

# AVERY BERKEL A DIVISION OF ITW LIMITED: CONDITIONS OF SALE – UK AND EXPORT

## 1. INTERPRETATION

In these conditions the following expressions shall have the meanings set opposite them.

**Application Software** - means software programs designed by or for us or our Licensor (if any) detailed in the Order Acknowledgement which will run on the Goods or the Plant and which enables the Goods or the Plant to perform a particular function.

**Commissioning** - means the checking, calibration, adjusting and testing of the Goods, as detailed in the Order Acknowledgement.

**Conditions** - means these terms and conditions which together with the Order Acknowledgement and any documents referred to in the Order Acknowledgement constitute the entire contract for the supply of the Goods.

**Contract** - means an accepted order for the supply of the Goods detailed or referred to in the Order Acknowledgement.

**Contract Price** - means the amount stated in the Order Acknowledgement as the Contract Price unless this has been expressly varied by agreement with us and recorded in writing.

**Customer** - means the person, body, or company named in the Order Acknowledgement.

**Deliver and Delivery** - means unless stipulated to the contrary in the Order Acknowledgement available for delivery on a CPT basis to the delivery point stated in the Order Acknowledgement. CPT shall have the meaning specified in Incoterms 2000.

**End User** - means any person, body or entity who ultimately is authorised to use the Goods.

**Goods** - means all that Goods, apparatus, machinery, materials, spare parts and articles (if any), other than Application Software detailed in the Order Acknowledgement to be provided by us pursuant to the Contract.

**Equipment** - means the Goods (if any), the Services (if any) and the Software (if any) supplied by us pursuant to the Contract.

**Installation** - means the placing and if appropriate fixing in position of the Goods, its mechanical connection with the Plant and its connection to the electrical power supply as detailed in the Order Acknowledgement.

**Installation Package** - means collectively delivery (other than CPT), Installation and Commissioning of the Goods. Only that installation Package that is detailed, or referred to, in the Order Acknowledgement will be provided by us pursuant to the Contract.

**Operating Environment** - means a dry, dust free, low humidity environment with moderate and constant temperatures in which the Goods will be operated unless different operating conditions are agreed to by us.

**Operating Software** - means all software or firmware programs, other than Application Software, designed by or for us or by our Licensor which is integral to the Goods and without which the Goods could not function.

**Order Acknowledgement** - means the last document issued (which in the event of any uncertainty shall be determined by reference to the date stated on such document) by us to acknowledge or accept the Customer's order for the Goods or by which we have offered, quoted or tendered to supply the Goods. The Order Acknowledgement is issued, and the Goods will be supplied, upon these Conditions only.

**Plant** - means all machinery, apparatus, materials and articles to be provided by the Customer on the site, and to be used in association or conjunction with the Goods.

**Services** - means the training and other services that will be provided by us, only to the extent full details of which are contained or referred to in the Order Acknowledgement.

**Software** - means collectively Application Software (if any) and Operating Software (if any) to be licensed by us to the Customer pursuant to the Contract.

**Specification** - means the performance and other functions expected of the Goods full details of which are conclusively detailed in or referred to in the Order Acknowledgement.

**We, our and us** - means us, the Company supplying the Goods to the Customer pursuant to the Contract. Our full name and address is: Avery Berkel a Division of ITW Limited, Foundry Lane, Smethwick, West Midlands, B66 2LP.

## 2. FORMATION OF CONTRACT

2.1 Each Contract shall be deemed to incorporate these Conditions. No variation of or addition to these Conditions shall form part of any Contract unless made or specifically accepted by us in writing.

2.2 Save where we have first expressly agreed in writing to the contrary these Conditions shall override and take the place of any other terms and conditions in any document or other communication used by the Customer in concluding any Contract with us.

## 3. VALIDITY AND ACCEPTANCE

Unless previously withdrawn quotations are valid for the period stated therein or if no period is stated, for 30 days from the date of issue. Any order placed in compliance with a quotation is subject to acceptance by the Company through issue of the Order Acknowledgement.

## 4. LIMITS OF CONTRACT

4.1 We are only obliged to supply those Goods and the Installations Package which are specified in the Order Acknowledgement.

4.2 Notwithstanding the above we reserve the right as our detailed design proceeds to make minor changes to the Goods and/or the Installation Package, provided that such changes shall not affect the Contract Price (or the performance of the Goods to conform to the Specification to the extent that one is detailed in the Order Acknowledgement).

4.3 Where we are not the Manufacturer of any part of the Goods we will not be liable in respect of any loss or damage caused by or resulting from any variation for whatever reason in the manufacturer's specifications or technical data of the Goods or any part thereof and will not be responsible for any loss or damage resulting from curtailment or cessation of supply following such variation. We will endeavour to advise the Customer of any such impending variation as soon as we receive notice thereof from the manufacturer. The Customer will accept delivery of the Goods in this varied form as though the variation had been incorporated in and formed part of this Contract.

