods to take into account any variation in cost to Malosa.
- 6.3 Any price quoted by Malosa for the Goods is exclusive of the cost of delivery to the Buyer (including transport, packaging, insurance and any taxes, duties or surcharges).
- 6.4 The price is exclusive of any applicable VAT.

## 7. PAYMENT

- 7.1 Payment of the price for the Goods is due 7 days after date of invoice.
- 7.2 Time of payment is of the essence.
- 7.3 For the purposes of these Conditions, payment is received when Malosa receives it in cleared funds.
- 7.4 Payment by the Buyer shall be made without any deduction or set off.
- 7.5 Malosa reserves the right to claim interest and compensation for debt recovery costs under the Late Payment of Commercial Debts (Interest) Act 1998 and the Late Payment of Commercial Debts Regulations 2002.
- 7.6 Despite any provision allowing credit, payment is due and payable to Malosa immediately upon cancellation or termination of the Contract.
- 7.7 Malosa is entitled to set off sums owed by Malosa to the Buyer against sums owed by the Buyer to Malosa.

## 8. DELIVERY

- 8.1 Delivery of the Goods shall be within the time agreed and if no time is agreed, within a reasonable time by the Buyer collecting the Goods at Malosa's premises at any time after Malosa has notified the Buyer that the Goods are ready for collection or, if some other place for delivery is agreed by Malosa, by Malosa delivering the Goods to that place at the Buyer's cost. Malosa may make delivery by instalments.
- 8.2 Any dates for delivery and/or performance are approximate only and time of delivery and/or performance is not of the essence.
- 8.3 No claim for damage or shortages will be considered unless Malosa is given written notice within seven days of delivery. If no such notice is received by Malosa, the Buyer is deemed to have accepted the Goods.
- 8.4 Any claim for damage, shortages or non-delivery must also be notified to the carrier by the Buyer in the manner and within the appropriate time limits prescribed by the carrier's terms and conditions.
- 8.5 In the event of failure by the Buyer to give the appropriate notices as specified by conditions 8.3 to 8.4 any claim by the Buyer is deemed to have been waived.

## 9. RISK AND PROPERTY

- 9.1 **The Goods remain the property of Malosa until:-**
  - 9.1.1 **their full price has been received by Malosa; and**
  - 9.1.2 **all other sums which are or which become due from the Buyer on any account with Malosa have been received by Malosa.**
- 9.2 If payments received from the Buyer are not stated to refer to a particular invoice Malosa may appropriate such payments to any outstanding invoice.

- 9.3 The Goods are at the risk of the Buyer from the time of delivery.
- 9.4 Until ownership of the Goods passes to the Buyer, the Buyer must:-
- 9.4.1 store them at its own cost on its premises separately from any other goods and in a manner which makes them readily identifiable as the goods of Malosa;
  - 9.4.2 not destroy, deface or obscure any identifying mark or packaging of the Goods;
  - 9.4.3 maintain the Goods in a satisfactory condition insured on Malosa's behalf for their full price against all risks; and
  - 9.4.4 hold the proceeds of insurance referred to in condition 9.4.3 on trust for Malosa and not mix them with any other money, nor pay the proceeds into an overdrawn account.
- 9.5 Malosa may, so as to discharge any overdue payment under the Contract recover or resell the Goods.
- 9.6 In order to verify the Buyer's compliance with its obligations under condition 9.4 and to exercise its rights under condition 9.5, Malosa shall be entitled by its employees or agents without notice to enter the Buyer's premises or such other premises where the Goods are stored.
- 9.7 The Buyer's right to possession of the Goods terminates immediately if any of the events set out in condition 12 occurs.
- 9.8 If the Goods shall be sold by the Buyer before payment for them has been made, any such sale shall be a sale of Malosa's property on the Buyer's own behalf and the Buyer deals as principal when making such a sale.

