

# Baker & Finnemore Limited – Terms & Conditions 01 September 2009

## BAKER & FINNEMORE LIMITED

### TERMS AND CONDITIONS OF SALE (“Conditions”)

#### 1. Interpretation

In these Conditions Baker & Finnemore Limited is called “the Company” and any individual, firm, company or other person with whom the Company contracts is called “the Customer”.

#### 2. Application of Terms

- 2.1. No order in pursuance of any quotation or otherwise shall be binding on the Company unless and until such order is accepted by the Company in writing or goods are delivered (if earlier). Any quotation is valid for a period of 30 days only from its date, provided that the Company has not previously withdrawn it.
- 2.2. In the event of the Customer's order, confirmation of order, specification or other document containing conditions at variance with these Conditions, such conditions will be of no effect and these Conditions shall apply to the exclusion of all others to any contract made between the Company and the Customer for the sale and purchase of goods (hereinafter called “the Contract”).
- 2.3. These Conditions apply to all the Company's sales and any variation to these Conditions and any representations about the goods shall have no effect unless expressly agreed in writing and signed on behalf of the Company. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of the Company which is not set out in the Contract. Nothing in this condition shall exclude or limit the Company's liability for fraudulent misrepresentation.

#### 3. Description

- 3.1. The quantity and description of the goods shall be as set out in the Company's quotation or acknowledgement of order.
- 3.2. All samples, drawings, descriptive matter, specifications and advertising issued by the Company and any descriptions or illustrations contained in the Company's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the goods described in them. They shall not form part of the Contract and this is not a sale by sample.

#### 4. Delivery

- 4.1. The time for delivery of goods or completion of work shall date from the receipt by the Company of the final information and drawings to enable the Company to proceed. Any dates specified by the Company for delivery of goods are intended to be an estimate and time for delivery shall not be made of the essence by notice. If no dates are so specified, delivery shall be within a reasonable time.
- 4.2. Subject to the other provisions of these Conditions, the Company will not be liable for any direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and similar loss), costs, damages, charges or expenses caused, directly or indirectly, by any delay in the delivery of the goods (even if caused by the Company's negligence), nor shall any delay entitle the Customer to terminate or rescind the Contract unless such delay exceeds 180 days.
- 4.3. If for any reason the Customer fails to accept delivery of any of the goods when they are ready for delivery, or the Company is unable to deliver the goods on time because the Customer has not provided appropriate instructions, documents, licences or authorisations:
  - 4.3.1. risk in the goods shall pass to the Customer (including for loss or damage caused by the Company's negligence);
  - 4.3.2. goods shall be deemed to have been delivered; and
  - 4.3.3. the Company may store the goods until delivery, whereupon the Customer shall be liable for all related costs and expenses (including, without limitation, storage and insurance).
- 4.4. The Customer shall provide at the delivery point and at its expense adequate and appropriate equipment and manual labour for loading and taking delivery of the goods.
- 4.5. If the Company delivers to the Customer a quantity of goods up to 5% more or less than the quantity accepted by the Company, the Customer shall not be entitled to object to or reject the goods or any of them by reason of the surplus or shortfall and shall pay for such goods at the pro-rata Contract rate.
- 4.6. The Company may deliver the goods by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions of the Contract.
- 4.7. Each instalment shall be a separate Contract and no cancellation or termination of any one Contract relating to an instalment shall entitle the Customer to repudiate or cancel any other Contract or instalment.

#### 5. Non-Delivery

- 5.1. The quantity of any consignment of goods as recorded by the Company on despatch from the Company's place of business shall be conclusive evidence of the quantity received by the Customer on delivery unless the Customer can provide conclusive evidence proving the contrary.
- 5.2. The Company shall not be liable for any non-delivery of goods (even if caused by the Company's negligence) unless the Customer gives written notice to the Company of the non-delivery within 7 days of the date when the goods would in the ordinary course of events have been received.
- 5.3. Any liability of the Company for non-delivery of the goods shall be limited to replacing the goods within a reasonable time or issuing a credit note of the pro-rata Contract rate against any invoice raised for such goods.
- 5.4. In the event of the suspension of the work or delay in delivery caused by the Customer's instructions, or lack of instructions, the Contract price may be increased to cover any extra expense thereby incurred by the Company.

**6. Force Majeure**

- 6.1. If the Company shall be prevented from performing any of its obligations under the Contract by any circumstances whatsoever outside its control (including in particular but without prejudice to the generality of the foregoing provision civil commotions, strikes, labour disputes, war, fire, accidents or defective material) further performance of the Contract shall either be suspended so long as the Company shall be so prevented or, at the Company's option, cancelled in which case the Company shall not be liable for any loss damage or injury of any kind whatsoever whether direct or indirect or consequential to any person or property caused by or arising out of or connected with the said suspension or cancellation of the Contract.

