

## **CONDITIONS OF SALE**

### **\*THESE CONDITIONS CONTAIN LIMITATIONS OF SELLER'S LIABILITY**

#### **1. GENERAL**

- (a) In these conditions "seller" means Dartex Coatings Limited or Dartex Coatings Incorporated; "buyer" means the buyer indicated on seller's order confirmation; and references to the "products" means products supplied by seller to buyer and include their packaging. If seller has not issued an order confirmation, "seller's order confirmation" means any document issued by seller after acceptance of the order by seller (including without limitation, any delivery note). Subject to the provisions of this contract, terms defined in the 2000 edition of Incoterms have the same meaning when used in these conditions.
- (b) A contract will only come into existence upon seller accepting the order by either issuing a written order confirmation or, if earlier, delivering the product to buyer. Until such acceptance of the order seller shall not be under any obligation to buyer. A quotation by seller does not constitute an offer, and seller reserves the right to withdraw or revise any quotation at any time prior to seller's acceptance of buyer's order. Buyer shall promptly supply all information and assistance required by Seller to execute buyer's order.
- (c) These conditions supersede all prior terms, representations or arrangements, and contain the entire agreement between the parties in connection with the products (unless otherwise stated on seller's order confirmation). All other terms and conditions, express or implied, are excluded and these conditions shall apply in place of and prevail over any terms or conditions contained or referred to in buyer's purchase order or elsewhere or implied by trade practice or course of dealing. None of seller's employees or agents has authority to modify or supplement these conditions or to accept any order except on seller's official sales forms.
- (d) Nothing in these conditions shall restrict the statutory rights of a buyer who deals as a consumer.

#### **2. DELIVERY**

- (a) Delivery or despatch dates quoted or requested are given or accepted by seller in good faith but are not guaranteed, and time shall not be of the essence in respect of the seller's delivery or other related obligations, unless in the case of a date stated in writing to be "guaranteed" on seller's order confirmation.
- (b) Delivery shall be made to the place(s) and by the method(s) specified on seller's order confirmation (or if none, ex works or, for export sales, FAS UK port/FOB UK airport). Buyer is responsible for unloading. Buyer's or its carrier's receipt shall be conclusive evidence of delivery.
- (c) Unless otherwise stated on seller's order confirmation, packaging is included in the price and is not returnable. Any special packaging requirements will incur a non-refundable additional charge. In relation to any packaging buyer shall comply with all applicable law and

regulations, and with any return, disposal or other requirements stated on seller's order confirmation.

- (d) Buyer shall accept manufacturing tolerances accepted in the trade and quantities or contract specifications varying by not more than 10% from the contract quantity/specifications, and shall pay pro rata for the actual quantity delivered. The quantity stated on seller's despatch note shall be conclusive evidence of the amount delivered except in cases of manifest error. CLAIMS FOR ANY SHORTAGES MUST BE NOTIFIED WITHIN 4 DAYS OF DELIVERY AND ANY LATE CLAIMS WILL NOT BE ENTERTAINED.
- (e) Save for the purposes of Clauses 3(e), 6(b) and 7, each delivery shall be treated as a separate contract, and partial deliveries are permitted unless otherwise stated on seller's order confirmation. Accordingly, failure to make any particular delivery, or any breach of contract by seller, shall not affect any remaining deliveries.
- (f) Buyer shall take delivery of the products by any date quoted or requested by seller. Seller may deliver early upon giving notice to buyer. Buyer shall be responsible for all storage and other costs relating to buyer's failure to comply with this clause or its other obligations.
- (g) Where the products are supplied under any internationally recognised trading term as specified in Incoterms 2000, the provision by seller of the usual transport document(s) or other evidence of delivery consistent with the relevant trading term will be conclusive evidence of delivery by seller.
- (h) If seller or its carrier is unable for any reason to place the products on board ship upon their arrival at the port of delivery, a warehouse receipt for the products shall be treated as sufficient delivery.
- (i) Unless otherwise specified on seller's order confirmation, buyer undertakes to obtain and comply with any necessary export/import licences, permits and consents for the supply and delivery of the products.

