

Niche Merchandising Limited – Terms and Conditions of Sale

1. Basis of contract

- 1.1 The terms and conditions set out in this document (**Conditions**) apply to any contract between us for the sale and purchase of any goods ordered by you (**Goods**), to the exclusion of any other terms that you seek to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 1.2 Your order for the Goods (howsoever submitted) (**Order**) constitutes an offer by you to purchase the Goods in accordance with these Conditions. You are responsible for ensuring that the terms of the Order are complete and accurate in all respects.
- 1.3 The Order shall only be deemed to be accepted when we confirm acceptance of the Order in writing (whether by way of delivery note, formal confirmation or otherwise), at which point a contract shall come into existence between us for the purchase of Goods in accordance with these terms and conditions (**Contract**).
- 1.4 You waive any right you might otherwise have to rely on any term endorsed upon, delivered with or contained in any of your documents that is inconsistent with these Conditions.
- 1.5 Any samples, drawings, descriptive matter or advertising produced by us and any descriptions or illustrations contained in any catalogues or brochures are produced for the sole purpose of giving an approximate idea of the Goods referred to in them. They shall not form part of the Contract nor have any contractual force.
- 1.6 A quotation for the Goods given by us shall not constitute an offer capable of acceptance.

2. Delivery

- 2.1 We shall deliver the Goods to the location set out in the Order or such other location as we may agree with you in writing (**Delivery Location**) at any time after we notify you that the Goods are ready.
- 2.2 Delivery is completed on the completion of unloading of the Goods at the Delivery Location.
- 2.3 Any dates quoted for delivery are approximate only, and the date of delivery shall not form part of the contract. In particular, we shall not be liable for any delay in delivery of the Goods that is caused by any event or circumstance beyond our reasonable control (**Force Majeure Event**) or your failure to provide us with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods. Where Goods are to be imported, we require a minimum of 8 weeks' lead time.
- 2.4 If we fail to deliver the Goods, our liability shall be limited to the costs and expenses incurred by you in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. We shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event or your failure to provide us with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

- 2.5 If you fail to take delivery of the Goods within three working days of us notifying you that the Goods are ready, then:
- (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the third working day after the day on which we notified you that the Goods were ready; and
 - (b) we shall store the Goods until delivery takes place, and charge you for all related costs and expenses (including insurance).
- 2.6 If ten working days after the day on which we notified you that the Goods were ready for delivery you have not taken delivery of them, we may resell or otherwise dispose of part or all of the Goods and charge you for any shortfall below the price of the Goods.
- 2.7 If we deliver up to and including 5% more or less than the quantity of Goods ordered you may not reject them, but on receipt of notice from you within 48 hours of delivery that the wrong quantity of Goods was delivered, a pro rata adjustment shall be made to the Order invoice.
- 2.8 We may deliver the Goods by instalments, which shall be invoiced and paid for separately. Any delay in delivery or defect in an instalment shall not entitle you to cancel any other instalment.

3. Quality

- 3.1 We warrant that on delivery the Goods shall:
- (a) conform in all material respects with their description; and
 - (b) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979).
- 3.2 Subject to clause 3.3, if:
- (a) you give notice in writing to us within 48 hours of the Goods being delivered that some or all of the Goods do not comply with the warranty set out in clause 3.1;
 - (b) we are given a reasonable opportunity of examining such Goods; and
 - (c) you (if asked to do so by us) return such Goods to our place of business at your cost or send us photographic evidence of any damage,
- we shall, at our option, replace the defective Goods, or refund the price of the defective Goods in full.
- 3.3 We shall not be liable for the Goods' failure to comply with the warranty set out in clause 3.1 in any of the following events:
- (a) any defects affect less than 5% of the items or packs in a shipment;
 - (b) you make any further use of such Goods after giving notice in accordance with clause 3.2;
 - (c) the defect arises because you failed to follow our oral or written instructions as to the storage and handling of the Goods or (if there are none) good trade practice regarding the same;
 - (d) the defect arises as a result of wilful damage, negligence, or abnormal storage conditions; or

(e) the Goods differ from their description as a result of changes made to ensure they comply with applicable statutory or regulatory requirements.

3.4 Except as provided in this clause 3, we shall have no liability to you in respect of the Goods' failure to comply with the warranty set out in clause 3.1.

3.5 The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 are, to the fullest extent permitted by law, excluded from the Contract.

3.6 These Conditions shall apply to any replacement Goods we supply.

4. Title and risk

4.1 The risk in the Goods shall pass to you on completion of delivery.

4.2 Title to the Goods shall not pass to you until the earlier of:

- (a) we receive payment in full (in cash or cleared funds) for the Goods in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment; and
- (b) you resell the Goods, in which case title to the Goods shall pass to you at the time specified in clause 4.4.

4.3 Until title to the Goods has passed to you, you shall:

- (a) store the Goods separately from all other goods you hold so that they remain readily identifiable as our property;
- (b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
- (c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price from the date of delivery;
- (d) notify us immediately if you become subject to any of the events listed in clause 6.1; and
- (e) give us such information relating to the Goods as we may require from time to time.

4.4 Subject to clause 4.5, you may resell or use the Goods in the ordinary course of your business (but not otherwise) before we receive payment for the Goods. However, if you resell the Goods before that time:

- (a) you do so as principal and not as our agent; and
- (b) title to the Goods shall pass from us to you immediately before the time at which resale by you occurs.