## 5. SUPPLY OF INFORMATION TO US

The Customer will promptly provide to us all necessary information that we may reasonably require from time to time to permit us to proceed uninterruptedly in performing our obligations under the Contract. In the event that the Delivery of the Goods or the performance of the Installation Package is delayed or the extent of the manufacture of the Goods or

performance of the Installation Package is prolonged by reason of delay in the provision by the Customer of the necessary information or to any change in such information, we shall be at liberty to amend the Contract Price to compensate us for any additional costs, including a reasonable element of profit, that we have reasonably and properly incurred, and to extend the Delivery and/or completion date by a reasonable period.

## 6. SUPPLY OF INFORMATION BY US

All drawings and particulars of all weights, measurements, powers, capacities and other particulars of the Goods produced or submitted by us are approximate only and the descriptions and illustrations contained in our catalogues, price lists, and other advertising matter are intended merely to represent a general idea of such Goods as may be described therein, and none of these shall form part of the Contract.

## 7. INSPECTIONS AND TESTS

7.1 If the Customer requires any specific tests, such tests will, if agreed to by us in writing (such agreement not to be unreasonably withheld), be conducted at our premises, at the Customer's expense.

7.2 If the Customer requires such specific tests to be held in the presence of the Customer or the Customer's representatives, the Customer will be charged for any additional expenses. In the event of any delay by the Customer or the Customer's representatives attending such tests or in carrying out any inspection required by the Customer after 48 hours notice that we are ready, the tests and/or inspection will proceed in the Customer's representatives absence and will be deemed to have been made in the Customer's and/or their representative's presence.

7.3 It will be the Customer's responsibility to ensure that during the period of any tests at the Customer's premises the Plant is working normally the correct Operating Environment exists, and the members of the Customer's staff whose acts or omissions may affect the operation of the Goods exercise all appropriate skill and care.

7.4 For the purpose of Condition 12 (terms of Payment) any tests shall nevertheless be deemed to have been successfully carried out if, due to circumstances within the Customer's control or that of the Customer's or other's contractors:

- The tests are prevented, delayed, interrupted or terminated beyond the time stated in the Order Acknowledgement or when no time is stated within 48 hours of the expiry of the 48 hours notice period, or
- The Goods fail to comply with the tests.

7.5 If the Goods fail to comply with the tests then the tests shall, if required by either party, be repeated at a time to be agreed and in the event that the Customer or its or another's contractor is responsible for such failure then all our reasonable expenses incurred in repeating the tests shall be paid by the Customer.

## 8. PERFORMANCE

8.1 Unless it is expressly guaranteed in the Order Acknowledgement the Customer assumes sole responsibility that any Goods ordered by the Customer are sufficient and suitable for the Customer's purpose and that of any End User.

8.2 We accept no liability for failure to attain any performance figures quoted by us unless these are expressly warranted in writing in the Order Acknowledgement and then subject to any tolerances specified in the Order Acknowledgement. If the performance figures obtained on any test stipulated in the Order

Order Acknowledgement performed upon the Goods or any part are outside any acceptance limits specified therein, the Customer will be entitled to reject the Goods or any non-performing part thereof in accordance with condition

8.3. Before the Customer becomes entitled to reject the Goods we are to be given reasonable time and opportunity to rectify their performance. If the Customer becomes entitled to reject the Goods we will repay the Customer any sum paid by the Customer to us on account of the Contract Price thereof and any sum that may have accrued to the Customer in respect of delay in Delivery pursuant to Condition 9 up to the date of such rejection. Such payment shall be in full satisfaction of our liability arising directly or indirectly from the non performance of the Goods or any part thereof.

## 9. LIABILITY FOR DELAY

9.1 We will use reasonable endeavours to comply with any date quoted for Delivery, or for the performance of any other obligation, but unless specifically described as a fixed date in the Order Acknowledgement, any such date is an estimate only and is calculated from whichever shall be the later of (i) the date of our acceptance of the Customer's offer, or (ii) receipt by us of an official written order to proceed, (iii) receipt of all necessary information and drawings to enable us to perform the Contract, or (iv) receipt of any payment, guarantee or other documentation due under the Contract on the making of the Contract.

9.2 We will use reasonable endeavours to Deliver by any date appearing in the Order Acknowledgement, but will not accept any liability for failure to do so howsoever arising unless the Customer shall have suffered loss thereby and it shall have been expressly agreed in the Order Acknowledgement that liquidated damages would in such event be payable in which case our liability shall be limited to an amount calculated in accordance with Condition 9.3.

