

# CellMark Chemicals Division - General Terms and Conditions of Sale in Asia (excluding Japan)

## 1. Definitions and Interpretation

In these Conditions, unless the context otherwise requires, the following definitions shall apply:

**"Buyer"** means the person whose Purchase Order for the Products is accepted by the Seller.

**"Conditions"** means the standard terms and conditions of sale set out in this document and (unless the context otherwise requires) including any special terms and conditions agreed in writing between the Buyer and the Seller in accordance with clause 2.4

**"Contract"** means the agreement between the Buyer and the Seller relating to the sale and purchase of the Products, consisting of the Specification, the Conditions and the Order Confirmation.

**"Default"** means any act, statement, omission, breach of obligation (whether expressed or implied, condition or warranty) contained in, precedent or collateral to the Contract, breach of duty under statute or at common law or negligence by or on the part of the Seller in connection with or arising out of the subject matter of the Contract in respect of which the Seller is legally liable to the Buyer. A number of defaults which together result in or contribute to substantially the same loss or damage shall be treated as one Default occurring on the date of the occurrence of the last such default.

**"Delivery"** means when the Seller has made the Products available to the Buyer at the place or with the carrier agreed upon in accordance with the Incoterms (as defined in the Incoterms in force on the date the Contract is concluded) set out in the Contract and **"Delivered"** and **"Deliver"** shall be construed accordingly.

**"Products"** means the goods (including any instalment of the goods or any parts for them) which the Seller is to supply in accordance with the Conditions.

**"Seller"** means the CellMark entity identified as the seller in the Order Confirmation.

**"Specification"** means the specification for the relevant Product as set out in the "product identification" section of the Seller's TDS.

**"TDS"** the technical data sheet for the relevant Product as provided by the Seller to the Buyer.

## 2. Basis of the sale

2.1 The Buyer may issue to the Seller an enquiry at any time in writing regarding the purchase of specific Products. On the basis of such a request, the Seller may provide an indicative quotation and TDS for the Products. Quotations issued to the Buyer by the Seller:

- (a) are for information only and shall not constitute an offer to the Buyer which is capable of acceptance;
- (b) may be withdrawn or varied at any time; and
- (c) unless otherwise specified, shall be automatically withdrawn after 42 days.

2.2 The Buyer may issue an order (the **"Purchase Order"**) in writing based on the Seller's quotation and TDS. No Purchase Order shall be deemed accepted by the Seller until its authorised representative issues a written confirmation (**"Order Confirmation"**) to the Buyer, at which point a binding Contract shall come into existence. Each Order Confirmation shall contain the price, quantity, payment terms and estimated Delivery date for the Products.

2.3 These Conditions shall govern the Contract to the exclusion of any terms and conditions submitted by the Buyer (including, without limitation, the Buyer's standard terms of purchase). To the extent of any conflict between these Conditions and the provisions of any Order Confirmation, the Order Confirmation shall prevail.

2.4 No variation of these Conditions shall be binding unless agreed in writing between the authorised representative of the Seller and the Buyer.

2.5 Any samples, illustrations or descriptive material shall not form part of the Contract and shall be treated as approximate and for guidance only unless specifically confirmed otherwise in writing, and neither expressly or impliedly shall give rise to sale by sample.

## 3. Purchase Orders and Specifications

3.1 The Buyer shall be responsible to the Seller for ensuring the accuracy of the terms of any Purchase Order (including any applicable Specification) submitted by the Buyer and for giving the Seller any necessary information relating to the Products within a sufficient time to enable the Seller to perform the Contract in accordance with its terms.

3.2 Unless otherwise agreed in writing, the properties of specimens and samples provided by the Seller to the Buyer are non-binding, and the quantity, quality and description of the Products shall be those set out in the Order Confirmation and the Specification.

3.3 Any technical advice or recommendation provided by the Seller to the Buyer as to the storage, application or use of the Products (whether provided verbally or in writing) is given to the best of the Seller's knowledge and shall not relieve the Buyer from undertaking its own investigations and tests.

3.4 Unless otherwise agreed in writing between the Seller and the Buyer, the Buyer shall be responsible for compliance with all laws and regulations regarding import, transport, storage and use of the Products.

3.5 No Purchase Order which has been accepted by the Seller may be cancelled by the Buyer except with the agreement in writing of the Seller and on terms that the Buyer shall indemnify the Seller in full against all loss (including loss of profit) costs (including the costs of all labour and materials used) damages, charges and expenses incurred by the Seller as a result of cancellation.

