

# EUROPEAN METAL RECYCLING LIMITED

## TERMS AND CONDITIONS OF SALE

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### 1. INTERPRETATION

**Definitions.** In these Conditions, the following definitions apply:

**Buyer:** the person or firm who purchases Materials from the Company.

**Business Day:** a day other than a Saturday or Sunday or a public or bank holiday in England and Wales.

**Company:** European Metal Recycling Limited (registered in England and Wales with registered number 2954623).

**Conditions:** the terms and conditions set out in this document.

**Contract:** each contract for the sale of Materials by the Company to the Buyer in acceptance of an Order.

**Force Majeure Event:** has the meaning given in Condition 8.

**Materials:** all ferrous or non-ferrous scrap metal or other goods supplied by the Company to the Buyer as set out in an Order.

**Order:** the Buyer's order for Materials whether oral or in writing.

#### **Construction.**

In these Conditions, the following rules apply:

A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

A reference to a party includes its personal representatives, successors or permitted assigns.

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.

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.

A reference to **writing** or **written** includes faxes and e-mails.

### 2. BASIS OF CONTRACT

- Unless otherwise agreed between the Company and the Buyer in writing and expressly stated to the contrary on the face of any Contract, these Conditions apply to each Contract to the exclusion of any other terms and conditions that the Buyer purports to apply under any purchase order, confirmation of order or similar document or which are implied by trade, custom, practice or course of dealing.
- Each Order will be deemed to be an offer by the Buyer to purchase Materials in accordance with these Conditions and a quotation for the sale of Materials given by the Company shall not constitute an offer.
- Each Contract is formed when the Company issues a written acceptance of an Order.
- Acceptance of delivery of Materials will be deemed conclusive evidence of the Buyer's acceptance of these Conditions.
- These Conditions supersede any conditions of sale previously applying to Contracts between the Company and the Buyer.

### 3. DELIVERY

- The Company will use reasonable endeavours to deliver each of the Buyer's Orders for Materials within the time agreed when the Buyer places an Order but the time of delivery is not of the essence. If, despite those endeavours, the Company is unable for any reason to fulfil any delivery on the specified date, the Company will have no liability to the Buyer for any direct, indirect or consequential loss (including pure economic loss, loss of profits, loss of business and the like) howsoever caused by any delay or failure in performance except as set out in this Condition. Any delay in delivery will not entitle the Buyer to cancel an Order unless and until the Buyer has given not less than 30 days' written notice to the Company requesting delivery to be made and the Company has not fulfilled the delivery within that period. If the Buyer cancels an Order in accordance with this Condition 3.1 then: (a) the Company will refund to the Buyer any sums which the Buyer has paid to the Company in respect of the Order which has been cancelled; (b) the Buyer will be under no liability to make payments in respect of the Order which has been cancelled.
- If the Buyer fails to take delivery of any Materials when they are ready for delivery or collection or fails to provide instructions, documents, licences or authorisations required to enable the Materials to be delivered or collected on time, the Materials will be deemed to have been delivered on the due date and if, 10 Business Days after the Company notified the Buyer that the Materials were ready for delivery or collection, the Buyer has not taken or accepted delivery of them, the Company may sell all or part of the Materials at the best price reasonably obtainable in the circumstances and may charge the Buyer for any shortfall below the price under

the relevant Contract.

- The Company may deliver to the Buyer Materials up to 5% more or less than the quantity of Materials ordered, in which event a pro rata adjustment shall be made to the Order invoice.
- The Company may deliver Materials by separate instalments and any delay in delivery or defect in an instalment shall not entitle the Buyer to cancel any other instalment.