**7. Risk/Title**

- 7.1. Unless otherwise agreed in writing by the Company, delivery of the goods shall take place at the Company's place of business, that is, EXW Ex-Works as defined in the Incoterms of the International Chamber of Commerce, and the goods are at the risk of the Customer from the time of delivery.
- 7.2. Ownership of the goods shall not pass to the Customer until the Company has received in full (in cash or cleared funds) all sums due to it in respect of:
- 7.2.1. the goods; and
- 7.2.2. all other sums which are or which become due to the Company from the Customer on any account.
- 7.3. Until ownership of the goods has passed to the Customer, the Customer shall:
- 7.3.1. hold the goods on a fiduciary basis as the Company's bailee;
- 7.3.2. store the goods (at no cost to the Company) separately from all other goods of the Customer or any third party in such a way that they remain readily identifiable as the Company's property;
- 7.3.3. not destroy, deface or obscure any identifying mark or packaging on or relating to the goods; and
- 7.3.4. maintain the goods in satisfactory condition and keep them insured on the Company's behalf for their full price against all risks to the reasonable satisfaction of the Company. On request, the Customer shall produce the policy of insurance to the Company.
- 7.4. The Customer's right to possession of the goods shall terminate immediately if:
- 7.4.1. the Customer 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 (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 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 the Customer or notice of intention to appoint an administrator is given by the Customer or its directors or by a qualifying floating charge order (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), or a resolution is passed or a petition presented to any Court for the winding-up of the Customer or for the granting of an administration order in respect of the Customer, or any proceedings are commenced relating to the insolvency or possible insolvency of the Customer; or
- 7.4.2. the Customer 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 or perform any of his/its obligations under the Contract or any other Contract between the Company and the Customer, or is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986 or a Customer ceases to trade; or
- 7.4.3. the Customer encumbers or in any way charges any of the goods.
- 7.5. The Company shall be entitled to recover payment for the goods notwithstanding that ownership of any of the goods has not passed from the Company.
- 7.6. The Customer grants the Company, its agents and employees an irrevocable licence at any time to enter any premises where the goods are or may be stored in order to inspect them, or, where the Customer's right to possession has terminated, to recover them.
- 7.7. On termination of the Contract, howsoever caused, the Company's (but not the Customer's) rights contained in this Condition 7 will remain in effect.

## **8. Quality>Returns**

- 8.1. The Company warrants that (subject to the other provisions of these Conditions) on delivery, and for a period of three months from the date of delivery, the goods shall be of satisfactory quality within the meaning of the Sale of Goods Act 1979.
- 8.2. The Company shall not be liable for a breach of the warranty in Condition 8.1 unless:
- 8.2.1. in the case of an alleged defect resulting from damage in transit, the Customer gives written notice of the defect to the Company within 7 days of the date of delivery;
  - 8.2.2. in the case of any other alleged defect, the Customer gives written notice of the defect to the Company within 7 days of the time when the Customer discovers or ought to have discovered the defect and in any event within 6 calendar months from the date of delivery; and
  - 8.2.3. the Company is given a reasonable opportunity after receiving the notice of examining such goods and the Customer (if asked to do so by the Company) returns such goods to the Company's place of business at the Customer's cost for the examination to take place there.
- 8.3. The Company shall not be liable for a breach of the warranty in Condition 8.1 if:
- 8.3.1. the Customer makes any further use of such goods after giving such notice; or
  - 8.3.2. the defect arises because the Customer failed to follow the Company's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the goods or (if there is none) good trade practice; or
  - 8.3.3. the Customer alters or repairs the goods without the written consent of the Company.
- 8.4. Subject to Condition 8.2 and 8.3, if any of the goods do not conform with the warranty in Condition 8.1, the Company will repair or at its option replace free of charge any goods supplied by it and of its own manufacture which are returned to the Company's works by the Customer and will refund any carriage paid.
- 8.5. It is a condition precedent to any obligation of the Company under this condition that the Customer shall duly have paid all sums due and payable by him/it to the Company.
- 8.6. Non-defective and undamaged goods may at the Company's absolute discretion be accepted for return by the Company subject to the following conditions:-
- 8.6.1. the goods must be in good and original condition, in their original packaging and clearly identified with the Company's label and original date stamp;
  - 8.6.2. goods must be returned in multiples of 1,000;
  - 8.6.3. the Company will apply a standard handling charge (which will be supplied upon request) based on the original invoice value; and
  - 8.6.4. return carriage must be paid by the Customer.