9.3 If Delivery is to be undertaken by a fixed date stated as such in the Order Acknowledgement, and we fail to Deliver by that date or by any extended date permitted by this Condition 9, and if as a result the Customer shall have suffered loss, and if it is expressly agreed in the Order Acknowledgement that liquidated damages would in such circumstances be payable then we undertake to pay the Customer for each full week of delay, liquidated damages at the rate of 0.25% up to a maximum of 2.5% of that portion of the Contract Price which referable to such part only of the Goods as cannot in consequence of the delay be used commercially and effectively. Such payment shall be in full satisfaction of our liability arising directly or indirectly from the delay.

## 10. DELIVERY

10.1 Should we incur any extra cost owing to the Customer's delay or refusal to accept Delivery of the Goods or the suspension of work by or upon the Customer's instructions or lack of instructions (which shall include delays arising from the Customer failing suitably to prepare its premises or the site, to receive the Goods, or provide the Operating Environment for the Goods) or interruptions, delays, mistakes or works for which we are not responsible such extra cost (including a reasonable profit element) shall be added to the Contract Price.

10.2 In the event of the Customer returning or failing or refusing to accept Delivery of the Goods or any part thereof in accordance with the Contract we shall be entitled at our option to :

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(a) advise the Customer that the Goods are available for Delivery and invoice the Customer for the Goods or any parts of the Goods then remaining undelivered, and/or,

(b) suspend or cancel that Delivery, and any further Deliveries under the Contract, and/or,

(c) place in a commercial store or place in our own store or warehouse the Goods or any part thereof and take reasonable steps to prevent the Goods' deterioration until the actual Delivery. The Customer shall in such an event be liable to reimburse us all additional cost and expenses of placing the Goods in commercial store.

If the Goods are placed in our own store or warehouse the Customer shall additionally be liable to pay to us prior to us releasing the Goods to the Customer liquidated damages in respect of the cost of storage at the rate of £10.00 per square foot occupied by the Goods (including where appropriate the packing for the Goods) for each week or part thereof. This action is without prejudice to our right at any time to Deliver and or cancel in accordance with the foregoing provisions of this Condition. The powers granted by this provision shall be in addition to and not in substitution for any other obligations for payment or damages for which the Customer may become liable in respect of its failure to take Delivery at the appropriate date. Moreover payment of the Contract Price shall become due when we place in store the Goods pursuant to Condition 10.2(c) as though the Goods had been duly Delivered in accordance with this Contract.

10.3 We may Deliver the Goods by instalments. Payment is to be made separately, in accordance with the payment terms, in respect of each instalment Delivered having regard to the value that each instalment bears in relation to the value of the Goods as a whole.

### 11. LOSS OR DAMAGE IN TRANSIT

When Delivery is stated in the Order Acknowledgement to be other than CPT, we will repair or, at our option, replace free of charge any Goods lost or damaged in transit provided such damage is caused to the Goods before Delivery takes place provided that we are given written notification of such loss or damage within such time as will enable us to comply with the carrier's conditions of carriage as affecting loss or damage in transit or, where Delivery is made by our own transport, within a reasonable time (and in the absence of agreement 14 days) after receipt of the advice note.

### 12. PRICE AND TERMS OF PAYMENT

12.1 The Contract Price is exclusive of value added tax or any similar taxes or tariffs and is exclusive of all levies duties or taxes applicable to the Goods which shall be added the Contract Price.

12.2 Payment of the Contract Price shall be made on or before the date(s) stipulated for payment in the Order Acknowledgement. If no date is so stipulated a minimum of 25% of the Contract Price shall be payable on the date that the order is placed (where the Goods are manufactured specifically for the Customer a greater part payment on order is expected) and the balance of the Contract Price shall be due on notification by us that the Goods are ready for Delivery. We reserve the right to charge the Customer a minimum administration fee of £20.00 in the event payment of the Contract Price is not paid within the date stipulated for payment in the Order Acknowledgement.

12.3 Where payment of the Contract Price or any part thereof has not been made in accordance with the terms set out in the

Order Acknowledgement or these Conditions, then without prejudice to any statutory or common law rights we may have, we reserve the right and the Customer hereby agrees that we may at our option withhold manufacture, supply of the Installation Package or Delivery of the Goods, or any part, until full payment is received in accordance with the terms hereof.

12.4 All sums due from the Customer to us including any payments due at a later date shall become immediately payable if the Customer is in breach of any of its obligations under the Contract including these Conditions.

12.5 Where we agree to give a discount to the Customer we reserve the right to cancel such discount if the Customer breaches any of the terms of the Contract and the Contract Price plus the amount discounted will then become immediately payable.

12.6 Interest shall be payable by the Customer on any amount not paid by the Customer when due in accordance with the terms set out in the Order Acknowledgement or these Conditions at the rate of 6% above the base rate from the time to time of

National Westminster Bank PLC's (calculated on a day to day basis) in respect of the period from the date when such amount shall fall due until receipt by us of the full amount thereof (whether before or after any judgement).

