

# Conditions of Sale



## Interpretation

**Buyer** means the person, firm or company who purchases the Products from Seller.

**Seller** means the company issuing the invoice in respect of the Products.

**Conditions** means these Conditions of Sale.

**Contract** means any contract between Seller and Buyer for the sale and purchase of the Products, incorporating these Conditions.

**Products** means any products, including but not limited to technical services and coating advisory related thereto, agreed in the Contract to be supplied to Buyer by the Seller company (including any part or parts of them).

**Order** means each individual purchase order whether delivered in one or several instalments.

## 1 Basis of the sale

1.1 If anyone or more provisions of these Conditions are found to be contrary to mandatorily applicable law, then such provisions shall be modified to the most limited extent necessary to be found enforceable and such modification shall in no way affect the validity of the other provisions of these "Conditions of Sale".

1.2 Subject to any variation under Article 1.3 the Contract between Seller and Buyer shall be on these Conditions to the exclusion of all other terms and conditions (including any terms or conditions which Buyer purports to apply under any purchase order, confirmation of order, specification or any other document).

1.3 No terms or conditions endorsed on, delivered with or contained in Buyer's purchase order, confirmation of order, specification or other document shall form part of the Contract simply as a result of such document being referred to in the Contract.

1.4 These Conditions apply to all sales made by Seller and any variation to these Conditions and any representations about the Products shall have no effect unless expressly agreed in writing and signed by Seller. 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 these Conditions shall exclude or limit Seller's liability for fraudulent misrepresentation.

1.5 Each order or acceptance of a quotation for Products by Buyer from Seller shall be deemed to be an offer by Buyer to buy Products subject to these Conditions.

1.6 No order placed by Buyer shall be deemed to be accepted by Seller until a written acknowledgement of order is issued by Seller or (if earlier) Seller delivers the Products to Buyer.

1.7 Buyer shall ensure that the terms of its order and any applicable specification are complete and accurate.

1.8 Any quotation is given on the basis that no Contract shall come into existence until Seller despatches an acknowledgement of order to Buyer. Any quotation is valid for a period of 30 days only from its date, provided that Seller has not previously withdrawn it.

## 2 Orders and Specifications

2.1 The quantity and description of the Products shall be as set out in Seller's quotation or its written acknowledgement of Buyer's order.

2.2 All samples, drawings, descriptive matter, specifications and advertising issued by Seller and any descriptions or illustrations contained in Seller's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Products described in them. They shall not form part of the Contract and this is not a sale by sample.

2.3 Seller reserves the right to make any changes in the specification of the Products which are required to comply with any applicable safety or other statutory requirements or, where the Products are to be supplied to Seller's specification, which do not materially affect their quality or performance.

## 3 Cancellation and Cancellation Fee

3.1 Orders that have been accepted by Seller cannot be cancelled by Buyer prior to delivery. However, accepted orders for standard products and colours may be cancelled by written agreement with Seller upon the condition that that Buyer indemnifies Seller by paying a cancellation fee to Seller of 10 -ten- percent of the gross sales value of the cancelled part of the order.

3.2 If Buyer has to accept a cancellation of an order from its own customer, Buyer may prior to delivery proportionally cancel its order(s) for standard products and colours related to that particular customer upon paying a cancellation fee to the Seller of 5 -five- percent of the gross sales value of the cancelled order(s).

3.3 Nothing in this Article 3.1 and 3.2 is intended to be a penalty payment. Any sums set out are intended to cover the costs of storage, handling and resale of ordered products and are genuine pre-estimates of such losses that would be suffered by Seller in the event of cancellation of the Order.

## 4 Returns

4.1 All sales are final and no refund or credit will be offered for Products returned after shipment or dispatch from Seller unless Seller has agreed in writing prior to return and the returns arrive promptly and in good re-sellable condition in Seller's opinion. Prices subject to refund or credit shall be fixed by Seller. Freight and handling fees to be covered by Buyer.

## 5 Price of the Products

5.1 The price of the Products shall be Seller's quoted price or the price agreed upon in writing between Seller and the Buyer.

