

## Harsco Metals Group Limited

### Terms of Sale

Edition 2010/1 – effective from 15 February 2010 and superseding earlier archived editions in respect of new contracts

The Buyer's attention is drawn in particular to –

- clause 18 – the rights of the Buyer where the Buyer is a consumer;
- clause 14 – the Buyer's responsibility and liability in relation to the use of the Goods;
- clause 14.3.1 – the Buyer's acknowledgement that it has read Harsco Metals guidance notice on the use of steel slag aggregate; and
- clause 16 – the limitation of Harsco Metals' liability.

#### 1. Interpretation

##### 1.1 In the Terms –

**Business Day** means a day that is not a Saturday, Sunday or public holiday in England;

**Buyer** means the person to whom a Quotation is made or who makes an Order (as the case may be);

**Consumer** means a consumer as defined in the Unfair Contract Terms Act 1977 Section 12 as amended or the Unfair Terms in Consumer Contracts Regulations 1999 Regulation 3(1);

**Contract** means the contract for the sale of the Goods between Harsco Metals and the Buyer which comes into existence on the Buyer accepting the Quotation or Harsco Metals accepting the Order (as the case may be);

**Default Event** means an event set out in clause 15.1;

**Delivery Date** means the date set out in the Quotation or Order (as the case may be) for the delivery of the Goods and if no date is set out in the Quotation or Order, the date stipulated for delivery of the Goods by Harsco Metals on reasonable notice to the Buyer prior to delivery;

**Delivery Place** means the place set out in the Quotation or Order (as the case may be) where the Goods are to be delivered and if no place is set out in the Quotation or Order, the place of delivery will be the Harsco Metals premises stipulated by Harsco Metals on reasonable notice to the Buyer prior to Delivery Date;

**Goods** means the goods (including any instalment of the goods or any parts for them) described in the Quotation or Order (as the case may be);

**Harsco Metals** means Harsco Metals Group Limited, registered in England and Wales under number 702790 and having its registered address at Harsco House, Regent Park, 299 Kingston Road, Leatherhead, Surrey KT22 7SG, United Kingdom;

**Liability Event** has the meaning given to it in clause 16.1;

**Order** means the Buyer's order (whether written or oral) to Harsco Metals for Harsco Metals to supply goods;

**Price** means the price of the Goods and (unless the context otherwise requires) includes any other amount due to Harsco Metals in relation to the Goods in terms of clause 6;

**Product Literature** has the meaning given to it in clause 14.1;

**Quotation** means Harsco Metals' written quotation to the Buyer for Harsco Metals to supply goods;

**Terms** means the standard terms of sale set out in this document and (unless the context otherwise requires) any special terms agreed in writing between Harsco Metals and the Buyer.

- 1.2 A reference in the Terms to a provision of a statute is to be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.
- 1.3 Unless the context otherwise requires –
  - 1.3.1 another grammatical form of a defined word or expression will have a corresponding meaning;
  - 1.3.2 the singular includes the plural and vice versa;
  - 1.3.3 a reference to one gender includes all genders;
  - 1.3.4 words denoting persons include firms and corporations and vice versa;
  - 1.3.5 any phrase introduced by the terms "including", "include", "in particular" or any similar expression is to be construed as illustrative and will not limit the sense of the words preceding the term; and
  - 1.3.6 the phrase "as set out in the Order" or similar expression is, in relation to an oral Order, to be construed as "as provided by the Buyer when making the Order".
- 1.4 Unless otherwise stated, a reference to a clause is a reference to a clause in this document.
- 1.5 The clause headings in this document are for convenience only and will not affect the construction of the Terms.

## **2. Basis of the sale**

- 2.1 The Terms will govern the Contract to the exclusion of any other terms, including any terms which the Buyer purports to apply in accepting the Quotation, making the Order, or under any confirmation of the Order, specification or other document.
- 2.2 No variation to the Terms will be binding unless agreed to in writing by Harsco Metals and the Buyer.
- 2.3 The quantity, quality and description of the Goods and any specification for them will be as set out in the Quotation (if accepted by the Buyer) or the Order (if accepted by Harsco Metals).