### **3. PRICE AND PAYMENT**

- (a) Unless otherwise stated on seller's order confirmation, prices are ex works and exclusive of VAT, delivery costs and all other duties, fees or taxes. All sums due to seller shall be paid in the currency and to the address stated on seller's order confirmation, or such other address as seller may require. Seller may at its sole discretion require security for payment from buyer in a form satisfactory to seller before dispatching any order.
- (b) Subject to Clause 3(e), unless otherwise stated on seller's order confirmation, payment is due on the twentieth day of the month following the month of invoice. Any amounts that are due to seller must be paid in cash or cleared funds and buyer may not make any deductions, withholding or set-off on any account.

- (c) Where prices are quoted in currencies other than sterling, buyer shall compensate seller for any currency losses suffered by seller as a result of buyer's failure to pay for the products on the date specified in Clause 3(b).
- (d) Unless prices are stated to be fixed on seller's order confirmation, seller may increase prices in accordance with increases in seller's costs and/or general price list increases occurring after the date of seller's order confirmation but before dispatch.
- (e) In the circumstances described in Clause 6(c), all unpaid balances owing to seller from buyer shall become a debt immediately due and payable to seller, notwithstanding any payment terms agreed.
- (f) Time of payment is of the essence of the contract. Seller may charge interest at 4% above National Westminster Bank plc's base rate per annum for the time being (to accrue from the day to day) on any sum owed to seller under the contract which is not paid on the due date, after as well as before any judgment. As well as charging interest, the seller also reserves the right to charge for third party costs including all legal fees as a result of or in connection with failure by buyer to pay on time.
- (g) Seller may appropriate sums received from buyer against any debt due to seller from buyer (under this or any other contract), irrespective of any purported appropriation by buyer.
- (h) Where any business or division of seller is indebted to buyer in respect of goods or services supplied by buyer (whether or not such debt is then due and payable), seller may in its discretion set off any or all of such indebtedness against any monies owing by buyer to seller, whereupon buyer shall, to the extent of such set-off, be discharged from its obligations to pay for products (without prejudice to any other remedies of seller in respect of any non-payment or other default by buyer) and seller shall to the same extent be discharged from its indebtedness to buyer.

#### **4. SELLER'S WARRANTY**

- (a) Seller warrants that upon delivery, the products:
  - (i) are sold with good title; and
  - (ii) comply in all material respects with seller's current published specification or data sheet for the products (or, where there is none, that they are in all material respects made with sound materials and workmanship to such standards that are ordinary in the industry) ("Seller's Warranty"). If the products correspond in all material respects to any sample supplied or accepted by seller as the agreed sample, they shall be considered to comply with this part of the Seller's Warranty. The Seller's Warranty shall not apply to seconds, remainder stock or samples or to goods sold as obsolete or sub-standard and in respect of such products, seller only warrants that they are sold with good title.

As per Clause 10(d), seller makes no other warranties in respect of the products including any warranty in relation to fitness for any particular purpose or intended use and it is for the buyer to satisfy itself that the products are so fit.