## 4. Price of the Products

4.1 The price of the Products shall be the price set out in the Order Confirmation.

4.2 The Seller reserves the right by giving notice to the Buyer at any time before Delivery, to increase the price of the Products to reflect any increase in the cost to the Seller which is due to any factor beyond the control of the Seller (such as, without limitation, any significant increase in the costs of labour, materials or other costs of manufacture), any change in Delivery dates, quantities or specifications for Products which is requested by the Buyer, or any delay caused by instructions of the Buyer or failure of the Buyer to give the Seller accurate information or instructions.

4.3 Unless otherwise agreed in writing between the Buyer and the Seller, all prices shall be exclusive of Value Added Tax (**"VAT"**) and the Buyer shall pay VAT in addition to any sum or consideration on receipt of a valid VAT invoice from the Seller.

## 5. Payment Terms and Security

5.1 Unless otherwise agreed in writing between the Buyer and the Seller, the Seller shall be entitled to invoice the Buyer with the price of the Products on or at any time after Delivery of the Products, unless the Products are to be collected by the Buyer or the Buyer wrongfully fails to take Delivery of the Products, in which event the Seller shall be entitled to invoice the Buyer for the price at any time after the Seller has notified the Buyer that the Products are ready for collection or (as the case may be) the Seller has tendered Delivery of the Products.

5.2 Unless the parties have agreed specific payment terms in the Contract, the Buyer shall pay the price of the Products no later than the end of the calendar month next following the date of the invoice relating to the Products. The time of payment shall be of the essence. All payments shall be made in full, in US dollars (unless a specific currency is agreed in the Contract) without deduction in respect of any set-off or counterclaim.

5.3 If the Buyer fails to make any payment on the due date then without prejudice to any other right or remedy available to the Seller, the Seller shall be entitled to:

- (a) cancel the Contract or suspend any further deliveries to the Buyer;
- (b) appropriate any payment made by the Buyer to such of the Products (or the Products supplied under any other contract between the Buyer and the Seller) as the Seller may think fit (notwithstanding any purported appropriation by the Buyer);
- (c) charge the Buyer interest (both before and after any judgment) on the amount unpaid, at the rate of 5% per annum over the annual LIBOR rate (such interest being deemed to accrue from day to day and being compounded on the last day of each calendar month) until payment is made; and
- (d) charge a fixed sum (as agreed in the Contract) in addition to the interest on the amount unpaid.

5.4 The Buyer shall reimburse the Seller for any reasonable costs incurred by the Seller (less any fixed sum charged in accordance with clause 5.3(d)) in recovering any unpaid amounts, including, without limitation, instructing a lawyer or employing a debt collection agency.

## 6. Delivery

6.1 Delivery of the Products shall be made at the location and in accordance with the Incoterms set out in the Order Confirmation.

6.2 The Seller shall endeavour to Deliver the Products by the date quoted for Delivery but such date is not guaranteed nor shall the time for Delivery be of the essence unless previously agreed by the Seller in writing. The date quoted for Delivery shall be extended by a reasonable period if there is any delay caused by industrial dispute or by any cause beyond the reasonable control of the Seller. The Products may be Delivered by the Seller in advance of the quoted Delivery date upon giving reasonable notice to the Buyer.

6.3 Where the Products are to be Delivered in instalments, each Delivery shall constitute a separate contract and failure by the Seller to Deliver any one or more of the instalments in accordance with these Conditions or any claim by the Buyer in respect of any one or more instalments shall not entitle the Buyer to treat the Contract as a whole as repudiated.

6.4 If the Buyer fails to take Delivery of the Products or fails to give the Seller adequate Delivery instructions at the time stated for Delivery (otherwise than by reason of any cause beyond the Buyer's reasonable control or by reason of the Seller's fault) then without prejudice to any other right or remedy available to the Seller, the Seller may:

- (a) store the Products until actual Delivery and charge the Buyer for the reasonable costs (including insurance) of storage; or
- (b) sell the Products at the best price readily obtainable and (after deducting all reasonable storage and selling expenses) account to the Buyer for the excess over the price under the Contract or charge the Buyer for any shortfall below the price under the Contract.

## 7. Risk and Property

7.1 Risk of damage to or loss of the Products shall pass to the Buyer in

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accordance with the specific Incoterms set out in the Order Confirmation.

7.2 Notwithstanding Delivery and the passing of risk in the Products, or any other provision of the Contract, the property in the Products shall not pass to the Buyer until the Seller has received in cash or cleared funds payment in full of the price of the Products and all other Products agreed to be sold by the Seller to the Buyer for which payment is then due.

7.3 Until such time as the property in the Products passes to the Buyer, the Buyer shall:

- (a) hold the Products as the Seller's fiduciary agent and bailee;
- (b) keep the Products separate from those of the Buyer and third parties and properly stored, protected, insured and identified as the Seller's property; and
- (c) be entitled to resell or use the Products in the ordinary course of its business (unless the Seller revokes such entitlement in writing.) On any such sale or use of the Products the Buyer shall sell or use those Products as have been longest in its possession.