- 2.4 Except for any representation set out in the Product Literature, Harsco Metals' employees or agents are not authorised to make any representations concerning the Goods. In entering into the Contract, the Buyer acknowledges that it did not rely on any representations which are not set out in the Product Literature (at the time the Contract came into existence).
- 2.5 Unless otherwise specifically agreed to in writing by Harsco Metals, all samples, drawings, illustrations, descriptions or specifications of the Goods issued or published by Harsco Metals (including any descriptions or illustrations of the Goods in any advertising material, catalogues, brochures or price lists) are for the sole purpose of giving the Buyer an approximate idea of the Goods and do not form part of the Contract.
- 2.6 The sale of the Goods will not be a sale by sample.

### **3. Quotations**

- 3.1 Unless otherwise stated in the Quotation, a Quotation –
- 3.1.1 is (subject to clause 3.1.2) open for acceptance for 28 days from the date on which it was given;
  - 3.1.2 may be withdrawn at any time before acceptance by the Buyer;
  - 3.1.3 is subject to the availability of the Goods at the time it is accepted by the Buyer; and
  - 3.1.4 will only be regarded as having been accepted by the Buyer when Harsco Metals actually receives the Buyer's acceptance.
- 3.2 The acceptance by the Buyer of any oral quotation given by Harsco Metals for Harsco Metals to supply goods will be deemed to be an offer by the Buyer to Harsco Metals for Harsco Metals to supply goods (i.e. an Order) which Harsco Metals may in its discretion accept or reject.

### **4. Orders**

- 4.1 The Buyer shall be responsible for –
- 4.1.1. ensuring the quantity, quality and description of the Goods (including any applicable specification for the Goods) is accurately set out in the Order; and
  - 4.1.2. giving to Harsco Metals any necessary information relating to the Goods within sufficient time to enable Harsco Metals to perform the Contract in accordance with its terms.
- 4.2 No Order (which has been accepted by Harsco Metals) or Quotation (which has been accepted by the Buyer) (as the case may be) may be cancelled by the Buyer except with the written agreement of Harsco Metals and on terms that the Buyer shall indemnify Harsco Metals in full against all loss (including loss of profit), costs (including the cost of all labour and materials used), damages, charges and expenses incurred by Harsco Metals as a result of the cancellation.

### **5. Specifications**

- 5.1 If the Goods are to be supplied or any process is to be applied to them by Harsco Metals in accordance with a drawing, design, specification or instruction submitted by the Buyer, the Buyer shall be responsible for ensuring that –
- 5.1.1 the drawing, design, specification or instruction is accurate and sufficient to enable Harsco Metals to perform its obligations in terms of the Contract; and
  - 5.1.2 the Goods supplied or to which the process is applied will be fit for the purpose for which the Buyer intends to use them.
- 5.2 The Buyer shall indemnify Harsco Metals against all loss, damages, costs and expenses awarded against, incurred, paid or agreed to be paid by Harsco Metals in connection with –
- 5.2.1 any infringement of any patent, copyright, design, trade mark or other industrial or intellectual property rights of any person which arises out of Harsco Metals' use of the Buyer's drawing, design, specification or instruction; and
  - 5.2.2 any defect in the Goods which arises from the Buyer's drawing, design, specification or instruction.
- 5.3 Harsco Metals reserves the right to make any changes in the specification of the Goods which are required to conform with any applicable statutory or E.U. requirements or do not materially affect their quality or performance.

## **6. Price of the Goods**

- 6.1 The price of the Goods will be Harsco Metals' quoted price or, where no price has been quoted, the price listed in Harsco Metals' published price list current at the date of acceptance of the Order.
- 6.2 Prices quoted orally are only valid for the day on which they are quoted.
- 6.3 Harsco Metals reserves the right, by giving written notice to the Buyer at any time before delivery, to increase the Price to reflect any increase in the cost to Harsco Metals which is due to –
- 6.3.1 any factor beyond the control of Harsco Metals (including any foreign exchange fluctuation, currency regulation, alteration of duties, any increase in the costs of labour, materials or other costs of supply or any increase in the costs of sourcing the Goods);
  - 6.3.2 any change in delivery dates, quantities or specifications for the Goods which is requested by the Buyer; or
  - 6.3.3 any delay or expense caused by any instructions of the Buyer or failure of the Buyer to give Harsco Metals adequate information or instructions.
- 6.4 Except as otherwise stated in the Quotation or in the relevant price list of Harsco Metals (as the case may be), all prices given by Harsco Metals are on an ex works basis.
- 6.5 If Harsco Metals agrees to deliver the Goods otherwise than at Harsco Metals' premises, the Buyer shall be liable to pay Harsco Metals' charges for transport, packaging and insurance.
- 6.6 The prices are exclusive of any applicable value added tax, which the Buyer shall pay to Harsco Metals when it pays for the Goods.