12.7 The Customer shall indemnify us in respect of all legal, administrative and other costs, charges and expenses resulting or arising from any breach by the Customer of these Conditions or any other part of the Contract.

### 13. RETENTION OF TITLE

13.1 Neither legal nor equitable property in any Goods shall pass to the Customer until payment in full for the same has been received by us and until such payment in full has been made the Customer shall hold any Goods as bailee for us. Risk in any Goods shall pass to the Customer upon the passing of title or the Delivery thereof whichever shall occur first. The Customer will keep any Goods supplied by us fully insured in their full replacement value against all risks prudently insured throughout the period between the risk and title therein passing to the Customer.

13.2 Until payment of all sums due to us by the Customer under the Contract the Customer shall store and mark the Goods in such a way that they are clearly seen to be our property.

13.3 If any payment under the Contract is overdue or there is any breach by the Customer of any of the provisions of the Contract we reserve the right and the Customer hereby agrees that we may re-possess the Goods (irrespective of whether they have become a fixture) and thereafter to re-sell the same and for this purpose the Customer hereby grants an irrevocable right and licence to us, our servants and agents to enter upon all or any of the Customer's premises where all or any parts of the Goods are located with or without vehicles during and outside normal business hours and this right shall continue to subsist notwithstanding the termination of the Contract through the happening of any of the events specified in these Conditions or otherwise and without prejudice to any of our accrued rights under the Contract.

13.4 If the Customer sells the Goods before the property in the Goods has passed to the Customer, the Customer will as a separate and severable obligation promptly account to the Company for the proceeds of any such re-sale and until payment

payment of such proceeds to the Company, the Customer will hold the same in a fiduciary capacity keeping the same separate from any other monies.

### 14. SOFTWARE AND CONFIDENTIALITY

14.1 Title to the media on which the Software is recorded will be transferred to the Customer in accordance with Condition 13 but title to the copyright and all other intellectual property rights in all Software, Specifications, drawings and technical descriptions supplied with or in connection with any Contract will remain with us or our Licensor and will not vest in the Customer.

14.2 The Customer acknowledges that the copyright in the Software is and remains our or our Licensor's property and that the Software consists of information proprietary to us or our Licensor and which is confidential Software which is licensed to us will be licensed to the Customer upon our Licensor's software licence details of which will be supplied with the Software. The terms of such Licence forms part of this Contract.

14.3 The Customer shall treat and keep strictly confidential, entirely secret and shall not without our prior consent in writing disclose to or use on behalf of any third party or permit such third party to use or copy any Software, Specifications, drawings, designs or information (whether of a commercial, technical, proprietary or other nature) whether orally or in writing relating to the Goods acquired from us or disclosed to or communicated to the Customer. ("Confidential Information").

14.4 The Customer undertakes to procure that all Confidential information including the Software, is kept safe and to prevent any unauthorised use, loss, theft, destruction, copying or disclosure thereof. The Customer shall arrange for and ensure that all persons using or having access to the Confidential Information, including the Software are made aware of, and bound by and enforce the security arrangements set out in Conditions 14.3 and 14.4.

14.5 Where the Customer has reason to believe that any Confidential Information including the Software has been wrongfully used, disposed of or disclosed to any third party he shall give notice of this fact immediately to and shall co-operate with us in any way we may require.

14.6.1 Upon and subject to the due performance by the Customer of all those obligations imposed on the Customer by the Contract we hereby grant the Customer the non-exclusive right and licence to use the Software in object code form, for its own internal purposes only.

14.6.2 The Customer may copy the Software for back up purposes only but not otherwise and may use the Software only upon the Goods or the Plant.

14.6.3 This licence is non-transferable. The Customer shall have no right to grant sub-licence here under save where and to the extent that such a right is expressly stipulated in the Order Acknowledgement. The Customer may then in such circumstances grant non-exclusive non-transferable sub-licences hereunder upon terms identical (*mutatis mutandis*) to the provisions of the Software Licence appearing at the end of and forming part of these Conditions and shall promptly notify us of the terms thereof. Any such sub-licence shall be co-terminus with this licence. The Customer shall enforce and shall indemnify us and hold us harmless against any breach of any such sub-licence.

14.6.4 Without our prior written agreement the Customer may not modify, copy, amend or adapt (other than configuring where configuring is implicit in the design of the Software) the Software nor reverse compile or do any other thing to produce the source codes of the Software.

14.7 The provisions of this Condition 14 shall continue to apply notwithstanding the termination of the Contract or any part thereof howsoever arising.