- (b) Seller's Warranty shall cease to apply if buyer fails to comply with any instructions of seller relating to the products.
- (c) Buyer shall notify seller immediately, and in any event within 2 business days of receipt of the order, of any incomplete or failed delivery or loss or damage during carriage. If the products fail to comply with Seller's Warranty, buyer shall notify seller within 7 business days after the date when buyer became or ought reasonably to have become aware of any of such breach and in any event before the earlier of (i) 6 months from the date of dispatch by seller; and (ii) 30 days after the products have been used or put into process. **If buyer fails to notify seller of any claim in accordance with this Clause, buyer shall be treated as having waived all claims connected with the matter which should have been notified.** In any event, no claims will be considered in respect of fabric after it has been cut.
- (d) Subject to notification within the period required by Clause 4(c), if it is shown to seller's reasonable satisfaction that the products fail materially to comply with Seller's Warranty, seller shall be given a reasonable opportunity to correct such failure, and if seller does not or is unable to do so, seller will at buyer's option either credit the purchase price (or, if the products have depreciated for reasons other than seller's default or have been used or put into process, a reasonable part of the purchase price), or replace the products (if reasonably practicable) within a reasonable time, free of charge. **SUCH CORRECTION, REFUND OR REPLACEMENT SHALL BE SELLER'S SOLE LIABILITY IN RELATION TO ANY SUCH FAILURE.** Replacement products are covered by these conditions, including Seller's Warranty. Products which are alleged not to comply with the contract shall as far as possible be preserved by buyer for inspection by seller, and if replaced or if a refund is made shall be returned to seller (at seller's cost) if seller so requests.
- (e) If the products are intended by seller to be and are in fact resold by buyer in the United Kingdom to individual(s) without further processing, testing or inspection, seller shall to the extent of its liability pay reasonable compensation to buyer for any damages and costs finally awarded against buyer in the United Kingdom under Part 1 of the Consumer Protection 1987 (as amended) (the "CPA"), but only to the extent that seller is itself liable under the CPA for the claim in question because the products were defective (within the meaning of the CPA) at the time of delivery by seller. Seller shall not be liable to the extent that any liability arises from any default of buyer (including but not limited to any failure by buyer to ensure that the products are sold only for uses recommended by seller) or where buyer knew or ought reasonably to have known of the said defect.
- (f) Buyer shall promptly notify seller of any claim by a third party for which seller may be liable and shall take all reasonable steps to mitigation such liability and comply with the seller's reasonable requirements to minimise liability and/or avoid further liability, and

shall allow the seller conduct of any action and/or settlement negotiations. Compliance with this clause is a condition to buyer making any claim against seller.

## **5. FORCE MAJEURE**

- (a) Seller shall not be liable for any failure to comply with the contract related to any circumstances whatever (whether or not involving seller's negligence) which are beyond seller's reasonable control and which prevent or restrict seller from complying with the contract.
- (b) Seller may where reasonable in the circumstances (whether or not involving seller's negligence) without liability suspend or terminate (in whole or in part) its obligations under the contract, if seller's ability to manufacture, supply, deliver or acquire materials for the production of the products by seller's normal means is materially impaired.

## **6. TERMINATION AND SUSPENSION**

- (a) Except where buyer has caused or contributed to any delay, buyer may (as buyer's sole remedy, without affecting the balance of the contract quantity) terminate the contract by notice to seller in respect of any installment of products which is not dispatched (i) by any date stated to be "guaranteed" on seller's order confirmation, or (ii) within 60 days after any date quoted on seller's order confirmation (unless the goods have been specially manufactured or adapted for buyer).
- (b) Seller may (without prejudice to its other rights or remedies) terminate or suspend seller's performance of the whole or any outstanding part of the contract in the circumstances described in Clause 6(c). Seller may also suspend deliveries while investigating any claim relating to prior shipments (under any contract) of products.
- (c) The relevant circumstances are if;
  - (i) Buyer fails to take delivery of or to pay for the products on the date required in accordance with these conditions or breaches any other term of the contract, or if buyer is late in payment or performance under or otherwise breaches any other contract for the sale or purchase of goods or services between buyer and seller; or
  - (ii) Buyer becomes unable to pay its debts, goes into administration, becomes bankrupt or insolvent or if a receiver or encumbrancer takes possession of any part of buyer's assets, or buyer suffers any of the other circumstance set out in Clause 7(e)(i) and (ii) or any foreign equivalent of any of the foregoing; or
  - (iii) Seller has reasonable grounds for suspecting that an event in Clause 6(c) (ii) has occurred or will occur, or that buyer will not pay for the products on the due date, and so notifies buyer.
- (d) Notwithstanding any payment terms agreed, upon such termination or suspension by seller, all amounts that are owing from buyer to seller will immediately become due and payable.

