

# Van den Berk's general terms and conditions for the supply of Goods

The Customer's attention is drawn in particular to the provisions of *clause 10*.

## 1. INTERPRETATION

### 1.1 Definitions:

**Business Day:** a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.

**Calendar Day:** means any day of the year, including public holidays, Saturdays and Sundays.

**Conditions:** the terms and conditions set out in this document as amended from time to time in accordance with clause 12.4.

**Contract:** the contract between the Supplier and the Customer for the sale and purchase of the Goods in accordance with these Conditions.

**Customer:** the person or firm who purchases the Goods from the Supplier and or concludes or intends to conclude an agreement for the sale and the delivery of the Goods.

**Force Majeure Event:** any circumstance not within the Supplier's reasonable control including, without limitation:

- a) acts of God, flood, drought, earthquake or other natural disaster;
- b) epidemic or pandemic;
- c) failure of crops or growth;
- d) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
- e) nuclear, chemical or biological contamination or sonic boom;
- f) any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary licence or consent;
- g) phytosanitary restrictions;
- h) collapse of buildings, fire, explosion or accident;
- i) any labour or trade dispute, strikes, industrial action or lockouts;
- j) non-performance by suppliers or subcontractors; and
- k) interruption or failure of utility service.

**Goods:** the goods (or any part of them) set out in the Order.

**Intellectual Property Rights:** plant variety rights, patents, utility models, rights to inventions, copyright and related rights, moral rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets] and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

**Order:** the Customer's order for the Goods, as set out in the Customer's purchase order form, the Customer's written acceptance of the Supplier's quotation, or overleaf, as the case may be.

**Specification:** any specification for the Goods, including any related plans and drawings, that is agreed in writing by the Customer and the Supplier.

**Supplier:** Van den Berk UK Limited incorporated and registered in England and Wales with company number 11864329 whose registered office is at Unit A, Unex House, Bourges Boulevard, Peterborough, PE1 1NG.

## 1.2 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 faxes and emails.

## 2. APPLICABILITY

- 2.1 These Conditions apply to the Contract and its formation to the exclusion of any other terms that the Customer seeks to impose or incorporate.
- 2.2 These Conditions do not apply to the provision of services by the Supplier.

## 3. OFFER

- 3.1 The Order constitutes an offer by the Customer to purchase the Goods in accordance with these Conditions. The Customer is responsible for ensuring that the terms of the Order and any applicable Specification submitted by the Customer are complete and accurate.
- 3.2 The Order shall only be deemed to be accepted

- (a) when the Supplier issues a written acceptance of the Order (Order Confirmation); or
- (b) where the Supplier has requested the Customer to sign the Order Confirmation when the Customer has signed that Order Confirmation (in which case clause 3.2 (a) does not apply),

at which point the Contract shall come into existence. Such written acceptance of the Order and any subsequent amendments to the Order are only valid when issued by an authorised representative of the Supplier. Any acceptance of the Order is conditional the positive outcome of a credit check on whether the Customer will be capable to adequately fulfil its obligations under the Contract (to be determined at discretion of the Supplier and its credit insurer).

- 3.3 The Customer waives any right it might otherwise have to rely on any term endorsed upon, delivered with or contained in any documents of the Customer that is inconsistent with these Conditions.
- 3.4 Any samples, drawings, descriptive matter or advertising produced by the Supplier and any descriptions or illustrations contained in the Supplier's 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.
- 3.5 A quotation for the Goods given by the Supplier shall not constitute an offer. A quotation shall only be valid for the period indicated on the quotation or in the absence of such period for 30 Calendar days after the date of the quotation and is subject to the proviso of interim sale and growth.
- 3.6 Plant names will be described according to the List of Names of Woody Plants and the List of Names of Perennials issues by Applied Plant Research ("Praktijkonderzoek Plant & Omgeving) in Lisse (The Netherlands), which is part of the European Nurserystock Association's (ENA) European Plant Names Working Group.