5.2 Products ordered in addition to the Products specified in the Contract are subject to Seller's regular prices.

5.3 Prices are exclusive of value added tax and all other duties, fees or taxes.

## 6 Terms of Payment

6.1 Unless otherwise agreed in writing, Buyer shall pay the price of the Products, including any applicable value added tax within 30 days of the date of Seller's invoice.

6.2 Unless otherwise agreed in writing, payment for the Products shall be made in USD.

6.3 If Buyer fails to make any payment, in full or in part, on the due date, then, without prejudice to any other right or remedy available to Seller, including those set out in Article 8 and 9 below, Seller shall be entitled to charge the Buyer interest on overdue payments, at the rate of 4 -four- percent above the average bank short-term lending rate to prime borrowers in the State of the currency of payment or such lesser rate permissible by relevant mandatory law until payment is made in full.

6.4 Buyer is responsible for obtaining any licenses or exchange control consents necessary for the importation and use of, as well as payment for the Products ordered, and Buyer shall not be discharged from its contractual obligation toward Seller by any total or partial failure to obtain such license or consent.

## 7 Delivery, delay and failure to take delivery

7.1 Unless otherwise agreed in writing, deliveries are made DAP (Buyer's warehouse or other delivery place specified by Buyer) as defined in accordance with Incoterms 2010. The Products are delivered in Seller's standard packaging including transport packaging as Seller finds necessary.

7.2 Where an Order is to be delivered in instalments, each instalment shall constitute a separate Contract delivery with regard to this Article 7.2 and Article 7.3. Failure by Seller to deliver any instalment in accordance with these Conditions, or any claim by Buyer in respect of any part deliveries shall not affect any other delivery.

7.3 Buyer is only entitled to cancel the Order or an instalment if delivery is delayed by more than 30 -thirty- calendar days from agreed date of delivery. Buyer is only entitled to claim compensation for delay if it is caused by an error or by negligence on behalf of Seller or someone for whom he is responsible, and the Order or instalment is cancelled as a result of the delay. Compensation can only be claimed for documented loss as a result of the delay, and limited to the lesser of 15 -fifteen- percent of the total Order price or the price related to the delayed instalment.

## 8 Retention of title

8.1 The Products are at the risk of the Buyer from the time of delivery according to agreed Incoterm. However, ownership of the Products shall not pass to Buyer until Seller has received in full all sums due to him in respect of: (i) the Products; and (ii) all other sums which are or which become due to Seller from Buyer on any account.

8.2 Until ownership of the Products has passed to Buyer, Buyer shall: (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 Buyer or any third party in such a way that they remain readily identifiable as Seller's property; (iii) not destroy, deface or obscure any identifying mark or packaging on or relating to the Products; and (iv) maintain the Products in satisfactory condition and keep them insured on Seller's behalf for their full price against all risks.

8.3 Buyer's right to possession of the Products shall terminate immediately if: (i) Buyer has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors, or 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 has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of Buyer or notice of intention to appoint an administrator is given by Buyer or its directors or by a qualifying floating charge holder or a resolution is passed or a petition presented to any court for the winding-up of Buyer or for the granting of an administration order in respect of Buyer, or any proceedings are commenced relating to the insolvency or possible insolvency of Buyer; or (ii) Buyer suffers or allows any execution, whether legal or equitable, to be levied on its property or obtained against it, or fails to observe or perform any of its obligations under the Contract or any other contract between Seller and Buyer, or is unable to pay its debts or Buyer ceases to trade; or (iii) Buyer encumbers, pledges or in any other way charges any of the Products.

8.4 Seller shall be entitled to recover payment for the Products notwithstanding that ownership of any of the Products has not passed from Seller.

8.5 Buyer grants 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 Buyer's right to possession has terminated, to recover them.

8.6 On termination of the Contract, howsoever caused, Seller's (but not Buyer's) rights contained in this Article 8 shall remain in effect.