6.7 The cost of pallets and returnable containers will be charged to the Buyer in addition to the price of the Goods. However, if the pallets and returnable containers are returned undamaged to Harsco Metals within 15 Business Days of the delivery of the Goods, Harsco Metals will give the Buyer a full credit against the charge.

## **7. Terms of Payment**

7.1 Harsco Metals may invoice the Buyer for the Price –

7.1.1 on or at any time after delivery of the Goods; and

7.1.2 in the case of the Buyer failing to give Harsco Metals adequate delivery instructions or wrongfully failing to take delivery of the Goods, on or at any time after Harsco Metals tenders delivery of the Goods.

7.2 Subject to clause 8, the Buyer shall pay the Price (in cash or cleared funds) on receipt of Harsco Metals invoice in respect of the Goods.

7.3 Harsco Metals may recover the Price notwithstanding that delivery may not have taken place and the property in the Goods has not passed to the Buyer.

7.4 The time for payment of the Price is of the essence of the Contract.

7.5 Receipts for payment will be issued only on request.

7.6 The Buyer shall make all payments due under the Contract in full without any deduction whether by way of set-off (including equitable set-off), counterclaim, discount, abatement or otherwise.

## **8. Credit**

8.1 If Harsco Metals has in writing agreed to grant the Buyer credit in relation to any amount due to Harsco Metals under the Contract, the Buyer shall pay the Price on or before the last day of the month following the month in which Harsco Metals invoices the Buyer in respect of the Goods. If, for example, Harsco Metals invoices the Buyer in June 2010, the Price will be payable on or before 31 July 2010.

8.2 The Buyer accepts that Harsco Metals may in its discretion at any time and from time to time –

8.2.1 review the basis for granting the Buyer credit; and

8.2.2 withdraw or reduce the amount of credit granted to the Buyer.

8.3 If at any time the amount due by the Buyer to Harsco Metals (whether under the Contract or on any account) is in excess of the Buyer's credit limit, the Buyer shall immediately pay to Harsco Metals such amount as will bring the Buyer within its credit limit.

8.4 The provisions of clause 15.2.5 will mutatis mutandis (i.e. with the necessary changes) apply to any amount the Buyer is required to pay under clause 8.3 and fails to pay.

8.5 The Buyer authorises Harsco Metals to carry out checks on the Buyer with credit reference agencies and at any time and from time to time provide the agencies with information as to the manner in which the Buyer conducts its account with Harsco Metals. The Buyer acknowledges that the agencies concerned may share this information with other credit

reference agencies and businesses conducting credit or fraud prevention checks on the Buyer.

## **9. Discounts**

Any discount, rebate or the like which Harsco Metals gives to the Buyer on the price of the Goods is given on the basis that -

- 9.1 the Buyer will pay all amounts due to Harsco Metals in terms of the Contract on their due date; and
- 9.2 if the Buyer fails to comply with the provisions of clause 9.1, Harsco Metals may invoice the Buyer for and immediately recover from the Buyer the difference between the price of the Goods invoiced in terms of clause 7.1 and the full price of the Goods as listed in Harsco Metals published price list current at the date the Contract comes into existence.