#### **4. GOODS**

- 4.1 The Goods are described in the Supplier's Specification.
- 4.2 The Supplier reserves the right to amend the Specification if required by any applicable statutory or regulatory requirements.

#### **5. DELIVERY**

- 5.1 Delivery shall take place Free Carrier, [XXXX] (FCA, Incoterms 2020), unless otherwise agreed in writing.
- 5.2 The following applies where the Customer and Supplier have agreed delivery based on Delivered at Place (DAP, Incoterms 2020):

- (a) **DAP:** the Goods will be transported by the Supplier to the agreed place based on full loads. Unloading will be carried out by the Customer.
- (b) **DAP combination:** if the Supplier assesses the amount of ordered goods as less than a full load, the delivery concerned can only be scheduled as a combination shipment. This means that scheduling the delivery date and time is less flexible and will be determined by the Supplier.

In any event the driver is responsible for reaching the unloading place free from damage. Therefore, the driver will be the person to assess whether the unloading place is accessible. The Customer shall ensure that the place is accessible for the lorry.

- 5.3 Where the Supplier is responsible for the transport of the Goods, delivery will take place through full loads. If the Customer only calls part of the Orders and where this results in a partial load, the Supplier is entitled to charge the additional costs and expenses to the Customer. Orders that are not full load, will be delivered when combination slots are available (to be determined at the Supplier's sole discretion).
- 5.4 The Supplier shall ensure that each delivery of the Goods is accompanied by a CMR consignment note with the relevant information and instructions regarding the delivery of the Goods.
- 5.5 The Supplier shall deliver the Goods to the location set out in the Order Confirmation or such other location as the parties may agree (**Delivery Location**) at any time after the Supplier notifies the Customer that the Goods are ready.
- 5.6 Delivery is completed when the Goods are made at the Customer's disposal for unloading at the Delivery Location and for loading on the Customer's carrier if delivery is at the Supplier's premises. The Customer shall at all times ensure loading and unloading in a safe and competent manner and that delivery can take place at the agreed time and Delivery Location. Where the Customer fails to take delivery at agreed time at the Delivery Location, delivery shall be deemed to have been completed at the agreed time for delivery. The Supplier shall then store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance). If 10 Business Days after the day on which the Customer failed to take delivery, the Customer has not taken delivery of them, the Supplier may resell or otherwise dispose of part or all of the Goods. The Customer then pays the Supplier
  - (a) the cancellation costs that are at least 50% of the invoice amount of the cancelled Order plus VAT; and
  - (b) any other costs and expenses incurred by the Supplier for the supply and delivery of the Goods, including the costs and expenses for preparation, nursery, care and storage and the costs and expenses set out in clause 5.10 (b),

without prejudice to the Supplier's right to compensation for loss of profit and other damages.

- 5.7 The maximum unloading time of a full load will amount to three hours, unless expressly agreed otherwise in writing. The unloading time of partial deliveries will be calculated on the basis of the number of load metres. The Supplier is entitled to charge to the Customer the additional unloading hours/waiting hours at cost price, if the aforesaid unloading time is exceeded or any unloading addresses are added. These extra hours will be charged per start of the hour. The applicable rates are included in the Supplier's transport conditions at [www.vdberk.co.uk](http://www.vdberk.co.uk).
- 5.8 Any dates and hours quoted for delivery are approximate only, and the time of delivery is not of the essence. The Supplier shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide the Supplier with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 5.9 If the Supplier fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. the Supplier 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 the Customer's failure to provide the Supplier with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 5.10 Where the Customer is responsible for arranging the transportation and fails to accept delivery of the Goods within 5 Business Days of the Supplier notifying the Customer that the Goods are ready, then, except where such failure or delay is caused by a Force Majeure Event or the Supplier's failure to comply with its obligations under the Contract:
- (a) delivery of the Goods shall be deemed to have been completed at 9:00 am on the 6th Business Day after the day on which the Supplier notified the Customer that the Goods were ready; and
  - (b) the Supplier shall store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance).
- 5.11 If 10 Business Days after the day on which the Supplier notified the Customer that the Goods were ready for delivery the Customer has not taken delivery of them, the Supplier may resell or otherwise dispose of part or all of the Goods. The Customer then pays the Supplier
- (a) the cancellation costs that are at least 50% of the invoice amount of the cancelled Order plus VAT; and
  - (b) any other costs and expenses incurred by the Supplier for the supply and delivery of the Goods, including the costs and expenses for preparation, nursery, care and storage and the costs and expenses set out in clause 5.10 (b),