## 10. **WARRANTY AND DEFECTS**

- 10.1 Malosa warrants to the Buyer that the Goods correspond with their specification at the time of delivery.
- 10.2 Malosa shall not be liable under this warranty (or any other warranty, condition or guarantee) if:-
- 10.2.1 the total price for the Goods has not been paid by the due date for payment;  
or
  - 10.2.2 any defect arises from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow Malosa's instructions (whether oral or written) or maintenance requirements, misuse or alteration or repair of the Goods without Malosa's prior approval.
- 10.3 This warranty does not extend to parts, materials or equipment not manufactured by Malosa, in respect of which the Buyer shall only be entitled to the benefit of any such warranty or guarantee as is given by the manufacturer to Malosa and which Malosa is entitled to and able to assign to the Buyer.

- 10.4 Any claim by the Buyer which is based on any defect in the quality or condition of the Goods or their failure to correspond with specification must (whether or not delivery is refused by the Buyer) be notified to Malosa and Malosa's carriers within seven days from the date of delivery or performance or, where the defect or failure was not apparent on reasonable inspection, within a reasonable time after discovery of the defect or failure.
- 10.5 In no event shall the Buyer be entitled to reject the Goods on the basis of any defect or failure which is so slight that it would be unreasonable for the Buyer to reject them.
- 10.6 If the Buyer does not notify claims in accordance with condition 10.4 then:-
- 10.6.1 the Buyer shall not be entitled to reject the Goods; and
  - 10.6.2 Malosa shall have no liability for such defect or failure; and
  - 10.6.3 the Buyer shall be bound to pay the full price for the Goods.
- 10.7 In the event the Buyer has a valid claim which has been notified to Malosa under condition 10.4, Malosa shall be entitled to repair or replace the Goods or carry out the Services again (or the part or element in question) free of charge or, at Malosa's option, refund to the Buyer the price of the Goods (or a proportionate part of the price), but Malosa shall have no further liability to the Buyer.
- 10.8 If the Buyer is entitled to reject the Goods because all or part of the Goods are defective, the Buyer must reject all of the Goods and cannot keep some of the Goods and reject the remainder.

## 11. **LIMITATION OF LIABILITY**

### **THE BUYER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CONDITION**

- 11.1 Subject to condition 10, the following sets out the entire financial liability of Malosa (including any liability for the acts or omissions of its employees, agents or subcontractors) to the Buyer in respect of any breach of these Conditions, and any representation, statement or act or omission (including negligence) arising under or in connection with the Contract and in respect of any contemplated performance or lack of performance.
- 11.2 All warranties, conditions or other terms implied by statute, common law, trade usage or otherwise are excluded to the fullest extent permitted by law but this exclusion does not apply to:-
- 11.2.1 any implied condition that Malosa has or will have the right to sell the Goods when the property is to pass; or
  - 11.2.2 where the Goods are sold to a person dealing as a consumer within the meaning of the Unfair Contract Terms Act 1977, any implied term relating to the conformity of the Goods with their description or sample or as to their quality or fitness for a particular purpose.
- 11.3 Nothing in these Conditions excludes or limits Malosa's liability for death or personal injury caused by Malosa's negligence or for fraudulent misrepresentation.

11.4 Subject to conditions 11.2 and 11.3:-

11.4.1 Malosa shall not be liable to the Buyer for:-

(a) any loss of profit, loss of production, financial loss, depletion of goodwill;  
and

(b) any indirect loss, damage, costs or expenses whatsoever

in each case which arise out of or in connection with the Contract or its contemplated performance of lack of performance; and

11.4.2 subject to condition 11.4.1, Malosa's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with the performance or contemplated performance or lack of performance of the Contract shall be limited to [[two] times the contract price] [specify insurance level].

## 12. **TERMINATION**

12.1 The Contract shall terminate immediately upon service of written notice of termination by Malosa on the Buyer on the happening of any one or more of the following:-

12.1.1 the Buyer has, suffers or allows any execution to be levied on its assets or obtained against it; or

12.1.2 the Buyer commits a material breach of any of its [material] obligations under the Contract or under any other contract with Malosa; or

12.1.3 the Buyer is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or

12.1.4 the Buyer ceases or threatens to cease to trade.

12.2 Termination of the Contract shall not affect rights and duties accrued before termination [and in particular shall not affect Malosa's rights contained in condition 9. However, the Buyer's rights contained in that Condition shall immediately terminate].