## **10. Delivery**

- 10.1 Delivery of the Goods will be made by making the Goods available at the Delivery Address on the Delivery Date.
- 10.2 Where the Delivery Address is other than at Harsco Metals' premises, the Goods will be delivered immediately prior to them being unloaded.
- 10.3 The Buyer shall (at its cost) provide adequate equipment and labour for –
  - 10.3.1 the loading of Goods where the Delivery Address is at Harsco Metals' premises; or
  - 10.3.2 the unloading of Goods where the Delivery Address is other than at Harsco Metals' premises.
- 10.4 The Delivery Date is approximate only and Harsco Metals will not be liable for any delay in delivery of the Goods however caused (including Harsco Metals negligence). Time for delivery is not of the essence of the Contract.
- 10.5 Harsco Metals may on reasonable notice to the Buyer deliver the Goods in advance of the Delivery Date.
- 10.6 Harsco Metals may deliver the Goods in instalments. Each instalment will constitute a separate contract and the termination of any one instalment by the Buyer as a result of a breach by Harsco Metals will not entitle the Buyer to terminate any other instalment or the Contract as a whole.
- 10.7 If Harsco Metals fails to deliver the Goods (or any instalment) for any reason (other than as a result of the Buyer's fault) and Harsco Metals is accordingly liable to the Buyer, Harsco Metals liability will be limited to the lower of –
  - 10.7.1 the excess (if any) of the purchase price (in the cheapest available market) paid by the Buyer for similar goods to replace those not delivered over the Price (of the Goods not delivered); and
  - 10.7.2 5% of the Price (of the Goods not delivered).

10.8 If the Buyer fails to take delivery of the Goods or fails to give Harsco Metals adequate delivery instructions (including any documents, licences or authorisations necessary or required to deliver the Goods), Harsco Metals may –

10.8.1 store the Goods until actual delivery and charge the Buyer for the reasonable costs (including insurance) of storage and re-delivery of the Goods; or

10.8.2 sell the Goods at the best price readily obtainable and after deducting the following amounts, account to the Buyer for the excess –

10.8.2.1 all reasonable storage and selling expenses;

10.8.2.2 the Price (or part of the Price) still outstanding; and

10.8.2.3 any other amounts due by the Buyer to Harsco Metals, whether in terms of the Contract or on any other account whatsoever.

## 11. Acceptance of the Goods

11.1. The Buyer shall within 3 Business Days of delivery of the Goods, notify Harsco Metals in writing of –

11.1.1 any Goods missing on delivery; or

11.1.2 any defect in the Goods on delivery which was apparent on a reasonable inspection at the time of delivery.

11.2 If the Buyer fails to give Harsco Metals notice in terms of clause 11.1 of –

11.2.1 any missing Goods, the Goods as set out in Harsco Metals' delivery documents will be deemed to have been duly delivered to the Buyer; and

11.2.2 any defective Goods, the Buyer will –

11.2.2.1 be deemed to have accepted the Goods and will not be entitled to reject them; and

11.2.2.2 be bound to pay the Price as if the Goods had been delivered in accordance with the Contract.

11.2.3 Harsco Metals' liability for any missing Goods in respect of which the Buyer has given notice in terms of clause 11.1 will be limited to replacing the Goods within a reasonable time or (at Harsco Metals discretion) issuing a credit note to the Buyer for the Price of the Goods (or a proportionate part of the Price) against any invoice raised for the Goods.

## 12. Risk and property

12.1 Risk of damage to or loss of the Goods will pass to the Buyer –

12.1.1 on delivery of the Goods; and

12.1.2 in the case of the Buyer failing to give Harsco Metals adequate delivery instructions (including any documents, licences or authorisations necessary or required to deliver the Goods) or wrongfully failing to take delivery of the Goods, at the time Harsco Metals tenders delivery of the Goods.