without prejudice to the Supplier's right to compensation for loss of profit and other damages.

- 5.12 The Supplier is entitled to replace Goods that are out of stock with similar or comparable items or to supply different sizes. The price for the Goods will be amended accordingly.
- 5.13 The Customer shall inspect the Goods at delivery on the quantity and possible defects that are apparent on normal visual inspection. The Customer shall note any deficiency in the quantity and possible defects of the Goods that are apparent on normal visual inspection on the CMR consignment note accompanying the delivery of the Goods.
- 5.14 The Supplier 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 the Customer to cancel any other instalment.
- 5.15 Where no delivery terms have been agreed and the delivery for the Goods takes place on a call-off basis, the Supplier will be entitled to make autumn deliveries before 15 December and spring deliveries after 1 April of the relevant year.
- 5.16 Goods that are plants with bare roots must be delivered before 15 April, wire root balled trees before 30 April and pot and container plants before 15 May of the relevant year. Any changes must be notified in writing.
- 5.17 The Customer is entitled to have the spring delivery postponed until autumn, provided the Customer pays
- (a) for all additional costs and expenses arising from this postponement ; and
  - (b) the Supplier an advance for at least 50% of the price for the Goods.
- 5.18 The Supplier will charge the Customer for ancillary materials supplied by the Supplier, such as straps, chains, holsters, and will repay the amounts charged provided these materials are returned in good condition to the Supplier by the Customer at the Customer's own expense and risk and within one month after delivery.

## **6. QUALITY**

- 6.1 The Supplier warrants that on delivery the Goods shall:
- (a) conform with the Specification; and
  - (b) be free from material defects in design, material and workmanship.
- 6.2 Subject to clause 6.4, if:
- (a) the Customer gives notice in writing to the Supplier
    - (i) in the case of a defect that is apparent on normal visual inspection, within 5 Business Days of delivery; and

- (ii) in the case of a latent defect, within a reasonable time of the latent defect having become apparent.

that some or all of the Goods do not comply with the warranty set out in clause 6.1 (**Complaint**);

- (b) the notice in this clause 6.2 contains a clear description of the defect;
- (c) the Supplier is given a reasonable opportunity of examining such Goods or of having such goods examined by an expert or independent examination body;
- (d) the Customer (if asked to do so by the Supplier) returns such Goods to the Supplier place of business at the Customer's cost and risk; and
- (e) the Customer has noted - in accordance with clause 5.13 - any deficiency in the quantity and possible defects of the Goods that are apparent on normal visual inspection on the CMR consignment note accompanying the delivery of the Goods,

the Supplier shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full. If the Complaint is declared well-founded by the expert or the independent examination body, the inspection costs will be paid by the Supplier. If the Complaint is declared unfounded the costs will be paid by Customer.

