

AVOCENT INTERNATIONAL LIMITED

TERMS AND CONDITIONS OF SALE

1. General

- 1.1. In these Terms and Conditions, the **Seller** means Avocent International Limited of Avocent House, Shannon Free Zone, Shannon, County Clare and such agents as it may from time to time authorise to act on its behalf, and the **Buyer** means the person, firm or company offering to purchase goods from the Seller.
- 1.2. These Terms and Conditions will apply to all sales, and no variation or purported variation (including in particular any terms and conditions on the Buyer's contract or purchase order form), whether before or after the making of the contract, will have effect unless expressly agreed to in writing by the Seller.
- 1.3. There will be no contract between the Seller and the Buyer until the Buyer's order is accepted in writing by the Seller or accepted by the Seller in such other manner as the Seller may determine from time to time.
- 1.4. THE CONTRACTUAL RIGHTS WHICH THE BUYER ENJOYS BY VIRTUE OF SECTIONS 12, 13, 14 AND 15 OF THE SALE OF GOODS ACT, 1893 (AS AMENDED) ARE IN NO WAY PREJUDICED BY ANYTHING CONTAINED IN THESE TERMS AND CONDITIONS SAVE (IF THE BUYER IS NOT DEALING AS CONSUMER OR IN THE CASE OF AN INTERNATIONAL SALE OF GOODS) TO THE EXTENT PERMITTED BY LAW.
- 1.5. Words and expressions defined in the Sale of Goods Acts, 1893 and 1980 will, when used in these Terms and Conditions, save where the context otherwise requires, bear the same meanings as therein.

2. Transfer of Ownership

- 2.1. Legal ownership (**Property**) in the goods will remain in the Seller until the Seller has received payment in full for all sums due and owing on any account by the Buyer.
- 2.2. If the Buyer sells or otherwise disposes of the goods before payment in full as aforesaid has been made to the Seller, the Buyer will in such case hold all monies received by him from such sale or disposal in trust for the Seller in a separate bank account to be designated exclusively for this purpose and will on request furnish the Seller with the names and addresses of the persons to whom such disposals have been made together with all necessary particulars to enable the Seller to recover any outstanding sums due from such persons.
- 2.3. So long as the Property in the goods remains in the Seller, the Buyer will hold the goods as bailee for the Seller and will store the goods so as to clearly show them to be the property of the Seller, and the Seller will have the right, without prejudice to the obligations of the Buyer to purchase the goods, to retake possession of the goods (and for that purpose to go upon any premises occupied by the Buyer).
- 2.4. Nothing in this condition will confer any right upon the Buyer to return the goods. The Seller may maintain an action for the price notwithstanding that Property in the goods has not vested in the Buyer.

3. Delivery

- 3.1. Any times quoted for delivery are estimates only and the Seller will not be liable for failure to deliver within the time quoted.

- 3.2. The Seller will be entitled to make partial deliveries or deliveries by instalments, and the terms and conditions herein contained will apply to each partial delivery.
- 3.3. Deviations in quantity of the goods (representing not more than 10 per cent by value) from that stated in the contract will not give the Buyer any right to reject the goods or to claim damages, and the Buyer will be obliged to accept and pay at the contract rate for the quantity of the goods delivered.
- 3.4. Notwithstanding condition 3.3, the Seller reserves the right to allocate goods among customers in a commercially fair and reasonable manner in case of shortage, however arising.
- 3.5. Subject always to condition 7.2 below, the Buyer will pay or reimburse the Seller for all delivery charges incurred by the Seller on the terms set out in condition 6 of these Terms and Conditions unless otherwise agreed.
- 3.6. The Seller reserves the right to change specifications of goods at any time and to ship against order units with revised specifications or goods other than those specified in the order, all without notice to Buyer; provided the goods shipped will perform functions of goods specified in the order with no reduction in quality or durability.

4. Risk of Loss or Damage

- 4.1. Notwithstanding that the Property in the goods may not have passed to the Buyer, the goods shall be delivered EXW at Seller's warehouse or other manufacturing facility, and the Buyer will carry all risk of loss of and damage to the goods from the time when the goods are delivered to a common carrier at Seller's warehouse or other manufacturing facility for delivery to Buyer, which event will constitute delivery to the Buyer, and section 32(2) and (3) of the Sale of Goods Act, 1893 will not apply.
- 4.2. From when the risk of loss of and damage to the goods commences to be carried by the Buyer until the Seller is paid in full for the goods, the Buyer will:
 - 4.2.1. indemnify and keep indemnified the Seller against all loss of and damage to the goods and against any reduction in the re-sale value thereof below the price to be paid therefor by the Buyer;
 - 4.2.2. insure and keep insured the goods in an amount at least equal to the price to be paid therefor by the Buyer; and
 - 4.2.3. hold upon trust for the Seller absolutely all proceeds of such insurance.