## 7. RISK AND TITLE

- (a) The products are at the risk of the buyer from the time of delivery.
- (b) Ownership of the products shall not pass to the buyer until seller has received in full (in cash or cleared funds) all the sums due to it in respect of:
  - (i) the products: and
  - (ii) all other sums which are or which become due to the seller from the buyer on any account;and until such time, full legal and beneficial title in the products shall be vested in the seller.
- (c) Until ownership of the products has passed to the buyer, the buyer must:
  - (i) hold the products on a fiduciary basis as seller's bailee;
  - (ii) store the products (at no cost to seller) separately from all other goods of the buyer or any third party in such a way that they remain readily identifiable as the seller's property;
  - (iii) not destroy, deface or obscure any identifying mark or packaging on or relating to the products;
  - (iv) maintain the products in good condition and keep them insured on the seller's behalf for their full price against all risks to the reasonable satisfaction of the seller. On request the buyer shall produce the policy of insurance to the seller; and
  - (v) hold the proceeds of the insurance referred to in condition 7.c. (iv) on trust for the seller and not to mix them with any other money, nor pay the proceeds into an overdrawn bank account.
- (d) The buyer may resell the products before ownership has passed to it solely on the following conditions: (i) any sale shall be effected in the ordinary course of the buyer's business at full market value; (ii) the buyer shall hold such part of the proceeds of sale as represent the amount owned by the buyer to the seller on behalf of the seller and the buyer shall account to the seller accordingly; (iii) any such sale shall be a sale of the seller's property on the buyer's own behalf and the buyer shall deal as principal when making such a sale.
- (e) The buyer's right to possession and use of the products shall terminate immediately if:
  - (i) the buyer is insolvent, has a bankruptcy order made against it or makes an arrangement or composition with its creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether

voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or if an application is made to the court for an administration order in respect of the buyer, or if any person appoints or purports to appoint an administrator of the buyer by notice, or if any person gives notice of its intention to appoint an administrator of the buyer, or if an order or interim order for the administration of the buyer is made or if the buyer has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or a resolution is passed or a petition presented to any court for the winding up of the buyer, or any proceedings are commenced relating to the insolvency or possible insolvency of the buyer or any of its parent companies; or

- (ii) the buyer suffers or allows any execution, whether legal or equitable, to be levied on his/its property or obtained against him/it, or fails to observe/performs any of his/its contractual obligations to seller under the contract or any other contract between the seller and the buyer, or is unable to pay debts within the meaning of section 123 of the insolvency Act 1986 or the buyer ceases to trade: or
- (iii) the buyer encumbers or in any way charges any of the products before title has passed in those products to buyer in accordance with this contract.
- (f) The seller shall be entitled to recover payment for the products notwithstanding that ownership of any of the products has not passed from the seller.
- (g) The buyer grants the seller, its agents and employees an irrevocable licence at any time to enter any premises where the products are or may be stored in order to inspect them, or, where the buyer's right to possession has terminated, to recover them.

## **8. INTELLECTUAL PROPERTY; THIRD PARTY CLAIMS**

- (a) Buyer shall not use any trademarks or tradenames applied to or used by seller in relation to the products in any manner not approved by seller.
- (b) BUYER SHALL INDEMNIFY AND HOLD HARMLESS SELLER AGAINST ANY LIABILITY INCURRED BY SELLER ARISING FROM OR IN CONNECTION WITH:
  - (i) SELLER SUPPLYING PRODUCT TO SPECIFICATIONS PROVIDED BY BUYER, OR INCORPORATING PROPERTY OF BUYER IN THE PRODUCTS, OR APPLYING ANY TRADEMARK, TRADENAME OR DESIGN TO THE PRODUCTS ON BUYER'S INSTRUCTIONS, OR COMPLYING WITH ANY OTHER INSTRUCTIONS OF BUYER RELATING TO THE PRODUCTS; AND
  - (ii) IN RELATION TO ANY THIRD PARTY CLAIMS ARISING FROM THE USE MADE OF OR DEALINGS BY BUYER IN

THE PRODUCTS (IRRESPECTIVE OF WHETHER THEY INVOLVE THE NEGLIGENCE OF SELLER, ITS AGENTS OR EMPLOYEES), EXCEPT IF ARISING FROM SELLER'S WILFUL DEFAULT.

- (c) Unless otherwise agreed by seller in writing, specifications, ideas, know how, processes, systems, designs, drawings, prints, and samples prepared by seller for the purposes of this contract or otherwise shall be seller's property.
- (d) Buyer shall keep in strict confidence all information relating to or provided by seller that is of a confidential nature, including any specifications, processes, know-how and financial, commercial and technical information.