6.3 The Supplier shall not be liable for the Goods' failure to comply with the warranty set out in clause 6.1 in any of the following events:

- (a) the Customer makes any further use of such Goods after giving notice in accordance with clause 6.2;
- (b) after 30 Calendar Days since the Supplier has rejected in writing the existence of the defect following the notice of clause 6.2, unless the Customer has given notice to the Supplier that it objects against such rejection;
- (c) the defect arises because the Customer failed to follow the Supplier's oral or written instructions as to the storage, commissioning, installation, use and maintenance of the Goods or (if there are none) good trade practice regarding the same;
- (d) the defect arises as a result of the Supplier following any drawing, design or Specification supplied by the Customer;
- (e) the Customer alters or repairs such Goods without the written consent of the Supplier;
- (f) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal storage or working conditions; or
- (g) the Goods differ from the Specification as a result of changes made to ensure they comply with applicable statutory or regulatory requirements
- (h) the defect arises as a result of

- (i) plant welfare and productiveness once delivery has been accepted, including pests or diseases (this applies to pests and diseases that are classified as quarantine organisms in certain countries or regions of Europe and any other form of pests and diseases); and
- (ii) the re-growth, flowering or the unsuccessful rooting or growing of the supplied Goods, unless otherwise agreed in writing.

The reason for this is that while the Supplier has taken reasonable care to keep the Goods true to type and disease and pest free and strives to supply Goods of the highest quality in accordance with the relevant British Standards and the National Plant Specification, plants are living organism and open to the environment.

- 6.4 Except as provided in this clause 6, the Customer shall be deemed to have accepted the Goods and the Supplier shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 6.1.
- 6.5 A complaint will not suspend the Customer's obligation to pay for the Goods, unless the Supplier agrees with such suspension.
- 6.6 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.
- 6.7 These Conditions shall apply to any repaired or replacement Goods supplied by the Supplier.
- 6.8 The Customer undertakes to inform its customers or any other relevant third parties on the proper treatment of the delivered Goods and – where applicable – on any dangers attached to the Goods, including toxicity of the Goods and intolerance on intake of the Goods or parts thereof. Subject to clause 10.1 of the Contract, the Customer indemnifies the Supplier for any third party claims arising from a breach of this clause 6.8 and for any costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by the Supplier in connection with any such claim made.

## **7. TITLE AND RISK**

- 7.1 The risk in the Goods shall pass to the Customer on completion of delivery.
- 7.2 Title to the Goods shall not pass to the Customer until the earlier of:
  - (a) the Supplier receives payment in full (in cash or cleared funds) for
    - (i) the Goods the Supplier has supplied to the Customer;
    - (ii) other goods that the Supplier has supplied to the Customer; and

- (iii) any other amounts due, including any interest, costs and damages, as a result of non-performance of the Customer of this Contract or any other contract between the Customer and the Supplier,

in which case title to the Goods shall pass at the time of payment of all such sums; and

- (b) the Customer resells the Goods, in which case title to the Goods shall pass to the Customer at the time specified in *clause 7.4*.

7.3 Until title to the Goods has passed to the Customer, the Customer shall:

- (a) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as the Supplier's 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 the Supplier immediately if it becomes subject to any of the events listed in clause 9.1; and
- (e) give the Supplier such information relating to the Goods as the Supplier may require from time to time.

7.4 Subject to clause 7.5, the Customer may resell or use the Goods in the ordinary course of its business (but not otherwise) before the Supplier receives payment for the Goods. However, if the Customer resells the Goods before that time:

- (a) it does so as principal and not as the Supplier's agent; and
- (b) title to the Goods shall pass from the Supplier to the Customer immediately before the time at which resale by the Customer occurs.

7.5 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 9.1, then, without limiting any other right or remedy the Supplier may have:

- (a) the Customer's right to resell the Goods or use them in the ordinary course of its business ceases immediately; and
- (b) the Supplier may at any time:
  - (i) require the Customer to deliver up all Goods in its possession that have not been resold, or irrevocably incorporated into another product; and
  - (ii) if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