4.5 If before title to the Goods passes to you, you become subject to any of the events listed in clause 6.1, then, without limiting any other right or remedy we may have:

- (a) your right to resell the Goods or use them in the ordinary course of your business ceases immediately; and

- (b) we may at any time:
 - (i) require you to deliver up all Goods in your possession that have not been resold or irrevocably incorporated into another product; and
 - (ii) if you fail to do so promptly, enter any of your premises or of any third party where the Goods are stored in order to recover them.

5. Price and payment

5.1 The price of the Goods shall be the price set out in the Order or otherwise agreed in writing between us.

5.2 We may, by giving notice to you at any time up to 7 days before delivery, increase the price of the Goods to reflect any increase in the cost of the Goods that is due to:

- (a) any factor beyond our control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
- (b) any request by you to change the delivery date(s) or quantities or types of Goods ordered; or
- (c) any delay caused by any of your instructions or failure to give us adequate or accurate information or instructions.

5.3 The price of the Goods:

- (a) excludes amounts in respect of value added tax (**VAT**), which you shall additionally be liable to pay to us at the prevailing rate, subject to the receipt of a valid VAT invoice; and
- (b) (unless agreed otherwise) excludes the costs and charges of packaging, insurance and transport of the Goods, which shall be invoiced to you.

5.4 We may invoice you for the Goods on or at any time after your order.

5.5 You shall pay our invoices as follows, in full and in cleared funds to the bank account nominated in writing by us:

- (a) Where the Goods are to be imported (as notified by us) you shall pay 50% of the invoice amount immediately after your Order and you acknowledge that we shall not process your Order prior to such payment. The balance shall be payable immediately after we notify you that the Goods are due to arrive in the UK in 5 days;
- (b) In all other cases, you shall pay our invoice within 28 days of the date of the invoice.

5.6 If you fail to make any payment due to us under the Contract by the due date for payment, then you shall pay interest on the overdue amount at the rate of 4% per annum above the Bank of England's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. You shall pay the interest together with the overdue amount.

5.7 You shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding (except for any deduction or withholding required by law).

6. Termination

6.1 Without limiting our other rights or remedies, we may terminate this Contract with immediate effect by giving written notice to you if:

- (a) you commit a material breach of any term of the Contract and (if such a breach is remediable) fail to remedy that breach within 28 days of being notified in writing to do so;
- (b) you take any step or action in connection with entering administration, provisional liquidation or any composition or arrangement with your 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 your assets or ceasing 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;
- (c) you suspend, threaten to suspend, cease or threaten to cease to carry on all or a substantial part of your business; or
- (d) your financial position deteriorates to such an extent that in our opinion your capability to adequately fulfil your obligations under the Contract has been placed in jeopardy.

6.2 Without limiting our other rights or remedies, we may suspend provision of the Goods under the Contract or any other contract between us if you become subject to any of the events listed in clause 6.1(a) to clause 6.1(d), or we reasonably believe that you are about to become subject to any of them, or if you fail to pay any amount due under this Contract on the due date for payment.

6.3 Without limiting our other rights or remedies, we may terminate the Contract with immediate effect by giving written notice to you if you fail to pay any amount due under the Contract on the due date for payment.

6.4 On termination of the Contract for any reason you shall immediately pay to us all of our outstanding unpaid invoices and interest.

6.5 Termination of the Contract shall not affect any of the parties' rights and remedies that have accrued as at termination, including the right to claim damages in respect of any breach of this Contract that existed at or before the date of termination.

6.6 Any provision of the Contract that expressly or by implication is intended to come into or continue in force on or after termination shall remain in full force and effect.

7. Limitation of liability

7.1 Nothing in these Conditions shall limit or exclude our liability for:

- (a) death or personal injury caused by our negligence, or the negligence of our employees, agents or subcontractors (as applicable);
- (b) fraud or fraudulent misrepresentation;

- (c) breach of the terms implied by section 12 of the Sale of Goods Act 1979;
- (d) defective products under the Consumer Protection Act 1987; or
- (e) any matter in respect of which it would be unlawful for us to exclude or restrict liability.

7.2 Subject to clause 7.1:

- (a) we shall under no circumstances whatsoever be liable to you, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract; and
- (b) our total liability to you in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the price of the Goods.

8. Force majeure

We shall not be in breach of the Contract nor liable for delay in performing, or failure to perform, any of our obligations under the Contract if such delay or failure result from a Force Majeure Event.

9. General

9.1 Assignment and other dealings.

You may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of your rights or obligations under the Contract without our prior written consent.

9.2 Entire agreement.

- (a) The Contract constitutes the entire agreement between you and us and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between us, whether written or oral, relating to its subject matter.
- (b) You shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Contract. You shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in the Contract.

9.3 **Variation.** No variation of the Contract shall be effective unless it is in writing and agreed by the parties (or their authorised representatives).

9.4 Waiver.

No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

9.5 Severance.

If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Contract.

9.6 Notices.

- (a) Any notice or other communication given to a party under or in connection with the Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, sent by pre-paid first class post or other next working day delivery service, commercial courier, or email.
- (b) A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause (a); if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second working day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by email, one working day after transmission.
- (c) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

9.7 Third party rights.

No one other than a party to the Contract shall have any right to enforce any of its terms.

9.8 Governing law.

The Contract, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, shall be governed by and construed in accordance with the law of England and Wales.

9.9 Jurisdiction.

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with the Contract or its subject matter or formation.

10. Interpretation

- (a) a reference to a statute or statutory provision is a reference to such statute or provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted;

- (b) any phrase introduced by the terms **including, include, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms;
- (c) a reference to **writing** or **written** includes emails; and
- (d) a working day excludes weekends and public holidays in England.