

ICI Paints AkzoNobel Conditions of Sale (2009)

1 Definitions

- 1.1 In these Conditions the following definitions shall apply:
"Buyer" means the person whose order for the Goods is accepted by Seller.
"Conditions" means the terms and conditions set out in this document.
"Contract" means the contract for the sale and purchase of the Goods.
"Default" means any breach of these Conditions, any breach of duty under statute or at common law or any misrepresentation, misstatement or tortious act or omission including negligence under or connected with the Contract.
"Goods" means the Goods (including any instalments of the Goods or any parts for them) which Seller is to supply in accordance with the Conditions.
"Insolvency Event" means a person (a) entering into voluntary/compulsory liquidation; (b) having a receiver or administrative receiver appointed over any of its assets or being the subject of an application for administration; (c) entering into an arrangement or composition with its creditors; or (d) becoming bankrupt (where person is an individual).
"Packaging" means all containers in or on which the Goods are supplied to Buyer including all bags, carboys, cylinders, drums, pallets and tank wagons.
"Seller" means Imperial Chemical Industries Limited trading as ICI Paints AkzoNobel.

2 Terms of Sale

- 2.1 Seller shall sell and Buyer shall purchase the Goods in accordance with these Conditions. The Conditions shall govern the Contract to the exclusion of any other terms and conditions. No variation of these Conditions shall be binding unless agreed in writing between the parties.
- 2.2 Orders may be made by Buyer in writing, by phone, by EDI or any other method agreed with Seller. Any order by Buyer shall be deemed to be an offer to purchase the Goods but no binding contract shall arise unless Seller accepts the order.
- 2.3 Once accepted by Seller, Buyer shall not be entitled to cancel an order unless Seller agrees in writing and Buyer indemnifies Seller in full for all costs incurred by Seller as a result of the order's cancellation.
- 2.4 Seller reserves the right to set minimum order sizes and to charge Buyer all costs incurred by Seller in fulfilling orders below that minimum order size.

3 Quality and Purpose

- 3.1 The Goods shall accord in all material respects with their specification at the time of delivery or, if there is no such specification, shall be within normal limits of industrial quality. All other warranties or conditions (statutory or otherwise) are excluded except in so far as such exclusion is prevented by law. In the event that any unused Goods do not conform to their specification, Seller shall, at its option, repair or replace such Goods or refund the price of the Goods and having carried this out Seller shall have no further liability for the breach of this Condition.
- 3.2 Seller warrants that all instructions, safety warnings and recommendations for use which are set out on the Goods' packaging are correct at the time of manufacture. However, no other samples, illustrations or descriptive material (including particulars of shade and pattern) and no other information, recommendations or suggestions made by Seller or contained in its brochures, advertising material or elsewhere shall form part of the Contract.
- 3.3 Seller may at its discretion from time to time vary the design of the Goods from that advertised without notice to Buyer provided that any such variations do not constitute material alterations to the Goods.

4 Delivery

- 4.1 Delivery shall take place at the premises notified to Seller by Buyer in its order. Time for delivery shall not be of the essence. If Buyer shall cause a delay in delivery Seller shall pass on to Buyer any costs/demurrage charged to it as a result.
- 4.2 In the event of any claim for non-delivery of any Goods Buyer must notify Seller within 3 days of the due date for delivery and in the event of any claim for a defect in the quality or condition of the Goods or their failure to correspond with specification Buyer must notify Seller within 28 days from the date of delivery. In the absence of such notice from Buyer to Seller the Goods shall be deemed to have been delivered and accepted by Buyer complete and in a satisfactory condition. Thereafter, Buyer shall not be entitled to reject the Goods, Seller shall have no liability for any defects or failure, and Buyer shall be bound to pay the price as if the Goods had been delivered in accordance with the Contract.
- 4.3 Where the Goods are to be delivered in instalments, each delivery shall constitute a separate contract. Any failure to deliver an instalment or any claim by Buyer in respect of an instalment will not entitle Buyer to repudiate the whole Contract.
- 4.4 Buyer shall have no right to reject any deliveries of Goods on the grounds of variation of quantity from Buyer's order where such variation is not more than 10% or not less than 10% of the quantity of Goods ordered.
- 4.5 Seller may at its sole discretion accept the return of non faulty Goods by Buyer provided Buyer indemnifies Seller for all costs and charges incurred by Seller in the original delivery of those Goods and their subsequent return.

5 Property and Risk

- 5.1 The risk in the Goods shall pass to Buyer at the point of delivery and, notwithstanding Condition 5.2, Seller shall have no responsibility in respect of the safety of the Goods thereafter. Accordingly Buyer shall insure the Goods against all risks of physical loss/damage for an amount not less than their replacement value.
- 5.2 Notwithstanding delivery, the property in the Goods shall remain in Seller until payment is received by Seller in full for the Goods and for all other amounts invoiced by and due to Seller from Buyer.
- 5.3 Until such time as the property in the Goods passes to Buyer, Buyer shall be entitled to resell or use the Goods in the ordinary course of its business but shall hold the Goods as Seller's fiduciary agent and bailee and shall properly store, protect and insure the Goods, shall keep them separate from all other goods and shall identify them as Seller's property. In addition, Buyer shall not be entitled to pledge, or in any way charge by way of security for any indebtedness, any of the Goods which remain the property of Seller.