## **8. PRICE AND PAYMENT**

- 8.1 The price of the Goods shall be the price set out in the Supplier's confirmation of the Order.
- 8.2 The Supplier may, by giving notice to the Customer at any time before delivery, increase the price of the Goods to reflect any increase in the cost of the Goods, including any increase due to:
- (a) any factor beyond the Supplier's control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
  - (b) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Specification; or
  - (c) any delay caused by any instructions of the Customer or failure of the Customer to give the Supplier adequate or accurate information or instructions.
- 8.3 The price of the Goods:
- (a) excludes amounts in respect of value added tax (**VAT**) and any other tax, duties, levies on the Goods, which the Customer shall additionally be liable to pay to the Supplier at the prevailing rate, subject to the receipt of a valid VAT invoice;
  - (b) excludes the costs and charges of packaging, insurance, inspection by the Department for Environment, Food & Rural Affairs (DEFRA) and transport of the Goods, which shall be invoiced to the Customer; and
  - (c) are based on Free Carrier,[XXXX] (FCA, Incoterms 2020), unless specifically agreed otherwise in writing.
- 8.4 The Supplier may invoice the Customer for the Goods and any costs and charges on or at any time after the completion of delivery. At any time before or during the Contract the Customer will upon request of the Supplier provide for the Supplier acceptable security for the Customer's obligations, including an advance payment or other form of security for the payment for the Goods and any costs and charges of packaging, insurance and transport of the Goods.
- 8.5 The Customer shall pay the invoice in full and in cleared funds within 30 Calendar Days of the date of the invoice, unless otherwise agreed in writing by the parties. Payment shall be made to the bank account nominated in writing by the Supplier. The date of payment is the value day on which the Supplier receives payment or in the event of a bank transfer the date on which the bank account of the Supplier is credited with the amount. Payment shall not be made to an individual employed by the Supplier, unless this person is expressly authorised to accept the particular payment. Time for payment is of the essence.

- 8.6 If the Customer fails to make any payment due to the Supplier under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 4.0% per annum above Barclays Bank PLC'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. The Customer shall pay the interest together with the overdue amount.
- 8.7 The Customer 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). The Supplier may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it by the Customer against any amount payable by the Supplier to the Customer. Where the Customer makes payment for a specific invoice, the Supplier is entitled to settle such payment with any earlier invoice or sums due, including any incurred costs, accumulated interest and damages.

## **9. TERMINATION AND CANCELLATION**

- 9.1 Without limiting its other rights or remedies, the Supplier may terminate this Contract with immediate effect by giving written notice to the Customer if:
- (a) the Customer commits a material breach of any term of the Contract and (if such a breach is remediable) fails to remedy that breach within 14 days of that party being notified in writing to do so;
  - (b) the Customer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing 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) the Customer suspends, threatens to suspend, ceases or threatens to cease to carry on all or a substantial part of its business;
  - (d) the Customer's financial position deteriorates to such an extent that in the Supplier's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy;
  - (e) the Customer is subject to any change in its legal business form, a change of control within the meaning of section 1124 of the Corporation Tax Act 2010, a change of its directors or a change in its activities.
- 9.2 Without limiting its other rights or remedies, the Supplier may suspend provision of the Goods under the Contract or any other contract between the Customer and the Supplier if the Customer becomes subject to any of the events listed in clause 9.1(a) to clause 9.1(e), or the Supplier reasonably believes that the Customer is about to become

subject to any of them, or if the Customer fails to pay any amount due under this Contract on the due date for payment.

- 9.3 Without limiting its other rights or remedies, the Supplier may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under the Contract on the due date for payment.
- 9.4 On termination of the Contract for any reason the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest.
- 9.5 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.
- 9.6 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.
- 9.7 The Customer is only entitled to cancel an order (whether partly or wholly), if
- (a) the goods have not yet been released to the carrier for transport;
  - (b) the Customer pays
    - (i) the cancellation costs that are at least 50% of the invoice amount of the cancelled Order plus VAT; and
    - (ii) any other costs and expenses incurred by the Supplier for the supply and delivery of the Goods, including the costs and expenses for preparation, nursery, care and storage, without prejudice to the Supplier's right to compensation for loss of profit and other damages.