### 15. SITE FACILITIES

15.1 To enable our obligations under the Contract to be expeditiously and properly carried out the Customer will provide the following free of charge unless otherwise agreed in writing in the Order Acknowledgement:

Suitable access to and possession of the site, proper foundations (if any) (to drawings supplied by us), a satisfactory Operating Environment for the Goods, all masons, joiners, builders and civil engineering work, suitable guarding and protection for the Goods and the site from time of Delivery, necessary lighting and heating and all other necessary facilities and adequate assistance. Permanent, continuous, clean, safe, secure and suitable electrical supplies for the Goods - this may entail modifying the statutory mains supply: suitable access to the Plant at reasonable times and for reasonable periods and competent operators and attendants for the Plant.

15.2 The Customer will be responsible for ensuring that the Plant is correctly installed and is sufficient and suitable for its purposes and that any minor adjustments that may be requested by us to be made to the Plant are carried out expeditiously before the Goods are Delivered.

15.3 In addition the Customer will at its own expense and where necessary:

install, protect and connect all interconnecting cables, and supply all cabling and wiring, where not indicated otherwise, in accordance with instructions, drawings and wiring diagrams supplied by us.

### 16. INSTALLATION

Installation of Goods in the United Kingdom

16.1 The provisions of Conditions 16 and 20 shall only apply if we undertake, in the Order Acknowledgement, to perform the Installation Package.

16.2 Save where the parties otherwise agree, installation of the Goods will only take place during our ordinary working hours at any location in the UK. We reserve the right to make an extra charge for installations on oilrigs remote mainland and all island locations and outside our ordinary working hours.

16.3 Our installation service will include only those of the following as are indicated in our Order Acknowledgement: delivery (other than CPT), off loading, skilled supervision of installation, provision of manual labour, hire of craneage, hire and cartage of test weights and/or test vehicle, attendance on trading standards officer or Our Verification Officer and payment of verification fees, commissioning, and training of operatives.

Installation of Goods in Overseas Territories

16.4 The installation of Goods in overseas territories will only be performed in accordance with the terms of installation stated in the Order Acknowledgement.

### 17. WARRANTY - GOODS

17.1 We will make good by repair or, at our option, by the supply of a replacement, any defect which under proper use, care and maintenance, appears in the Goods including the

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Operating Software for the period set out in the Warranty Schedule forming part of these Conditions after the Goods have been Delivered to the Customer and which arises solely from our faulty design material or workmanship, provided always that:

(a) the existence of any defective Goods or part thereof has been communicated to us and if we so require, we may attend the site to repair the Goods or at our option request that the defective Goods or the part thereof which is believed to be defective has been returned to us at the Customer's cost immediately upon the Customer becoming aware of any defect covered by the above warranty.

(b) no warranty express or implied will be given by us for any defect caused by design, materials or workmanship furnished by the Customer which has been incorporated into the Goods.

(c) where we have manufactured Goods to the Customer's design, the scope of this warranty is limited to our workmanship.

(d) unless stated on the Order Acknowledgement, no warranty express or implied will be given by us in respect of Goods where the installation, assembly, repair or maintenance is performed by any person other than us, nor where the Operating Environment is not maintained or consumables other than those recommended by us are used.

(e) no warranty express or implied will be given where the Customer has failed to promptly comply with all its obligations to make payment or provide any guarantees or other documents as specified in these Conditions.

17.2 Any Goods or part thereof which are properly returned in accordance with this warranty and has been accepted by us as being defective will be repaired and/or replaced by us free of charge and the repaired or replaced Goods or part will be despatched to the Customer, at our cost.

17.3 Except where the Customer deals with us as a Consumer, our liability under Condition 17.1 is in lieu of and shall be deemed to exclude all warranties and conditions whether express or implied and whether arising by common law statute or otherwise relating to the Goods, in particular but without limitation to the foregoing we shall not be liable for the failure of any of the Goods supplied to be fit for any particular purpose for which they are required, nor for failure in other than a properly maintained Operating Environment. Save as provided in this Condition 17, we shall not be under any liability, whether in contract, tort or otherwise, in respect of defects in the Goods and the Operating Software, damage or loss resulting from such defects or from any work done in connection therewith, or for any injury, other than death or personal injury caused by our negligence as defined in Section 1 of the Unfair Contract Terms Act 1977.

17.4 If the Customer returns any Goods or part thereof to us which we do not accept as defective we reserve the right to charge the Customer an inspection fee.

17.5 We at our discretion may, on being advised by the Customer that a part of the Goods is defective, at our cost, despatch to the Customer a replacement part. In such an event, the Customer shall promptly and, in any event, immediately it is removed from the Goods, return to us the part which is believed to be defective. If we do not accept the part is defective, in addition to the charge that we may make pursuant to Condition 17.4, we may invoice the Customer for the replacement part and the cost of its carriage to the Customer.