6 Price

The price charged shall be that ruling on the date of despatch of the Goods exclusive of VAT and any other government duty or tax applicable.

7 Payment

- 7.1 Payment for the Goods supplied shall be due by the 20th of the month following the month of invoice or before delivery if required. All payments shall be made free and clear without any deduction for, or account of, any set-off or counterclaim.
- 7.2 Time for payment shall be of the essence. If Buyer fails to make any payment on the due date then in addition to Seller's other rights payment for all Goods supplied on any account shall immediately become due and payable and Seller shall be entitled to cancel or suspend the Contract and/or any deliveries and to charge Buyer default interest at the rate of 4% pa over the base rate for the time being of Bank of England. Interest shall accrue daily and be compounded annually.

8 Liability

- 8.1 Buyer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of Seller which is not set out in the Contract. Nothing in this Condition will exclude or limit Seller's liability for fraudulent misrepresentation.
- 8.2 Buyer shall inform Seller of any Default and afford it a reasonable opportunity to correct the Default.
- 8.3 Save in the case of death or personal injury caused by the negligence of Seller or any breach of its obligations implied by Section 12, Sale of Goods Act 1979, and so far as permitted by English law:
(a) Seller shall not be liable for any pure economic loss, loss of profit, loss of business, depletion of goodwill or otherwise, in each case whether direct, indirect or consequential, or any claims (howsoever caused and whether or not foreseeable) which arise out of or in connection with the Contract;
(b) Seller shall not be liable for any breach of warranty to the extent that any defect was caused by Buyer's failure to exercise effective quality control or, to store, use or otherwise handle the Goods as advised; and
(c) Seller's liability for Default shall be limited to 3 times the contract price of the Goods to which the Default relates.

8.4 This Condition 8 does not affect Buyer's statutory rights.

9 Termination or Suspension

- 9.1 Seller shall be entitled to immediately terminate/suspend the Contract:
(a) if Buyer materially or consistently breaches the Contract;
(b) if Buyer undergoes a change of control as defined in section 416 or 840 of ICTA 1988;
(c) if Buyer suffers (or it is reasonably likely it will suffer) an Insolvency Event; or
(d) at anytime subject to at least 7 days notice.
- 9.2 On termination/suspension of the Contract for whatever reason:
(a) all amounts invoiced by Seller to Buyer, whether or not due for payment, shall become due immediately;
(b) Seller's permission for Buyer to sell, convert or process the Goods set out in Condition 5.3 shall terminate immediately; and
(c) Seller may (without prejudice to any of its other rights) recover or resell the Goods and may enter Buyer's premises for that purpose.

10 Packaging

- 10.1 Subject to Condition 10.2, all Packaging remains the property of Seller at all times and Buyer must return them to Seller as soon as possible, ensuring they are empty, correctly labelled, securely closed and externally clean. Buyer shall be liable for all loss of or damage to the Packaging save where this loss or damage occurs prior to delivery or after their return. Any Packaging not returned or not returned in good order and condition within a reasonable period shall be paid for by Buyer at Seller's standard rate operating at the date of issue by Seller to Buyer of a debit note.
- 10.2 In the case of CHEP pallets Buyer may return the pallets directly to CHEP provided it indemnifies Seller for all fees, costs, claims, losses and damages Seller incurs due to any failure or delay by Buyer in returning the pallets to CHEP.

11 General

- 11.1 Any notice under the Contract shall be in writing and, unless delivered to a party personally, shall be left at or sent by prepaid first class post or prepaid recorded delivery or facsimile to the address of the party as notified in writing from time to time (deemed service upon delivery, if posted, 48 hours after posting and if by facsimile 3 hours after having been sent).
- 11.2 The failure or delay by either party to exercise a right or remedy provided by the Contract or by law does not constitute a waiver of that right or remedy or of any other rights and remedies. No single or partial exercise of a right or remedy shall prevent a further exercise of that or any other right or remedy.
- 11.3 If any provision of the Contract is found by any court or competent authority to be invalid, unlawful or unenforceable, that provision shall be deemed not to be a part of the Contract and it shall not affect the enforceability of the rest of the Contract.
- 11.4 The word "including" shall not limit the generality of any preceding words.
- 11.5 Seller shall not be liable for its non-performance of the Contract where this is due to circumstances beyond its reasonable control (such circumstances including industrial action of its own or sub-contractors workforces).
- 11.6 Unless expressly provided in this Contract, no term of it is enforceable under the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.
- 11.7 This Contract is personal to Buyer and Buyer shall not assign any of its rights or benefits under it without Seller's prior written consent.
- 11.8 Seller owns the copyright, trademarks, design right and all other intellectual property rights in the Goods and Buyer agrees that these rights may not be used in any way without Seller's written consent.
- 11.9 The price of the Goods and the commercial terms of the Contract are commercially sensitive and confidential to Seller and Seller requires that they are kept secret for a period of one year from the date of the Contract. Buyer may disclose this information where required to by law, court order, or regulation or act of any governmental authority including the Freedom of Information Act provided (to the extent permissible by law) it has notified Seller in advance and agreed the scope of disclosure with it.
- 11.10 The Contract shall be governed by English Law and Buyer and Seller agree to submit to the exclusive jurisdiction of the English Courts.