## 9 Security of Payment

9.1 If at any time Buyer: (i) fails to take delivery; or (ii) exceeds its credit limits; or (iii) is overdue with payments; or (iv) suspends its payments to Seller or any other supplier of Buyer; or (v) enter into insolvency as described in Article 8 or (vi) if in Seller's sole and reasonable opinion it appears that Buyer for any reason will have difficulties in collecting its outstanding amounts; then Seller may at its own discretion and without liability or prejudice to its other rights and remedies under the Contract, dispose of the Products in transit and suspend or cancel further deliveries under the Contract or require advance payment or satisfactory security for payment in the form of an on demand guarantee from a first class international bank. The said bank needs to be approved by Seller at Seller's sole discretion.

## 10 Warranties and Liabilities

10.1 Seller warrants that the Products correspond with their specification at the time of delivery according to provisions in this Article 10. **This warranty is given by Seller subject to the following conditions and Seller has no liability;**

**a) in respect of any defect in the Products arising from any drawing, design or specification supplied by Buyer;**

**b) in respect of any defect arising from fair wear and tear, damage, negligence, abnormal working conditions, storage, application and handling failure on Buyer's side, or failure to follow Seller's instructions (whether oral or in writing);**

**c) if the Products are not used in accordance with the specification;**

**d) if the total price for the Products delivered has not been paid by the due date for payment;**

**e) for parts, materials or equipment not manufactured by the Seller, in respect of which Buyer shall only be entitled to the benefit of any such warranty or guarantee as given by the manufacturer to Seller.**

10.2 **Buyer shall examine the Products as upon delivery. Claims from Buyer which is based on any defect in quality, volume, weight or condition of the Products or their failure to correspond with specifications shall be notified to Seller in writing within 14 days from (i) date of delivery or (ii) (where the defect or failure was not apparent on reasonable inspection) the date the defect or failure was or ought to have been discovered. If Buyer fails to notify Seller accordingly, Buyer shall be treated as having waived all claims connected with the matter which should have been notified.**

10.3 No claim, controversy or dispute relating to, arising out of or in connection with the Product may be initiated against Seller unless written notification is received by Seller within twelve -12- months after the delivery.

10.4 Buyer has the burden of proof that the damage, loss or cost is caused by defective Products and is a result of having followed Seller's instructions or any other of the conditions named in this article.

10.5 Where any valid claim is notified to Seller in accordance with these conditions, Seller shall at its sole option and discretion: (i) replace the Products (or the part in question) free of charge, or (ii) repair the Products as appropriate.

## 11 Seller's limitation of liability under the Contract

11.1 Subject to Article 11.2, the following provisions set out the entire financial liability of Seller (including any liability for the acts or omissions of its employees, agents and sub-contractors) to Buyer in respect of: (i) any breach of this Contract; and (ii) any defects related to use or resale by Buyer of any of the Products, or of any product incorporating any of the Products; and (iii) any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

11.2 All warranties, conditions and other terms implied by statute or law are, to the fullest extent permitted by law, excluded from the Contract.

11.3 Nothing in these Conditions excludes or limits the liability of Seller: (i) for death or personal injury caused by Seller's negligence; or (ii) for any matter which it would be illegal or contrary to public policy under applicable law for Seller to exclude or attempt to exclude its liability; or (iii) for fraud or fraudulent misrepresentation; or (iv) for gross negligence or willful misconduct.

11.4 Subject to Article 11.1 and Article 11.2 and proportionality between the value of the Products, Seller's margins and the potential loss or damage that may occur: Seller's total liability in law, contract, equity, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to 115 -one hundred and fifteen- percent of the Contract price of each individual Order. Should an individual Order be performed over a period of time exceeding 12 -twelve- months (counting from first to last physical delivery), Seller's maximum liability (as described in the previous sentence) is further limited to 100 -one hundred- percent of the accumulated invoice value of Products delivered as part of the said individual Order in the 12 -twelve- month period prior to Seller's receiving of Buyer's notification of any defect.

11.5 Seller shall not be liable to Buyer for loss of profit, loss of business and hire, harbour dues, docking fees or depletion of goodwill in each case whether direct, indirect or consequential, or any other claims for consequential or indirect compensation for loss or damage whatsoever and howsoever caused which arise out of or in connection with the Contract.