### 4. WARRANTY AND EXCLUSION OF LIABILITY

- Unless otherwise agreed in writing, Materials supplied shall comply with the relevant specification (if any) set out in the relevant Contract.
- The Buyer shall inspect Materials immediately upon delivery thereof and any claim in respect of deficient quantity or quality or other defect in the Materials must be notified by the Buyer to the Company by the close of business on the Business Day following the date of delivery and confirmed in writing within three days. If no claim is made within this period, the Buyer shall be deemed to have accepted the Materials and the invoice relating thereto shall be conclusive as to the quality and quantity of the Materials delivered. The Buyer shall permit the Company to inspect the Materials supplied in order to assess whether the Materials are of deficient quality or quantity or whether there is some other defect in the Materials.
- In the case of delivery of Materials by container or by a sealed vehicle, the Buyer shall not be entitled to claim in respect of deficiency in quantity after the seal has been broken. In the case of delivery by a vehicle which does not have a seal, any claim by the Buyer in respect of a deficiency in quantity must be brought before the vehicle has been unloaded.
- On being satisfied that any Materials supplied are deficient in quality or quantity or otherwise, the Company shall (in the absence of agreement to the contrary with the Buyer) at its option either (a) make good by replacement (b) collect the Materials and, if payment has been made, reimburse the cost of the Materials (c) make good any shortfall in quantity, PROVIDED THAT where the Company delivers Materials in instalments, rejection by the Buyer of any instalment shall not entitle the Buyer to terminate the Contract or otherwise vary the parties' obligations in respect of other instalments delivered or to be delivered under such Contract.
- In the event that the Buyer and the Company are unable to agree whether there is any defect or deficiency in quality or quantity of any Materials supplied, the matter in dispute shall be referred by either party for determination by an independent accountant (**Expert**) who shall act as an expert and not as an arbitrator. The Expert's decision shall be final and binding on the Buyer and the Company in the absence of manifest error. Each party shall bear its own costs in relation to the reference to the Expert. The Expert's fees shall be borne by the parties in such proportions as the Expert shall determine.
- Nothing in these conditions shall exclude the liability of the Company for (a) breach of the Company's obligations under section 12 Sale of Goods Act 1979; (b) personal injury or death resulting from the Company's negligence; (c) fraud; or (d) any matter for which it would be illegal for the Company to exclude or to attempt to exclude its liability.
- Subject to Condition 4.6, all warranties, conditions and other terms implied by law (whether by statute, common law or otherwise) are excluded from each Contract.
- Subject to Condition 4.6:  
(a) the Company shall not be liable to the Buyer, whether in contract, tort (including negligence), breach of statutory duty or otherwise, for any loss of profit or indirect or consequential loss arising whether under or in connection with any Contract; (b) the Company's total liability to the Buyer in respect of all other losses arising under or in connection with any Contract, (whether in contract, tort (including negligence), breach of statutory duty, restitution or otherwise) shall not exceed a sum equal to the price of the Materials under the Contract in question.

### 5. TITLE AND RISK

- The risk of damage to or loss of Materials shall pass to the Buyer on completion of delivery or deemed delivery in accordance with Condition 3.2.
- In the event that Materials are to be delivered or collected in more than one consignment, risk in each consignment shall pass separately in accordance with the provisions of Condition 5.1.
- Legal and beneficial ownership of Materials shall not pass to the Buyer until the Company has received payment in full (in cash or cleared funds) for: (a) all sums due to the Company in respect of the Materials; and (b) all other sums which are due to the Company from the Buyer on any account whatsoever.
- Until title to the Materials has passed to the Buyer, the Buyer shall: (a) hold the Materials on a fiduciary basis as the Company's bailee; (b) store the Materials separately (at no cost to the Company) from all other Materials held by the Buyer so that they remain readily identifiable as the Company's property; (c) keep the Materials insured against all risks for their full price from the date of delivery; and (d) give the Company such information relating to the Materials as the Company may require from time to time, but the Buyer may resell or use the Materials in the ordinary course of its business (provided any such sale is at full market value).
- The Buyer's right to possession, use and resale of the Materials shall terminate immediately if, before title to the Materials passes to the Buyer, the Buyer

becomes subject to any of the events listed in Condition 7.3, or the Company reasonably believes that any such event is about to happen and notifies the Buyer accordingly or the Buyer is in material breach of the terms of any Contract.

### 6. PRICE AND PAYMENT

- Unless otherwise stated, prices of Materials are quoted exclusive of value added tax (**VAT**) and/or customs & excise duty. Where VAT is applicable, the Buyer shall, on receipt of a valid VAT invoice from the Company, pay to the Company such additional amounts in respect of VAT as are chargeable on the supply of the Materials.
- If the Buyer has any queries in respect of any invoice it receives, the Buyer shall raise such query within 14 days of receipt of such invoice. In the event that the Buyer does not raise a query in respect of an invoice within such 14 day period, the invoice shall be deemed to be accepted by the Buyer as valid and the Buyer shall be bound to make payment to the Company of the sum set out in the invoice.
- If the Buyer fails to make any payment due to the Company under a Contract by the due date for payment (**due date**), then the Buyer shall pay interest on the overdue amount at the rate of 6% per annum above the base lending rate of HSBC Bank plc from time to time. Such interest shall accrue on a daily basis from the due date until the date of actual payment of the overdue amount, whether before or after judgment. The Buyer shall pay the interest together with the overdue amount.
- The Buyer shall pay all amounts due under a Contract in full without any deduction or withholding for or on account of any counterclaim or any present or future taxes, levies, duties, charges, fees, deductions of any nature except as required by law.
- The Company may at any time, without limiting any other rights or remedies it may have, set off any amount owing to the Company by the Buyer against any amount payable by the Company to the Buyer.