5. Prices

- 5.1. Unless otherwise agreed in writing, all prices will be as specified in the Seller's price list as published from time to time and will be exclusive of VAT (if any) and any other applicable taxes or duties and of all freight and clearance. Prices apply only to goods scheduled and released for delivery within three (3) months from date of order; otherwise the Seller's standard price in effect on the date of delivery applies
- 5.2. The Seller reserves the right at any time prior to delivery of the goods to adjust the price to take account of any increase in the costs to it of materials, labour and services or of any currency fluctuations which increase the costs to it of goods imported into the Republic of Ireland.
- 5.3. Unless otherwise agreed in writing, the price does not include insurance in transit or cost of delivery to the Buyer's address.
- 5.4. After an order is confirmed Seller may refuse a request to cancel an order of the Buyer in whole or in part, or the Seller may consent on such terms as the Seller will determine, including without limitation, re-billing quantity shipped to price for such quantity in effect at cancellation time, as

well as 20% of value cancelled will be charged to the Buyer as cancellation charge.

6. **Terms of Payment**

- 6.1. Payment will be made in United States Dollars (or such other currency as may be agreed in writing between the parties) within 30 days from the date of the invoice unless otherwise agreed.
- 6.2. The Seller may charge interest on overdue payments calculated on the day-to-day balance at a rate of interest which is the greater of thirteen percent or three percent over the standard overdraft rate charged by the bank of Ireland to private customers for unsecured borrowings. The Buyer will pay to the Seller such interest on demand. The interest may be charged and added to the balance of overdue payments, and thereby compounded, from time to time as the Seller may determine. A statement from the Seller as to the rate of interest applicable under this condition will, in the absence of manifest error, be conclusive.
- 6.3. Nothing in this condition will be taken as limiting the Seller's rights under condition 8.

7. **Remedies for Any Defects Etc.**

- 7.1. Subject to the terms of any Reseller or Distributor Agreement between the Seller and the Buyer, condition 7.2 states the full warranty and extent of liability (if any) of the Seller:
- 7.2. The Seller warrants that the goods when delivered to the Buyer (or its agent or carrier) will be in good working order, free from defects in materials and workmanship, and subject to condition 3.6, will conform substantially to the specifications of the Seller for the goods.

If after installation of the goods at the premises of an end user, there are any such affects or the goods do not conform as aforesaid, the Seller will, at its sole option, either replace the goods or restore the goods to good working order in substantial conformance with such specifications, and the Seller will pay one half of the reasonable round trip cost of shipping goods to the Seller for repair or replacement provided that:-

- 7.2.1. the Buyer fully and satisfactorily documents to the Seller's satisfaction the trail of the goods from the Buyer to such end user including the location of the installation;
- 7.2.2. the goods were despatched to the Buyer not more than twenty four months previously;
- 7.2.3. the goods have not been affected by misuse, neglect, accident, improper storage, installation or handling or, subject always to condition 7.3 below, by repair or alteration not effected by the Seller; and
- 7.2.4. the identification plate has not been removed or affected and the warranty registration card is not filed with the Seller.

The Seller's liability under this provision will be limited to two years from the date of receipt of the goods by the Buyer.

- 7.3. If the Buyer participates in the Seller training and meets reasonable qualification requirements to provide repairs to goods, then, upon receiving written authorisation from the Seller in specific circumstances, the Buyer will have the right to provide a repair service under the warranty contained in condition 7.2 after identifying the defect. The Seller agrees to reimburse the Buyer for its reasonable costs of repair and / or replacement of defective goods. The Buyer will maintain a reasonable stock of backup or spare parts for the purposes of the service and, at its own expense, will replenish this stock from time to time.
- 7.4. THE SELLER HEREBY DISCLAIMS AND EXCLUDES ANY REPRESENTATIONS OR WARRANTIES THAT THE GOODS ARE COMPATIBLE WITH ANY COMBINATION OF GOODS NOT FURNISHED BY THE SELLER, OR WITH ANY COMBINATION OF GOODS FURNISHED BUT NOT MANUFACTURED BY THE SELLER, WHICH THE BUYER OR ANY PURCHASER OR END USER MAY CHOOSE TO CONNECT TO THE GOOD EXCEPT THOSE EXPRESSLY

APPROVED IN WRITING BY THE SELLER.