**9. ADVICE AND ASSISTANCE**

SELLER SHALL NOT BE LIABLE, IN CONTRACT, TORT OR OTHERWISE, AND IRRESPECTIVE OF THE NEGLIGENCE OF SELLER, ITS AGENTS OR EMPLOYEES, FOR ANY REPRESENTATIONS, ADVICE OR ASSISTANCE GIVEN (UNDER THIS CONTRACT OR OTHERWISE, AND WHETHER BEFORE OR AFTER THE DATE OF THE CONTRACT) BY OR ON BEHALF OF SELLER IN CONNECTION WITH THE PRODUCTS OR THE CONTRACT, UNLESS AND THEN ONLY TO THE EXTENT THAT, SELLER HAS MADE SUCH REPRESENTATIONS, AND/OR AGREED TO PROVIDE SUCH ADVICE OR ASSISTANCE, FOR A FEE UNDER A SEPARATE WRITTEN CONTRACT WITH BUYER.

**10. LIMITATION OF LIABILITY**

- (a) WITHOUT PREJUDICE TO ANY OTHER LIMITATION OF SELLER'S LIABILITY (WHETHER EFFECTIVE OR NOT) IN NO CIRCUMSTANCES WHATEVER SHALL SELLER BE LIABLE (IN CONTRACT, TORT OR OTHERWISE, AND IRRESPECTIVE OF ANY NEGLIGENCE OR OTHER ACT, DEFAULT OR OMISSION OF SELLER OR ITS EMPLOYEES OR AGENTS) FOR ANY:
  - (i) (a) LOSS OF PROFITS; (b) LOSS OF PRODUCTION OR USE; (c) LOSS OF GOODWILL; (d) LOSS OF BUSINESS OR REVENUE; (e) LOSS OF ANTICIPATED SAVINGS; AND (f) FOR ANY TYPE OF SPECIAL, INDIRECT OR CONSEQUENTIAL LOSSES, IN CONNECTION WITH THE PRODUCTS OR THE CONTRACT, IN EACH SUCH CASE REGARDLESS OF THE NEGLIGENCE OF SELLER OR WHETHER OR NOT SELLER HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH LOSS;
  - (ii) FOR ANY SHORTAGES, DAMAGE OR DEFECTS IN THE PRODUCTS UNLESS BUYER NOTIFIES SELLER IN ACCORDANCE WITH CLAUSES 2(D) OR 4(C) (AS THE CASE MAY BE);