### 7. BUYER'S INSOLVENCY OR BREACH

- If the Buyer fails to pay on time any sum due under any Contract or should the Buyer be in breach of any of its obligations under any Contract or any other agreement between the Buyer and the Company, then the Company shall be entitled (without prejudice to any other claim or right the Company may have) at its sole discretion either (a) suspend performance of such Contract until the default in question is made good (with or without notice to the Buyer); or (b) rescind such Contract by written notice to the Buyer, in which event the Company shall be entitled to exercise the power conferred on it by Condition 5.5 under such Contract.
- If the Buyer becomes subject to any of the events listed in Condition 7.3, or the Company reasonably believes that the Buyer is about to become subject to any of them and notifies the Buyer accordingly, then, without limiting any other right or remedy available to the Company, the Company may cancel or suspend all further deliveries under any Contract without incurring any liability to the Buyer, and all outstanding sums in respect of Materials delivered to the Buyer under any Contract shall become immediately due.
- For the purposes of Condition 7.2, the relevant events are: (a) the Buyer suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or (b) the Buyer commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors; or (c) a creditor or encumbrancer of the Buyer attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days; or (d) an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the Buyer; or (e) a floating charge holder over the assets of the Buyer has become entitled to appoint or has appointed an administrative receiver; or (f) a person becomes entitled to appoint a receiver over the assets of the Buyer or a receiver is appointed over the assets of the Buyer; or (g) any event occurs, or proceeding is taken, with respect to the Buyer in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in Condition 7.3(a) to Condition 7.3(f) (inclusive); or (h) the Buyer suspends, threatens to suspend, ceases or threatens to cease to carry on all or substantially the whole of its business; or (i) the financial position of the Buyer deteriorates to such an extent that in the opinion of the Company the capability of the Buyer adequately to fulfil its obligations under a Contract has been placed in jeopardy.

### 8. FORCE MAJEURE

- The Company shall not be liable for any failure or delay in performing its obligations under any Contract to the extent that such failure or delay is caused by a Force Majeure Event. A **Force Majeure Event** means any event beyond the Company's reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, including strikes, lock-outs or other industrial disputes (whether involving its own workforce or a third party's), failure of energy sources or transport network, acts

of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions, or default of suppliers or subcontractors provided however that market volatility shall not constitute a Force Majeure Event.

### 9. GENERAL

- Assignment and subcontracting.** The Company may assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under a Contract without the prior written consent of the Buyer. The Buyer may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under a Contract without the prior written consent of the Company.
- Notices.**
  - Any notice or other communication given to a party under or in connection with a Contract shall be in writing, addressed to that party at its registered office or its principal place of business or such other address as that party may have specified to the other party in writing in accordance with this Condition, and shall be delivered personally, sent by pre-paid first-class post, recorded delivery, commercial courier or fax.
  - A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in Condition 9.2(a); if sent by pre-paid first-class post or recorded delivery, 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, one Business Day after transmission.
  - The provisions of this Condition shall not apply to the service of any proceedings or other documents in any legal action.
- Severance.**
  - If any court or competent authority finds that any provision of a Contract (or part of any provision) is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of the Contract shall not be affected.
  - If any invalid, unenforceable or illegal provision of a Contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.
- Waiver.** A waiver of any right or remedy under a Contract is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under a Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
- Third party rights.** The Company's employees, agents and subcontractors shall be entitled to enforce Condition 5.5 subject to and in accordance with the Contracts (Rights of Third Parties) Act 1999 but no other person who is not a party to a Contract shall have any rights under or in connection with it.
- Variation.** Any variation to a Contract, including the introduction of any additional terms and conditions, shall only be binding when agreed in writing and signed by the Buyer and the Company.
- Rights not exhaustive.** The Company's rights and remedies set out in these Conditions are in addition to and not exclusive of any rights and remedies provided by law.
- Governing law and jurisdiction.** Each Contract, and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims), shall be governed by, and construed in accordance with, English law, and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of England and Wales.
- Arbitration.** Any dispute arising out of or in connection with a Contract, including any question as to its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules, which rules shall be deemed to be incorporated into each Contract. The number of arbitrators shall be one. The seat or legal place of arbitration shall be London. The language to be used in the arbitration shall be English and the governing law shall be English law.