## **9. Price and Payment**

- 9.1. Unless otherwise subsequently agreed by the Company in writing, the price of the goods shall be the price set out in the Company's order acknowledgement.
- 9.2. The price shall for the goods shall be exclusive of any value added tax and all costs or charges in relation to packaging, loading, unloading, carriage and insurance, all of which amounts the Customer shall pay in addition when it is due to pay for the goods.
- 9.3. Unless otherwise provided in the Contract payment for goods or for work done shall be net cash before the last day of the month following the month of the date of invoice. For this purpose time for payment shall be of the essence of the Contract. No payment shall be deemed to have been received until the Company has received cash or cleared funds.
- 9.4. All payments payable to the Company under the Contract shall become due immediately on its termination despite any other provision.
- 9.5. The Customer shall make all payments due under the Contract in full without any deduction whether by way of set-off, counter-claim, discount, abatement or otherwise unless the Customer has a valid Court Order requiring an amount equal to such deduction to be paid by the Company to the Customer.
- 9.6. If the Customer fails to pay the Company any sum due pursuant to the Contract, the Company reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998.

## **10. Tooling**

Where tools have to be made especially to produce goods to the Customer's specification, pattern or design or to fulfil the Customer's order the Company reserves the right to make a Tooling Charge. Unless otherwise agreed the tools will remain the absolute property of the Company and may be retained in its possession, items referred to in clause 9.2 shall be added to the Tooling Charge and payment of the Tooling Charge shall be due as stated in Clause 9.3.

## **11. Intellectual Property**

- 11.1. The Company does not accept any liability for any defects in the design of goods and no conditions warranty or representation whether express or implied by statute or otherwise is given that the design of the Company's goods is or that the goods themselves are suitable for any particular purpose or otherwise. Copyright in all designs prepared by the Company remains with the Company at all times and such designs may not be copied or reproduced without the Company's written permission.
- 11.2. Where goods are made to the Customer's own specification, pattern or design the Customer undertakes full responsibility for the suitability and fitness of the specification, pattern or design and undertakes to indemnify the Company against any infringement of any patent, registered design or copyright and any loss, damage or expense which it may incur by reason of any such infringement in any country.

## **12. Limitation of Liability**

- 12.1. Subject to Condition 4, Condition 5 and Condition 8, the following provisions set out the entire financial liability of the Company (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:
- 12.1.1. any breach of these Conditions;
- 12.1.2. any use made or resale by the Customer of any of the goods, or of any product incorporating any of the goods; and
- 12.1.3. any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.
- 12.2. All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by Section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.
- 12.3. Nothing in these Conditions excludes or limits the liability of the Company:
- 12.3.1. for death or personal injury caused by the Company's negligence; or
- 12.3.2. under Section 2(3), Consumer Protection Act 1987; or
- 12.3.3. for any matter for which it would be illegal for the Company to exclude or attempt to exclude its liability; or
- 12.3.4. for fraud or fraudulent misrepresentation.
- 12.4. Subject to Condition 12.2 and Condition 12.3:
- 12.4.1. the Company's total liability in contract, 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 the Contract price; and
- 12.4.2. the Company shall not be liable to the Customer for loss of profit, loss of business, or depletion of goodwill and in each either direct, indirect or consequential, or any claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the Contract.

## **13. General**

- 13.1. These Conditions shall apply mutatis mutandis to any goods supplied or any work done by the Company by way of replacement, rectification or improvement under any of the Conditions.
- 13.2. Each right or remedy of the Company under the Contract is without prejudice to any other right or remedy of the Company whether under the Contract or not.
- 13.3. If any provision of the Contract is found by any Court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions of the Contract and the remainder of such provisions shall continue in full force and effect.
- 13.4. Failure or delay by the Company in enforcing or partially enforcing any provision of the Contract shall not be construed as a waiver of any of its rights under the Contract.
- 13.5. Any waiver by the Company of any breach of, or any default under, any provision of the Contract by the Customer shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of the Contract.
- 13.6. The parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not a party to it.

## **14. Law**

- 14.1. The Contract shall be governed by and construed in accordance with English law. All questions disputes or differences whatsoever arising out of in relation to or in connection with the Contract or any goods supplied or to be supplied or any work done or to be done shall if not settled be referred to the arbitration of a person appointed by the Company and the Customer or in default of mutual agreement as to such appointment shall be referred to the arbitration of a person appointed by the President for the time being of the Institute of Mechanical Engineers and the arbitration shall be subject to the Arbitration Act 1996 or any modification or re-enactment thereof.