- 12.2 Notwithstanding delivery and the passing of risk in the Goods, the property in the Goods will not pass to the Buyer until Harsco Metals has received in full (in cash or cleared funds) all sums due to it in respect of the Goods and all other sums which are due by the Buyer to Harsco Metals on any account.
- 12.3 Until such time as the property in the Goods passes to the Buyer, the Buyer shall –
- 12.3.1 maintain the Goods in a satisfactory condition;
  - 12.3.2 hold the Goods as Harsco Metals' bailee;
  - 12.3.3 store the Goods (at no cost to Harsco Metals) separately from all other goods of the Buyer or any other person in such a way that they remain readily identifiable as Harsco Metals' property;
  - 12.3.4 keep the Goods insured on Harsco Metals' behalf (and at no cost to Harsco Metals) for their full price against all risks to the reasonable satisfaction of Harsco Metals. The Buyer shall on request produce the policy of insurance to Harsco Metals; and
  - 12.3.5 not be entitled to pledge or in any way encumber or charge the Goods.
- 12.4 The Buyer may resell the Goods before the property in the Goods has passed to it subject to any sale being –
- 12.4.1 in the ordinary course of the Buyer's business at full market value; and
  - 12.4.2 a sale of Harsco Metals' property on the Buyer's own behalf and the Buyer dealing as principal when making such a sale.
- 12.5 If a Default Event occurs before the property in the Goods has passed to the Buyer –
- 12.5.1 the Buyer's right to possession of and to resell the Goods will immediately terminate; and
  - 12.5.2 Harsco Metals may immediately recover the Goods.
- 12.6 The Buyer grants Harsco Metals, its agents and employees an irrevocable licence at any time to enter any premises where the Goods are or may be stored in order to inspect them, or (where the Buyer's right to possession has terminated) to recover them (with such transport and equipment as may be necessary).
- 12.7 Where Harsco Metals is unable to determine whether goods in the Buyer's possession are Goods in respect of which the property has not passed from Harsco Metals to the Buyer, Harsco Metals will be deemed to have sold to the Buyer all such goods of the kind sold by Harsco Metals to the Buyer (but only up the quantity sold by Harsco Metals to the Buyer) in the reverse order in which they were invoiced by Harsco Metals.

### **13. Warranties**

- 13.1 Harsco Metals warrants that upon delivery the Goods will –
- 13.1.1 comply with any description or specification of the Goods in the Contract; and
  - 13.1.2 be of satisfactory quality within the meaning of the Sale of Goods Act 1979.



- 13.2 Subject as expressly provided in the Terms, all other warranties, conditions or terms relating to fitness for purpose, quality or condition of the Goods (whether express or implied by statute or common law or otherwise) are excluded to the fullest extent permitted by law.
- 13.3 Harsco Metals will not be liable under the warranty in terms of clause 13.1 unless –
- 13.3.1 the Buyer gives Harsco Metals written notice of any defect in the Goods –
- 13.3.1.1 in accordance with the provisions of clause 11.1.2; or
- 13.3.1.2 where the defect was not apparent on a reasonable inspection at the time of delivery, within a reasonable time after the Buyer discovers the defect or ought to have discovered the defect but in any event within 12 months of the delivery of the Goods; and
- 13.3.2 Harsco Metals is given a reasonable opportunity (after receiving the notice referred to in clause 13.3.1) of examining the Goods (which may, at Harsco Metals' request, include examining the Goods at Harsco Metals' place of business).
- 13.4 The warranty in terms of clause 13.1 does not extend to parts, materials or equipment not manufactured by Harsco Metals. Harsco Metals' only liability in respect of such parts, materials or equipment shall be to transfer to the Buyer (subject to the provisions of clause 13.6) on the written request of the Buyer, such rights as Harsco Metals has and is entitled to transfer under any warranty or guarantee given by the manufacturer in respect of such parts, materials or equipment.
- 13.5 Harsco Metals will not be liable under the warranty in terms of clause 13.1 –
- 13.5.1 if the Buyer (or any other person) makes any use of the Goods after the Buyer has given Harsco Metals notice of any defect in the Goods;
- 13.5.2 in respect of any defect in the Goods arising from any drawing, design, specification or instruction supplied by the Buyer; or
- 13.5.3 in respect of any defect arising from the Goods being used or maintained otherwise than in accordance with the Product Literature.
- 13.6 Harsco Metals will not be liable under the warranty in terms of clause 13.1 and the Buyer will not be entitled to the benefit of any manufacturers warranty or guarantee referred to in clause 13.4 if –
- 13.6.1 the Buyer fails or failed to pay to Harsco Metals the Price on its due date; or
- 13.6.2 the Buyer is in breach of the provisions of clause 14.5.2 and as a result of such breach Harsco Metals is unable to determine whether or not it supplied the goods or, if Harsco Metals did supply the Goods, when they were manufactured or supplied.
- 13.7 If Harsco Metals is liable under the warranty in terms of clause 13.1 (or any other warranty, guarantee or the like given by Harsco Metals in respect of the Goods), Harsco Metals' liability will be limited to repairing or replacing the Goods (or the defective part) or (at Harsco Metals' discretion) refunding to the Buyer the Price (or a proportionate part of the Price).