### 18. WARRANTY - SOFTWARE

#### 18.1 General Warranty - Software

18.1.1 We warrant that for a period of three months from the date of Delivery to the Customer :

(a) the material of the media upon which the Application Software is recorded is not defective.

(b) the Application Software is properly recorded upon the media.

(c) documentation, where provided by us, contains all the information we deem necessary for proper use and operation of the Application Software, and

(d) the Application Software functions substantially as described in the Specification (if any) attached to the Order Acknowledgement under proper use, care and maintenance.

If the Customer returns Application Software to us which we do not accept as failing to complying with the warranty set out in this Condition 18, we reserve the right to charge the Customer an inspection fee.

18.1.2 Our entire liability arising out of the supply of Application Software which fails to comply with the warranty set out in Condition 18.1 shall be limited to and the Customer's exclusive remedy shall be, the replacement of Application Software recorded upon media provided always that it has been returned to us, carriage prepaid, immediately upon the Customer becoming aware of any defect covered by the warranty set out in Condition 18.1.1.

18.1.3 Our liability under Conditions 18.1.1 and 18.1.2 is in lieu of and shall be deemed to exclude all other warranties and conditions whether express or implied and whether arising by common law statute or otherwise. Subject to Conditions 18.1.1 and 18.1.2, Application Software is provided "as is" without warranty of any kind and we shall not be liable for the failure of any of the Application Software supplied to be fit for any particular purpose for which it is required. Save as provided in this Condition 18.1, we shall not be under any liability, whether in contract, tort or otherwise, in respect of defects in Application Software or for any damage or loss (including any loss of data or corruption to Customer's information) resulting from such defects or from such defects or from any work done in connection therewith or injury, other than death or personal injury caused by our negligence.

18.1.4 We do not warrant that the operation of the Application Software will be uninterrupted or error free.

18.1.5 If for any reason whatsoever the provisions of Condition 18.1 or part thereof is deemed or found to be unenforceable then the corresponding provision of Condition 17 shall apply to the Application Software.

#### 19. EXCLUSION OF WARRANTIES

We shall have no liability under Conditions 17 or 18 in respect of Goods and/or Software which has been altered in any way whatsoever or has been subjected to misuse or unauthorised remedial work, has been improperly installed or connected and where such misuse, alteration, remedial work, installation or connection caused or contributed to the defect.

#### 20. ACCEPTANCE

The Goods and any portion thereof shall be deemed to be accepted 14 days after Delivery, or earlier, when the installation of the Goods have been completed or where Goods have been brought into earlier commercial use. This date shall not be delayed on account of additions, minor omissions or defects which do not materially affect the use of the Goods.

#### 21. LIABILITY

21.1 Subject to the provisions of Conditions 17 and 18, we will indemnify the Customer against direct damage or injury to the Customer's property or person to the extent that this is caused solely and directly by the negligent acts or omissions of ourselves, our sub-contractors or agents whilst performing the Contract, but not otherwise, by making good such damage to property or compensating personal injury.

Provided that:

(a) except where the Customer deals with us as a Consumer, and subject to Condition 21.1 our total liability for damage to the Customer's property (including damage caused by our breach of contract, tort, negligence or breach of statutory duty) shall not exceed the greater of (a) the Contract Price or (b) £100,000, in respect of any claim or series of claims arising out of one incident and £500,000 in the aggregate in respect of all claims whether arising from one incident or more than one incident under this Contract.

(b) we shall not be liable to the Customer for any loss of profit or of contracts or special, consequential or indirect loss, goodwill or other intangible property (including without limitation any loss of or spoiling of data) or, loss or use, or save of aforesaid, for any loss or damage of any kind whatsoever and whether caused by our breach of contract, tort, breach of statutory duty or otherwise howsoever, and subject to 21.1(a) and save where the Customer deals with us as a Consumer, the Customer shall indemnify us against any liability, loss, damage, costs, fees or expenses suffered by us as a result of any claim or action brought by any third party in respect of any damage or injury caused whether direct or indirect as a result of or in connection with the performance or non performance of our obligations under this Contract.

#### 22. PATENTS

We will indemnify the Customer against any claim for infringement of UK or other Letters Patent, Registered Design, Trade Mark or Copyright (published at the date of the Contract) by the use or sale of any Goods manufactured by us and supplied by us to the Customer and against all costs and damages which the Customer may incur in any action for such infringement or for which the Customer may become liable in any such action. Provided always that this indemnity shall not apply to any infringement which is due to our having followed a design or instruction furnished or given by the Customer or to the use of the Goods in a manner or for a purpose or in a country not specified by or disclosed to us, or to any infringement which is due to the use of the Goods in association or combination with any other article or material not supplied or approved of by us. Provided also that this indemnity is conditional on the Customer giving to us the earliest possible notice in writing of any claim being made or action threatened or brought against the Customer and on the Customer permitting us at our own expense to conduct any litigation that may ensue and all negotiations for a settlement of the claim. The Customer on the Customer's part warrants that any design or instruction furnished or given by the Customer shall not be such as will cause us to infringe any Letters Patent, Registered Design, Trade Mark or Copyright in the execution of the Customer's order and agrees to indemnify and hold us harmless against any claim arising therefrom. Our liability under this Condition 22 or otherwise in respect of such infringement shall in no event exceed £1 million.