- 7.5. The foregoing limited two year warranty is not applicable to sales of prototype models or to models custom-designed to the needs of the particular customer, and with respect to the sale of such items, all warranties, express or implied including but not limited to, implied warranties or merchantability and of fitness, are disclaimed.
- 7.6. The Buyer may assign to its customers the warranty and warranty remedies granted hereunder by the Seller; however, the Seller will not be responsible for any warranties or warranty remedies granted by the Buyer to any customer of the Buyer to the extent that any such third party warranties are more extensive than those granted by the Seller to the Buyer.
- 7.7. Notwithstanding condition 7.2, the Seller's maximum liability for any claim, whether in contract, tort (including negligence) or otherwise, for any loss or damage arising out of or in connection with or resulting from the manufacture, sale, delivery, re-sale, replacement or use of any of the goods will in no case exceed the price paid by the Buyer to the Seller for the goods which give rise to the claim. In no event will the Seller be liable for any loss of profits or special or consequential damages suffered by the Buyer including unfair charges. The parties expressly agree that this is fair and reasonable having regard to the agreement between the parties and the goods being transferred. Nothing contained in this paragraph will by implication create any liability or obligation on the part of the Seller, or effect or diminish any disclaimer or liability elsewhere contained herein.
- 7.8. The Buyer will not reject any goods or cancel or purport to cancel the contract or any part of it because of an alleged default unless and until the Seller has failed to correct such alleged default within thirty days of written notice specifying the default.
- 7.9. Except as expressly stated above, all other warranties, conditions, terms, undertakings, obligations and representations, expressed or implied (including, without limitation, warranties, conditions, terms, undertakings, obligations and representations implied by statute, common law, trade usage, course of dealing or otherwise, are hereby excluded of the fullest extent permitted by law. Nothing in this condition 7 will be taken as in any way limiting or extending liability which the Seller may have to the Buyer under Section 2 of the Liability for Defective Products Act, 1991.

8. **Default By Buyer**

- 8.1. If the Buyer:
 - 8.1.1. fails to comply with any term of the contract (including stipulations as to payment);
 - 8.1.2. commits an act of bankruptcy, makes an arrangement or composition with creditors or if it suffers or takes any similar action in consequence of debt;
 - 8.1.3. resolves or is ordered to be wound up or has a receiver or an examiner appointedthen, in any such event, the Seller will have the right (without prejudice to any other remedies) to cancel any uncompleted order and withhold or suspend delivery of further goods, and to demand payment forthwith of all sums due by the Buyer to the Seller.
- 8.2. In the event the Seller stops goods in transit because of the Buyer's financial condition, the Seller may at its option resell such goods at public or private sale without notice to the Buyer and without affecting the Seller's rights to hold the Buyer liable for any loss or damage caused by breach of contract by the Buyer.

9. **Proprietary Rights**

Any design, features and/or implementation, including, but not limited to microprocessor or computer software included in the good sold by the Seller are, and will remain post sale, the proprietary property of the Seller. The sale of goods confers on the Buyer only a non-exclusive licence to use the same name, and not a license to copy the proprietary property of the Seller.

The Buyer acknowledges that the Seller owns all patents, trademarks, inventions, registered designs, copyrights, confidential information, know-how and trade secrets relating to the design, manufacture, operation or service of the goods, whether the same are licensed to or owned by the Seller or by any other company associated with the Seller.

10. **Supplemental Terms**

The Seller may apply terms supplementary to these Terms and Conditions in the form of Value Added Reseller Agreements or otherwise, which may make provision for discounts or rebates of different amounts on the price of goods sold.

11. **Force Majeure**

The Seller will not be under any liability of whatever kind for non-performance in whole or in part of its obligations under the contract due to causes beyond the control of the Seller or beyond the control of the Seller's suppliers including, but not limited to, war (whether an actual declaration thereof is made or not), terrorism, sabotage, insurrection, riot or other act of civil disobedience, acts of the Buyer or a third party, failure or delay in transportation, acts of any Government or any agency or sub-division thereof, Government regulations, judicial actions, labour disputes, strikes, embargoes, illness, accident, fire, explosion, flood, tempest or other acts of God, delay in delivery to the Seller or the Seller's suppliers or shortage of labour, fuel, raw materials or machinery, power or technical failure. In any such event, the Seller may, without liability, cancel or vary the terms of contract including, but not limited to, extending the time for performing the contract for a period at least equal to the time lost by reason of such causes.

12. **Assignment**

Subject to condition 7.6 above, the Buyer will not assign or transfer or purport to assign or transfer to any other person the contract or the benefit thereof or the benefit of any condition, warranty or guarantee or other term or condition (express or implied) forming part thereof or relating to the goods. A waiver by the Seller of any of the foregoing conditions will not constitute a general waiver of such conditions.

13. **Headings**

The headings of these Terms and Conditions are for convenience only and will have no effect on the interpretation thereof.

14. **Severability**

All the terms of and provisions of these Terms and Conditions are distinct and severable and if any term or provision is held unenforceable illegal or void in whole or in part by any court, regulatory authority or other competent authority, it will to that extent be deemed not to form part of these Terms and Conditions and the enforceability, legality and validity of the remainder of these Terms and Conditions will not be affected.

15. **Governing Law and Jurisdiction**

This contract will be governed and construed in all respects in accordance with the laws of the Republic of Ireland, and the Buyer agrees to submit to the non-exclusive jurisdiction of the Courts of the Republic of Ireland, but agrees to the jurisdiction of any Court chosen by the Seller competent to deal with any claim hereunder.