7.4 Until such time as the property in the Products passes to the Buyer (and provided that the Products are still in existence and have not been resold) the Seller shall be entitled:

- (a) on 4 days' notice to enter upon any premises where the Products are stored to inspect them; and
- (b) at any time to require the Buyer to deliver up the Products to the Seller and, if the Buyer fails to do so forthwith, to enter upon any premises of the Buyer or any third party where the Products are stored and repossess the Products.

7.5 The Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Products which remain the property of the Seller, but if the Buyer does so, all monies owing by the Buyer to the Seller shall (without prejudice to any other right or remedy of the Seller) forthwith become due and payable.

7.6 The provisions set out in this clause shall be without prejudice to the obligation of the Buyer to purchase the Products.

### 8. Notification of Claims

8.1 The Buyer must conduct appropriate inspection and testing of all Products delivered to confirm the quality and quantity prior to any processing, mixing or use of the Products.

8.2 Any claim which is based on any defect in the quality or condition of the Products or their failure to correspond with the Specification shall (whether or not Delivery is refused by the Buyer) be notified in writing to the Seller within 10 days from the date of Delivery (or attempted Delivery) or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure.

8.3 If Delivery is not refused, and the Buyer does not notify the Seller of any claim in accordance with the provisions of this clause, the Buyer shall not be entitled to reject the Products and the Seller shall have no liability for such defects or failure, and the Buyer shall be bound to pay the price as if the Products had been Delivered in accordance with the Contract.

### 9. Warranties, Liability and Remedies

9.1 The Seller warrants that the Products will correspond (within tolerances specifically stated or established by usage or trade custom) with the Specification, (or with any other specification expressly agreed in writing between the Buyer and the Seller at the time of Delivery) and will be free from defects in material and workmanship, on Delivery and for such period after Delivery (if any) as agreed in writing between the Buyer and Seller and set out in the Order Confirmation.

9.2 The above warranty is given by the Seller subject to the following conditions:

- (a) the Seller shall be under no liability in respect of any defect in the Products arising from any drawing, design or specification supplied by the Buyer;
- (b) the Seller shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, failure to follow the Seller's instructions (whether oral or in writing), misuse or alteration of the Products without the Seller's approval;
- (c) the Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price for the Products has not been paid by the due date for payment;
- (d) the above warranty does not extend to any technical advice or recommendation provided by the Seller to the Buyer as to the storage, application or use of the Products whether provided verbally or in writing; and
- (e) the above warranty does not extend to parts or materials not manufactured by the Seller, 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 the Seller.

9.3 Subject as expressly provided in these Conditions all warranties conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

9.4 Where any valid claim in respect of any of the Products which is based on any defect in the quality or condition of the Products or their failure to meet the Specification is notified to the Seller in accordance with these Conditions, the Seller shall, at its sole discretion, replace the Products (or the part in question) free of charge or refund to the Buyer the price of the Products (or a proportionate part of the price) but the Seller shall have no

further liability to the Buyer.

9.5 All information contained in the TDS, except the Specification, is based on data believed to be reliable but the Seller makes no warranties, express or implied as to its accuracy and assumes no liability arising out of its use. The information contained in the TDS falls within the normal range of the relevant Product properties but should not be used to establish specification limits or used alone as the basis of design.

### Liability and Remedies

9.6 The Buyer acknowledges that it has entered into the Contract in reliance only on the representations, warranties, promises and terms contained or expressly referred to in the Contract and, save as expressly set out in the Contract, the Seller shall have no liability in respect of any other representation, warranty or promise made prior to the date of the Contract unless it was made fraudulently.

9.7 The Buyer shall inform the Seller of any Default and afford it reasonable opportunity to correct the Default.

9.8 In relation to any Default the Seller will accept unlimited liability for:

- (a) death or personal injury caused by the negligence of the Seller; and
- (b) anything else for which the Seller cannot at law limit or exclude its liability.

9.9 Except as provided in sub-clause 9.8, the Seller will not be liable for the following loss or damage arising directly or indirectly out of any Default and even if foreseeable by the Seller:

- (a) economic loss including administrative and overhead costs, loss of profits, business, contracts, revenues, goodwill and production;
- (b) loss arising from any claim made against the Buyer by any other person; or
- (c) loss or damage arising from the Buyer's failure to fulfil its responsibilities or any matter under the control of the Buyer.

9.10 Except for the liabilities accepted by the Seller under sub-clause 9.8 the Seller's entire liability in respect of all Defaults shall be limited to an amount equal to the value of any sums paid by the Buyer under the Contract.