13.8 Any Goods replaced will belong to Harsco Metals and any repaired or replacement Goods will be warranted mutatis mutandis (i.e. with the necessary changes) on the terms set out in this clause 13 save that the 12 month period referred to in clause 13.3.1.2 will be calculated from the date of delivery of the original Goods.

#### **14. Product Literature and responsibility for the use of the Goods**

14.1 "Product Literature" means, in relation to the Goods concerned –

- 14.1.1. any representation, advice, instruction or recommendation given in writing by a director of Harsco Metals, an employee of Harsco Metals holding the position of Director (notwithstanding that such person may not be on the board of directors of Harsco Metals), an employee of Harsco Metals holding the position of Business Manager or an employee of Harsco Metals holding the position of manager within its Laboratory to the Buyer which is specific to the Goods (but only to the extent that it is not contrary to that contained in any subsequently issued or published guide or notice referred to in clauses 14.1.3 or 14.1.4);
- 14.1.2. any safety notices on the Goods or their packaging (but only to the extent that it is not contrary to that contained in any subsequently issued or published guide or notice referred to in clauses 14.1.3 or 14.1.4);
- 14.1.3. the most recent and generally available user guide (or part of a user guide) and safety guide (or part of a safety guide) from time to time issued or published by Harsco Metals which is specific to the Goods (but only to the extent that it is not contrary to any advice, instruction or recommendation in any subsequently issued or published notice referred to in clause 14.1.4); and
- 14.1.4. any notice which Harsco Metals from time to time issues or publishes and which can be accessed from the internet site <http://www.harscometals.com/tc.html>

14.2 Harsco Metals shall on the written request of the Buyer and the Buyer indicating the specific goods concerned, forward to the Buyer copies of the most recent guides or notices referred to in clauses 14.1.3 or 14.1.4 in relation to such goods.

14.3 Where the Goods are steel slag aggregate, the Buyer acknowledges that –

- 14.3.1 it has read Harsco Metals' guidance notice on the use of steel slag aggregate in effect on the date the Contract comes into existence which can be accessed from the internet site <http://www.harscometals.com/tc.html>
- 14.3.2 such notice is a notice referred to in clause 14.1.4 and is therefore included in the definition of Product Literature in relation to steel slag aggregate.

14.4 The Buyer accepts that any notice referred to in clause 14.1.4 concerning the Goods, including any defect in the design or quality of the Goods which could affect the manner in which the Goods should be used or safely used, will be adequate and sufficient notice to the Buyer.

14.5 The Buyer shall ensure that –

- 14.5.1 any person using the Goods is made aware of and complies with the Product Literature (if any) and good trade practice; and
- 14.5.2 any numbers or distinguishing marks on the Goods are not removed, altered, defaced or otherwise tampered with.

14.6 Subject to clause 16.5 the Buyer shall indemnify Harsco Metals against all loss, damages, costs and expenses awarded against, incurred, paid or agreed to be paid by Harsco Metals in connection with any claim which arises out of –

- 14.6.1 the use of the Goods after the Buyer is aware or ought to be aware of any defect in the Goods;
- 14.6.2 any defect in the Goods arising from fair wear and tear, wilful damage, the negligence of any person (other than Harsco Metals), misuse, abnormal working conditions, or alteration or repair of the Goods without Harsco Metals' prior written approval;
- 14.6.3 any use of the Goods (including the installation, disassembly, application, maintenance or removal of the Goods) other than in accordance with the Product Literature (if any) and good trade practice; or
- 14.6.4 the disposal of the Goods.

## **15. Default of the Buyer**

15.1 A "Default Event" will occur if any one or more of the following events occur –

- 15.1.1 the Buyer fails to pay any amount due to Harsco Metals in terms of the Contract on its due date or breaches any other provision of the Contract;
- 15.1.2 the Buyer fails to pay any amount due to Harsco Metals in terms of any other contract between Harsco Metals and the Buyer on its due date or breaches any other provision of any other contract between Harsco Metals and the Buyer;
- 15.1.3 the Buyer makes or threatens to make any voluntary arrangement with its creditors or becomes subject to any administration order or (being a company) goes into liquidation or (being an individual or firm) becomes bankrupt;
- 15.1.4 an encumbrancer takes possession, or a receiver, administrative receiver or administrator or any similar official is appointed in respect of the whole or any part of the assets of the Buyer.
- 15.1.5 any distress or execution is levied on the Buyer's property or assets;
- 15.1.6 the Buyer ceases, or threatens to cease, to carry on business;
- 15.1.7 anything analogous to any of the events specified in clauses 15.1.3 to 15.1.5 occurs under the laws of any applicable jurisdiction;
- 15.1.8 Harsco Metals reasonably apprehends that any of the events set out in 15.1.1 to 15.1.7 is about to occur in relation to the Buyer; or
- 15.1.9 any event set out in clauses 15.1.2 to 15.1.8 occurs in relation to any holding company of the Buyer or any subsidiary of any such holding company.