Explanatory note: the nature of the Supplier's business (tree nursery) means it needs to plan and make investments well in advance of delivery.

## **10. LIMITATION OF LIABILITY**

- 10.1 Nothing in these Conditions shall limit or exclude the Supplier's liability for:
- (a) death or personal injury caused by its negligence, or the negligence of its 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 the Supplier to exclude or restrict liability.
- 10.2 Subject to clause 10.1:

- (a) the Supplier shall under no circumstances whatsoever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, environmental damage, damage or loss arising as a result of or in connection with any of the events set out in clause 6.3, or any indirect or consequential loss arising under or in connection with the Contract;
- (b) the Supplier's total liability to the Customer 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 nett price of the Goods with a maximum of GBP 20,000 per event; and
- (c) The Customer indemnifies the Supplier for any third party claims for which the Supplier is not liable under this Contract and for any costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by the Supplier in connection with any such claim made.

## **11. FORCE MAJEURE**

- 11.1 The Supplier shall not be in breach of this Contract nor liable for delay in performing, or failure to perform, any of its obligations under this Contract if such delay or failure result from a Force Majeure Event.
- 11.2 In the event of a Force Majeure Event the Supplier may
  - (a) suspend the performance of its obligations under this Contract until this event has ended, or
  - (b) terminate this Contract with immediate effect by giving written notice to the Customer,

without being in breach of this Contract, or being liable for delay in performing, or failure to perform any of its obligations under this Contract.
- 11.3 The Customer will pay for the goods where the Supplier has partially fulfilled its obligations under this Contract.
- 11.4 If the period of delay or non-performance as set out in clause 11.1 continues for 4 weeks, the Customer may terminate this Contract by giving reasonable written notice to the Supplier. In that event the Customer shall reimburse the Supplier any costs and expenses incurred by the Supplier for the supply and delivery of the Goods, including the costs and expenses for preparation, nursery, care and storage of the Goods,

## **12. GENERAL**

- 12.1 **Assignment and other dealings.**

- (a) The Supplier may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract.
- (b) The Customer may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights or obligations under the Contract without the prior written consent of the Supplier.

## 12.2 **Intellectual Property Rights.**

- (a) All Intellectual Property Rights of the Supplier in the Goods supplied to the Customer will remain property of the Supplier or the relevant third-party owner(s) (as the case may be).
- (b) Where it is clear from the parties' agreement or the catalogue used by the Supplier, that a variety is grower- or design protected, which is indicated by ® printed following the name of the variety concerned, the Customer undertakes not to infringe the intellectual property rights of this variety.
- (c) The Customer will indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by the Supplier for an infringement of its intellectual property rights or in connection with any claim made against the Supplier for actual or alleged infringement of a third party's intellectual property rights
- (d) the Supplier for any losses, damages, costs (including legal fees) and expenses incurred by the Supplier, or awarded against the Supplier in the event of a third-party claim, as a result of a breach of this clause 12.2.
- (e) To the extent that the Goods are to be manufactured in accordance with a Specification supplied by the Customer, the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by the Supplier in connection with any claim made against the Supplier for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with the Supplier's use of the Specification.
- (f) For the avoidance of doubt, this clause 12.2 shall survive termination of the Contract.

## 12.3 **Entire agreement.**

- (a) This Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

- (b) Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Contract. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.
- 12.4 **Variation.** No variation of this Contract shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
- 12.5 **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.
- 12.6 **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.
- 12.7 **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, fax 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 12.7(a); if sent by pre-paid first class post or other next working day delivery service, at 9:00 am on the second Business 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 fax or email, one Business 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.
- 12.8 **Third party rights.** No one other than a party to this Contract and their permitted assignees shall have any right to enforce any of its terms.
- 12.9 **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.

- 12.10 **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 this Contract or its subject matter or formation.
- 12.11 **Exclusion CISG.** The provisions of the United Nations Convention on the International Sale of Goods (CISG) shall not apply to this Contract.