11.6 **Seller shall not be liable for any damage to property caused by the Products after delivery. Nor shall Seller be liable for damage to goods and property manufactured by Buyer including goods and property belonging to any third party.**

11.7 **The Buyer will indemnify and hold the Seller harmless from and against all third party claims, including but not limited to claims for loss, damage or expenses which may be brought against Seller in so far as the same arise by reason of, caused by or are related to the Products, its application or any repair. This indemnity shall apply to all third party claims of whatever nature and however arising except for claims relating to death or personal injury directly arising due to gross negligence on the part of the Seller.**

11.8 Seller shall take reasonable care when providing any services to Buyer, but for the avoidance of any doubt, any services provided, including but not limited to technical services and coating advisory, to Buyer by Seller will be subject to the provisions of this Article 11.

## 12 Force Majeure

12.1 Neither Seller nor Buyer shall be liable or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of their obligations in relation to the Contract, if the delay or failure (i) was due to any cause beyond its control that (ii) could not reasonably be expected when concluding the Contract and (iii) cannot reasonably be avoided or overcome. Without prejudice to the generality of the foregoing, the following shall always be regarded as causes beyond Seller's or Buyer's reasonable control, Acts of God, explosion, flood, tempest, fire or accident; war or threat of war, sabotage, insurrection, terrorism, civil disturbance or requisition; acts, restrictions, regulations, prohibitions or measures of any kind on the part of any governmental, parliamentary or local authority; import or export regulations or embargoes; strikes, lock-outs or other industrial actions or trade disputes.

## 13 Intellectual Property Rights

13.1 Buyer does not acquire any property rights in any intangible assets such as know-how and ideas including patents, patent applications, drawings, designs, trademarks, internet domain names, software and technical information, as well as any copyright relating thereto, whether registered or not which may have been made available to him or may have been generated as a result of the Contract and Seller or Jotun A/S (as applicable) remains the exclusive owner of any such intellectual property rights relating to the Products.

## 14 Termination

14.1 Either party may terminate a Contract in the event of a material breach by the other party or in the event of the insolvency of the other party as such insolvency is described in Article 8.

## 15 General

15.1 Seller is a member of the Jotun Network of Companies and Seller may perform any of its obligations or exercise any of its rights hereunder by itself or through any other member of the Network provided that any act or omission of any such other member shall be deemed to be the act or omission of Seller only.

15.2 Each right or remedy of Seller and Buyer under the Contract is without prejudice to any other right or remedy, whether under the Contract or otherwise.

15.3 No waiver by Seller or Buyer of any breach of, or any default under, the Contract, including these Conditions, shall be deemed or considered as a waiver of any subsequent breach or default of the same or any other provision and shall in no way affect the other terms of the Contract.

15.4 If any provision of the Contract, including these Conditions is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partially invalid or unenforceable, it shall, to the extent of invalidity or unenforceability be deemed severable and the remaining provisions of the Contract and the remainder of such provision shall continue in full force and effect.

15.5 Buyer's rights and obligations under the Contract may not be assigned or transferred to any third party without the written consent of Seller. Such consent not to be unreasonably withheld.

## 16 Governing law and disputes

Unless otherwise agreed in writing, this Contract shall be governed by and interpreted and enforced in accordance with the laws of the State of New York, U.S.A., excluding any conflict of laws principles that would direct the substantive law of another jurisdiction to apply. Any claim, controversy or dispute relating to, arising out of or in connection with this Contract, including any question regarding its existence or validity, shall be referred to and finally settled by arbitration under the Commercial Arbitration Rules of the American Arbitration Association (the "Rules"), and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The number of arbitrators shall be three. The seat, or legal place, of arbitration shall be New York, New York. The language to be used in the arbitration shall be English. The proceedings and award shall be confidential.

**Without limiting the generality of the foregoing, each of the parties hereto waives any right to a jury trial with respect to any controversy between the parties.**