- (iii) FOR ANY DEFECTS IN PRODUCTS CAUSED BY ANY ACT, DEFAULT OR NEGLIGENCE OF BUYER OR ANY OF ITS REPRESENTATIVES OR CUSTOMERS.
- (b) EXCEPT AS PROVIDED UNDER CLAUSE 4(E), SELLER'S TOTAL AGGREGATE LIABILITY IN CONNECTION WITH THE PRODUCTS OR THE CONTRACT (IN CONTRACT, TORT OR OTHERWISE AND WHETHER OR NOT RELATED TO ANY NEGLIGENCE OR OTHER ACT, DEFAULT OR OMISSION OF SELLER OR ITS EMPLOYEES OR AGENTS), IS LIMITED TO THE INVOICE PRICE FOR THE PRODUCTS CONCERNED, EX-WORKS AND EX VAT.
- (c) WITHOUT PREJUDICE TO SELLER'S WARRANTY, BUYER'S SOLE REMEDY SHALL BE IN DAMAGES.
- (d) SELLER'S WARRANTY AND BUYER'S REMEDIES UNDER THIS CONTRACT ARE IN SUBSTITUTION FOR ANY OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS, LIABILITIES, TERMS OR CONDITIONS (WHETHER THEY ARE EXPRESS OR IMPLIED, OR ARISE IN CONTRACT, TORT, OR OTHERWISE, AND IRRESPECTIVE OF THE NEGLIGENCE OF SELLER ITS EMPLOYEES OR AGENTS) IN CONNECTION WITH THE PRODUCTS (INCLUDING, WITHOUT LIMITATION, ANY RELATING TO MERCHANTABILITY, FITNESS FOR PURPOSE, CONFORMITY WITH DESCRIPTION OR SAMPLE, CARE AND SKILL OR COMPLIANCE WITH REPRESENTATIONS, BUT EXCLUDING IMPLIED STATUTORY WARRANTIES RELATING TO TITLE), AND ALL SUCH WARRANTIES, OBLIGATIONS, REPRESENTATIONS, LIABILITIES, TERMS OR CONDITIONS ARE HEREBY EXPRESSLY EXCLUDED.
- (e) WITHOUT PREJUDICE TO CLAUSE 4(c), NO ACTION MAY BE BROUGHT AGAINST SELLER IN CONNECTION WITH THE PRODUCTS OR THE CONTRACT UNLESS PROCEEDINGS ARE ISSUED AGAINST SELLER WITHIN TWO YEARS AFTER BUYER BECAME OR OUGHT REASONABLY TO HAVE BECOME AWARE OF THE CIRCUMSTANCES GIVING RISE THERETO.
- (f) THIS CLAUSE 10 APPLIES NOTWITHSTANDING ANY FUNDAMENTAL BREACH OR BREACH OF A FUNDAMENTAL TERM OF THE CONTRACT BY SELLER.
- (g) Notwithstanding any other provision of this contract, nothing in this contract is intended to or shall be deemed to limit or exclude in any way any liability for (i) death or personal injury cause by seller's negligence; (ii) fraudulent misrepresentation; (iii) any liability under the CPA which cannot be excluded by law; (iv) any other liability to the extent that such liability cannot be excluded by applicable law.

## **11. MISCELLANEOUS**

- (a) The contract may not be assigned by buyer without seller's prior written consent.

- (b) Notices must be in writing to seller's or buyer's address and are deemed delivered on the first working day after sending by hand or (subject to confirmation of transmission) by facsimile, or, within the UK, on the third working day after being placed prepaid in the first class post to buyer's or seller's UK address. Qualified acceptances by buyer on delivery notes shall not constitute notice of any claim or acceptance by seller of any such qualification.
- (c) Each provision of this Agreement is separate and independent. If any provisions of this Agreement are held to be illegal, invalid or unenforceable, in whole or in part, either under any enactment or rule of law, such provision or part shall to that extent be deemed not to form part of this Agreement but the legality, validity and enforceability of the remainder of this Agreement shall not be affected.
- (d) No failure by seller to enforce any provision of this contract shall be construed as a release of its rights relating thereto or to sanction any further breach.
- (e) No failure by seller to exercise, and no delay by it in exercising, any right, power or remedy in connection with this contract will operate as a waiver of such right, power or remedy nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of such right, power or remedy or the exercise of any other rights, powers or remedies (whether provided by law or otherwise). Any waiver by seller must be in writing and no waiver of any breach of this contract shall be deemed to be a waiver of any subsequent breach.
- (f) The parties consider that the limitations and exclusions contained in this contract are reasonable in the context of the commercial arrangement. If any such restrictions, limitations or exclusions are held to be unenforceable but would be valid if any part of it were deleted or the amount or period of application reduced (as the case may be), such provision shall apply with such modification as may be necessary to make it valid and effective.
- (g) If any provision of the contract is found to be invalid or unenforceable it shall have effect to the maximum extent permitted by law, or, if not so permitted shall be deemed deleted.
- (h) Any person who is not a party to this contract has no rights under the Contracts (Rights of Third Parties) Act 1999 (as may be amended).
- (i) The provisions of Clauses 3(e), 3(h), 4(e), 4(f), 6(d), 7, 8, 9, 10, 11 and 12 shall survive any termination of this contract.

## **12. LAW**

This contract shall be governed by and construed in accordance with the law of England. Buyer hereby agrees, for seller's exclusive benefit that the English courts shall have sole jurisdiction to hear all claims or proceedings connected with the products or the contract. Seller may nevertheless bring claims in any other courts of competent jurisdiction.