#### 23. PACKING

Unless otherwise specified in any Order Acknowledgement, packing in accordance with our standard practice is included in the Contract Price Save where specified in the Order Acknowledgement packing cases and packing materials are non returnable.

#### 24. LEGAL CONSTRUCTION

The construction validity and performance of the Contract shall be governed by the laws of England and any claim or dispute arising therefrom shall be subject to the exclusive jurisdiction of and be determined by the English Courts. Nothing in this Condition shall limit our right to take proceedings against the Customer in any other Court of competent jurisdiction.

#### 25. STATUTORY AND OTHER REGULATIONS

If the cost to us of performing our obligations under any Contract shall be increased by reason of the making or amendment, after the date of acceptance of the Customer's order, of any law or of any order, regulation or bye-law having the force of law that shall affect the performance of our obligations under such Contract, the amount of such increase shall be added to the Contract Price.

#### 26. EXTRA COST

Should we incur extra cost owing to variation or suspension of the supply of the Goods by the Customer's instructions or lack of instructions, delays, over time, unusual hours, mistakes, or work, for which we are not responsible, a reasonable sum in respect of such extra cost including a reasonable element in respect of profit shall be added to the Contract Price.

#### 27. TERMINATION OF CONTRACT

27.1 If the Customer shall make default or commit any breach of any of its obligations under this Contract or any licences or if any distress or execution shall be levied upon the Customer's property or assets or if the Customer shall make or offer to make any arrangement or composition with creditors or commits any act of bankruptcy or if any bankruptcy petition shall be presented or made against him or if the Customer shall be limited company and any resolution or petition to wind up the business of such company shall be passed or presented otherwise than for reconstruction or amalgamation or if a receiver or administrative receiver of such company's undertaking property or assets or any part thereof shall be appointed or a petition for an administration order shall be presented the Customer shall be deemed to be in breach of the Contract and any Software licence and we shall have the right forthwith to determine the Contract including any Software licence and upon written notice of such determination being posted by us to the Customer's last known address this Contract and any Software licence shall be deemed to have been determined without prejudice to any claim or right we might otherwise make or exercise. Termination of the Contract and any of the Customer's Software Licences shall not affect the validity of valid granted sub-licences granted to End Users.

#### EFFECT OF TERMINATION

27.2 Upon termination of this Contract or any part thereof for whatever reason the Customer shall return all copies of the Application Software to us, or, if requested by us the Customer shall forthwith destroy them and certify at the hand of a responsible officer that there has been such destruction and deliver the certificate to us.

## AVERY BERKEL A DIVISION OF ITW LIMITED: CONDITIONS OF SALE – UK AND EXPORT

27.3 The parties acknowledge that the termination of this Contract or any part thereof for whatsoever cause shall not release them from any of their obligations under the Contract arising prior to termination or which expressly or by implication become effective or continue to be effective on or after the termination of the Contract including, without prejudice to the generality of the foregoing, the provisions relating to confidentiality set out in Condition 14.

### 28. FORCE MAJEURE

This Contract (including for the avoidance of doubt obligations arising under these Conditions and the documents referred to in these Conditions) may be suspended by us for such period or periods as we in our absolute discretion shall elect (and we shall have the right to cancel after a period or periods of suspension aggregating six months) without liability on our part in the event of us being unable to fulfil or being delayed or interrupted in the fulfilment of any of our obligations under this Contract by reason of accidents, statutes, regulations, orders, restrictions, embargoes, boycotts, prohibitions, recommendations, requisitions or other act of national or local government strikes, lockouts, trade disputes, war, invasion, acts of foreign enemy, hostilities (whether war has been declared or not) civil war, rebellion, inclement or adverse weather conditions, fluctuations or failures of electricity and power supplies and communication line failures, shortages of raw materials or inability to secure materials, labour, transport or licences, suppliers shortages or delays or otherwise such other causes as are beyond our reasonable control and the Customer shall be obliged to pay for that part of the Contract which is actually carried out by us on a pro-rata basis relation to the Contract Price as a whole.

### 29. SET-OFF

The Customer shall not be entitled to withhold payment of any sums after they have become due by reason of any right of set off or counter claim which the Customer may have or alleged or for any reason whatsoever.