15.2 If a Default Event occurs, Harsco Metals may, without incurring any liability to the Buyer, take any one or more of the following actions –

- 15.2.1 suspend any further deliveries to the Buyer under the Contract (and any other contracts between Harsco Metals and the Buyer);

- 15.2.2 terminate the Contract;
  - 15.2.3 declare all amounts due by the Buyer to Harsco Metals in terms of the Contract (and any other contracts between Harsco Metals and the Buyer) to be immediately due and payable;
  - 15.2.4 appropriate any payment made by the Buyer to such of the Goods (or the goods supplied under any other contract between Harsco Metals and the Buyer) as Harsco Metals may think it (notwithstanding any purported appropriation by the Buyer); and
  - 15.2.5 charge the Buyer interest on any amount unpaid (both before and after any judgment) –
    - 15.2.5.1 calculated on a daily basis (and compounded monthly in arrear on the last day of each month) from its due date until it is paid in full at 4% per annum above the base rate from time to time of National Westminster Bank plc; or
    - 15.2.5.2 (at Harsco Metals' discretion) under the Late Payment of Commercial Debts (Interest) Act 1998.
- 15.3 The termination of the Contract will not affect and will be without prejudice to –
- 15.3.1 any rights which have accrued or any rights arising out of any breach giving rise to the termination; and
  - 15.3.2 any provision which is expressly or by implication to operate after the termination of the Contract.
- 15.4 The provisions of clauses 5.2, 8, 9, 12.2 to 12.7, 14.6, 15.5 and 16 will survive the termination of the Contract.
- 15.5 The Buyer shall indemnify Harsco Metals against all costs and expenses incurred by Harsco Metals in enforcing any of its rights in terms of the Contract as against the Buyer and (where the Buyer's right to possession of the Goods has terminated in terms of clause 12.5) recovering the Goods.
- 16. Limitation of liability**
- 16.1 A "Liability Event" means –
- 16.1.1 any breach by Harsco Metals of any of its obligations in terms of or arising out of the Contract;
  - 16.1.2 any liability Harsco Metals may have arising out of or in connection with the use or resale of the Goods by the Buyer (or any product incorporating the Goods); and
  - 16.1.3 any act or omission (including any tortious or negligent act or omission or any breach of statutory duty) by Harsco Metals or any of its employees, agents or sub-contractors arising out of or in connection with the Contract and as a result of which the Buyer suffers loss or damage.
- 16.2 Subject to the provisions of clauses 16.4 and 16.5 –

- 16.2.1 Harsco Metals liability to the Buyer in respect a Liability Event will be limited to an amount equal to the price of the Goods which are the subject matter of or give rise to the claim; and
- 16.2.2 Harsco Metals shall not be liable to the Buyer in respect of a Liability Event –
- 16.2.2.1 for indirect or consequential (whether direct or indirect) loss or damage (including loss or damage suffered by Buyer as a result of an action brought by a third party, pure economic loss, wasted time or expenditure or loss of profit, revenue, production, business or goodwill); and
- 16.2.2.2 not previously satisfied or settled unless legal proceedings in respect of the Liability Event are commenced by being both issued and served within 18 months of the delivery of the Goods.
- 16.3 If a number of Liability Events give rise to substantially the same loss, they will be regarded as having arisen from a single Liability Event and will accordingly only give rise to one claim under the Contract.
- 16.4 The provisions of clause 16.2.1 are without prejudice to the provisions of clauses 10.7, 11.3 and 13.7.
- 16.5 Nothing in the Terms excludes or limits the liability of Harsco Metals for –
- 16.5.1 death or personal injury caused by Harsco Metals' negligence;
- 16.5.2 any matter which it would be illegal for Harsco Metals to exclude or limit or attempt to exclude or limit its liability; and
- 16.5.3 fraud or fraudulent misrepresentation.