### 10. Force Majeure

The Seller shall not be liable to the Buyer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of the Seller's obligations in relation to the Products, if the delay or failure was due to any cause beyond the Seller's reasonable control. Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond the Seller's reasonable control:

- (a) Act of God, explosion, flood, tempest, fire or accident;
- (b) strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Seller or third parties);
- (c) war or threat of war, sabotage, insurrection, civil disturbance or requisition;
- (d) import or export regulations or embargos;
- (e) difficulties in obtaining raw materials, labour, fuel, parts or machinery; and
- (f) power failure or breakdown in machinery.

### 11. Intellectual Property

11.1 By purchasing Products, the Buyer shall not obtain any rights to any intellectual property in or relating to the Products including, without limitation, any trade marks, copyright, patents or other proprietary or intellectual property rights and, where such intellectual property is capable of registration, whether or not the same is registered.

11.2 The Buyer agrees that the trade marks or brands under which the Products are delivered may not be reproduced or used for any products derived from them or used in any other way except with the prior written consent of the Seller.

11.3 The Seller has not knowingly infringed any intellectual property rights of any third party but does not warrant or give any assurance to the Buyer that any intellectual property in or relating to the Products does not infringe the intellectual property rights of any third party.

### 12. Indemnity

The Buyer shall indemnify and keep the Seller indemnified against all costs, expenses, damages and demands incurred by the Seller in respect of:

- (a) any alleged infringement of the patents, trade marks, copyright, design or other industrial property rights used by the Seller at the request of the Buyer;
- (b) any alleged breach of any statute or regulation concerning the preparation, marketing and distribution of the Products;
- (c) any alleged breach of any statute or regulation relating to trade descriptions or weights and measures where the Seller relies or has relied upon information relating thereto or labels provided by the Buyer, and the breach does not arise from the negligence or Default of the Seller;
- (d) any claims arising and made under the Consumer Protection Act 1987 and which arise by reason of or in connection with a defect in the Products or in the end product manufactured and/or supplied by the Buyer in which the Products are comprised, which defect is attributable either to the compliance by the Seller with the

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instructions given by the Buyer or to the Buyer's design of the end product.

**13. Insolvency of Buyer**

13.1 This clause applies if:

- (a) the Buyer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing or threatening to cease to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction; or
- (b) the Seller reasonably apprehends that any of the events mentioned above is about to occur in relation to the Buyer and notifies the Buyer accordingly.

13.2 If this clause applies then, without prejudice to any other right or remedy available to the Seller, the Seller shall be entitled to cancel the Contract or suspend any further Deliveries under the Contract without liability to the Buyer, and if the Products have been Delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

**14. General**

14.1 Any notice to either party under these Conditions shall be in writing signed by or on behalf of the party giving it and shall, unless delivered to a party personally, be left at or sent by prepaid first class post, prepaid recorded delivery, email, telex or fax to the address of the party as notified in writing from time to time.

14.2 No single or partial exercise, or failure or delay in exercising any right, power or remedy by any party shall constitute a waiver by that party of, or impair or preclude any further exercise of, that or any right, power or remedy arising under the Contract or otherwise.

14.3 To the extent that any provision of these Conditions is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, that provision shall be deemed not to be a part of these Conditions, it shall not affect the enforceability of the remainder of these Conditions nor shall it affect the validity, lawfulness or enforceability of that provision in any other jurisdiction.

14.4 Any reference in these Conditions to any provision of a statute shall be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.

14.5 These Conditions set out the entire agreement and understanding between the parties and supersede all prior agreements, understandings or arrangements (whether oral or written) in respect of the subject matter of these Conditions. Each party acknowledges that it has entered into this Agreement in reliance only on the representations, warranties, promises and terms contained in this Agreement and, save as expressly set out in this Agreement, neither party shall have any liability in respect of any other representation, warranty or promise made prior to the date of this Agreement unless it was made fraudulently.

**14.6 Exclusion of Third Party Rights**

Unless expressly provided in these Conditions, no term of these Conditions are enforceable pursuant to the Contracts (Rights of Third Parties) Act 1999 or any equivalent legislation under the governing law applying to the Contract by any person who is not a party to them.

**15. Governing Law and Jurisdiction**

15.1 These Conditions shall be governed by and construed in accordance with the governing law in the jurisdiction in which the Seller's principal place of business is located. The United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not apply.

15.2 Waiving their right to any other forum, the parties expressly agree that all disputes arising in connection with these Conditions shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by a single arbitrator appointed in accordance with the said Rules. The arbitration shall take place in the country in which the Seller's principal place of business is located and the language of arbitration shall be the official language of such country, except where the Seller elects to bring proceedings in the country where the Buyer is incorporated.