### 30. GENERAL

30.1 The Customer shall not, without our prior written consent, assign or sub let any of its rights or duties under the Agreement and shall furnish copies of any such assignments or sub contracts to us. We shall have the right, without prior notice or penalty, and the Customer hereby consents to and shall do all acts and execute all documents necessary to enable us to assign the benefit of and/or by novation or otherwise transfer the obligations arising from the Contract or any part thereof without restriction. We shall give to the Customer notice of any such assignment novation or transfer within 14 days of its occurrence.

30.2 The failure on the part of either party to exercise or enforce any right conferred by the Contract shall not be deemed to be a waiver of any such rights nor to operate so as to bar the exercise or enforcement there at any time thereafter.

30.3 Any notice required to be given under this Contract shall be given in writing and shall be deemed to have been duly given if hand delivered or sent by prepaid post first class or telex or telecopier (facsimile) addressed to the party concerned and its principal place of business or the known address and in the case of a notice sent by prepaid post shall be deemed to be served at the time of actual delivery or 48 hours (if the Customer's address for service is in Europe, and seven (7) days in all other instances) after posting whichever is the earlier. Notices

Notices delivered by telex, facsimile shall be deemed delivered when transmitted. Notices delivered by hand shall be deemed served when delivered.

30.4 In the event that any one or more of the provisions contained in these Conditions shall be invalid illegal or unenforceable in any respect, the validity legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

30.5 The Customer warrants to us that:

- (i) it has the power to engage in the transactions contemplated by any of contained in this Contract.
- (ii) it has full power, authority and legal right to execute and deliver the Contract and to comply with the provisions hereof.
- (iii) the obligations expressed and or assumed constitute valid and binding obligations of the Customer.
- (iv) all acts, conditions and things to be done and performed and to have happened prior to the execution and delivery of the Contract in order to constitute all of the obligations of the Customer hereunder as valid and binding have been done and performed and have happened in due and strict compliance with all applicable laws.

30.6 We may advertise and make known that we are undertaking work for the Customer.

30.7 The Customer warrants and undertakes that during the performance, and for a period of nine (9) months following the completion of the Contract, it will not without our prior written agreement, employ or offer to employ or to introduce to any third party any person employed by us at the time of the making of this Contract and not directly or indirectly to induce any such person to leave our employment as aforesaid.

30.8 The provisions of Incoterms 2000 shall apply to these Conditions save where they are inconsistent with these Conditions.

30.9 Save as otherwise expressly stated, a person who is not a third party to the Contract has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

### 31. HEADINGS

The headings of these Conditions are for convenience only and shall in no way form part thereof.

### SOFTWARE LICENCE

1. The End User is licensed to use the Software for its own internal purposes only and shall not grant sub-licenses of, nor copy or reproduce in any form (other than for back-up purposes) the Software.

### PROPERTY RIGHTS

2. The intellectual property rights (including copyrights in the Software) vests in us or our Licensor.
3. The End User shall not obtain any rights in the Software in particular but without limitation to copyrights.
4. The End User shall ensure that the Software and every copy thereof or part thereof shall carry a prominent copyright notice to be determined by us.
5. The End User shall bring to our attention any authorised use or infringement or suspected infringement by any third person of any copyright or other rights of ours in the

Software and shall at our request take or join with us in taking all such action as we may reasonably request for the purpose of preventing such use or protecting such rights.

### CONFIDENTIALITY

6. The End User acknowledges that the Software is confidential ("Confidential Information"). The End User shall, and shall procure that all its employees shall, preserve the confidentiality of the Confidential Information and in particular shall only authorise access to or disclose Confidential Information to the extent that such access or disclosure is strictly necessary and in accordance with the use thereof permitted under the Licence or in pursuance of and to the extent that there is a statutory obligation to do so. Moreover, the End User shall ensure that all necessary security measures shall be taken to ensure that the Confidential Information is safeguarded from theft, loss and unauthorised use and shall use its best endeavours to obtain and enforce appropriate undertaking to maintain the confidentiality of the Confidential Information from persons having access to it.

### WARRANTY SCHEDULE

1. (i) No warranty period is given for second hand Goods. Thermal print heads or consumable items.  
(ii) A 3 months warranty period is given for spare parts and computers (which terms shall include smart cards, cash registers and EPoS Terminals).  
(iii) No more than the same period of warranty as is given to by other suppliers of factored Goods is passed onto the Customer.  
(iv) Subject to (i), (ii) and (iii) above all other items of Goods receive a 12 month warranty period from the date of their use or an eighteen month warranty period from the date of our invoice whichever is the sooner.
2. Extended guarantees and warranties are available by agreement.
3. The provision of spare parts or replacement Goods during a warranty period shall not extend the warranty period for the Goods into which these are incorporated beyond that stipulated in 1 above.