## 13. **HEALTH AND SAFETY**

The Buyer agrees to:-

13.1 indemnify Malosa in respect of any and all claims arising from the Goods being unsafe as a result of the Buyer's activities;

13.2 monitor the safety of the Goods, to pass on to Malosa information as to the risks of the Goods and to co-operate in any action Malosa decides to take to avoid those risks; and

13.3 to keep records of the customers to whom the Goods are sold and to provide Malosa with copies of them as and when requested.

#### 14. **EXPORT**

- 14.1 Where the Goods are to be exported to the Buyer the provisions of this condition 14 shall apply.
- 14.2 Payment shall be made in England in pounds sterling or such currency as is agreed in writing by Malosa.
- 14.3 If so requested by Malosa, the Buyer shall establish and maintain in favour of Malosa an irrevocable letter of credit which shall:-
  - 14.3.1 be in English;
  - 14.3.2 be confirmed by a UK clearing bank;
  - 14.3.3 be payable on drafts drawn at sight upon presentation to the bank by Malosa of a certified copy of Malosa's invoice;
  - 14.3.4 be established at least 30 days prior to anticipated shipment date;
  - 14.3.5 cover the full price of the Goods (including applicable taxes); and
  - 14.3.6 be transferable.

All bank charges and other expenses in relation to the letter of credit shall be paid by the Buyer.

- 14.4 The Buyer shall be responsible for complying with any legislation or regulations governing the importation of the Goods into the country of destination and for the payment of any duties the Goods.
- 14.5 Unless otherwise agreed in writing between the Buyer and Malosa, the Goods shall be delivered EXW or FCA at the option of Malosa (as those terms are defined in Incoterms) and Malosa shall be under no obligation to give notice under section 32(3) of the Sale of Goods Act 1979.
- 14.6 The Buyer is responsible for arranging for testing and inspection of the Goods at Malosa's premises before shipment. Malosa shall have no liability for any claim in respect of any defect in the Goods which would be apparent on inspection and which is made after shipment, or in respect of any damage during transit.
- 14.7 If there is any conflict between Incoterms and the Contract, the terms of the Contract prevail.

#### 15. **GENERAL**

- 15.1 Each right or remedy of Malosa under the Contract is without prejudice to any other right or remedy of Malosa, whether or not under the Contract.
- 15.2 If any provision of the Contract (including any provision of condition 9) is found by any competent authority to be invalid, unenforceable or unreasonable, it shall be severed from the remainder of the Contract which shall continue in full force and effect.

- 15.3 Failure or delay by Malosa in enforcing or partially enforcing any provision of the Contract is not a waiver of any of its rights under the Contract.
- 15.4 Any waiver by Malosa of any breach by the Buyer is not a waiver of any subsequent breach.
- 15.5 Any notice to be given by either party to the other under these Conditions must be in writing addressed to that other party at its registered office or principal place of business or such other address as may have been notified for these purposes.
- 15.6 Notices shall be delivered personally or sent by first class post or sent by facsimile transmission.
- 15.7 A notice is deemed to have been received:-
- 15.7.1 if delivered personally, at the time of delivery;
  - 15.7.2 if sent by prepaid first class post, on the second working day after posting (exclusive of the day of posting);
  - 15.7.3 if sent by facsimile transmission, on a working day prior to 4.00pm at the time of completed transmission and otherwise on the next working day.
- 15.8 The Contract does not create, confer or purport to confer any benefit or right enforceable by any person not a party to it by virtue of the Contracts (Rights of Third Parties) Act 1999.

## 16. **ASSIGNMENT**

- 16.1 Malosa may assign or subcontract the Contract or any part of it and may dispose of or deal in any manner with any of its rights or beneficial interests under it.
- 16.2 The Buyer may not assign the Contract or dispose of or deal in any manner with any of its rights or beneficial interests under it.

## 17. **ENGLISH LAW**

- 17.1 The Contract shall be governed by English law, and the parties submit to the exclusive jurisdiction of the English courts.
- 17.2 Condition 17.1 is for the benefit of Malosa only and as a result Malosa shall not be prevented from taking proceedings in any other courts with jurisdiction, whether concurrently or not.