## 17. Force Majeure

Harsco Metals will not be liable to the Buyer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of its obligations in terms of the Contract, if the delay or failure was due to any cause beyond its reasonable control including any act of God, fire, flood, accident, strike, lock-out, or other industrial dispute or action (of its own or other employees), power failure, mechanical failure, delay in transportation, inability to obtain raw materials or supplies of the Goods, act of government or state, requirement of any governmental or local authority, war, civil commotion, insurrection or embargo.

## 18. Consumers

- 18.1 Where the Goods are sold under a consumer transaction (as defined by the Consumer Transactions (Restrictions on Statements) Order 1976) or otherwise to a Consumer, the statutory rights of the Buyer are not affected by the Terms.
- 18.2 Furthermore, in relation to any Contract where the Buyer is a Consumer, the Terms will be varied to the extent necessary (but no more) for them to comply with any applicable consumer legislation and regulations.

## 19. Authorised Harsco Metals persons

Where the Terms provide for certain matters to be agreed in writing between Harsco Metals and the Buyer or Harsco Metals providing its written consent or approval, the

agreement, consent or approval will be of no effect unless it is signed on Harsco Metals' behalf by a director of Harsco Metals, an employee of Harsco Metals holding the position of Director (notwithstanding that such person may not be on the board of directors of Harsco Metals) or an employee of Harsco Metals holding the position of Business Manager.

## **20. Notices**

20.1 Any notice required to be given by the Buyer to Harsco Metals must be sent –

20.1.1 in the case of the Contract coming into existence on the acceptance by the Buyer of the Quotation and subject to clause 20.1.3, to Harsco Metals' business address as set out in the Quotation; or

20.1.2 in the case of the Contract coming into existence on the acceptance by the Harsco Metals of the Order and subject to clause 20.1.3, to SteelPhalt, Sheffield Road, the Ickles, Rotherham, South Yorkshire, S60 1DR; or

20.1.3 to such changed address as Harsco Metals may notify to the Buyer in writing from time to time.

20.2 Any notice required to be given by Harsco Metals to the Buyer must be sent –

20.2.1 in the case of the Contract coming into existence on the acceptance by the Buyer of the Quotation and subject to clause 20.2.3, to the address of the Buyer as set out in the Quotation.

20.2.2 in the case of the Contract coming into existence on the acceptance by the Harsco Metals of the Order and subject to clause 20.2.3, to the Buyer's business address as set out in the Order; and

20.2.3 to such changed address as the Buyer may notify to Harsco Metals in writing from time to time.

20.3 A notice to the Buyer at its address referred to in clause 20.2 will be deemed to have been received by the Buyer –

20.3.1 if delivered by hand, at the time of delivery;

20.3.2 if sent by pre-paid first class post, 2 Business Days after posting (exclusive of the day of posting);

20.3.3 if sent by facsimile, on Harsco Metals receiving a successful transmission report.

20.4 A notice actually received by the Buyer will be regarded as effective, notwithstanding that it was not delivered or sent to the Buyer at its address referred to in clause 20.2.

## **21. Assignment and sub-contracting**

21.1 The Buyer may not transfer any of its rights under the Contract to any other person without the prior written consent of Harsco Metals.

21.2 Harsco Metals may on notice to the Buyer transfer any or all of its rights or obligations under the Contract to any other person.

21.3 Harsco Metals may sub-contract any of its obligations under the Contract.

**22. Third Party Rights**

A person who is not a party to the Contract will not acquire any rights under the Contract by virtue of the Contracts (Rights of Third Parties) Act 1999.

**23. Rights Cumulative**

Each right or remedy of Harsco Metals under the Contract is without prejudice to any other right or remedy of Harsco Metals whether under the Contract or in law or equity.

**24. Waiver**

The failure or delay by Harsco Metals to exercise any of its rights under the Contract will not operate as a waiver or variation of that or any other right and any defective or partial exercise of any right will not preclude Harsco Metals from exercising that or any other right.

**25. Severability**

If any provision of the Contract is held by a court or other competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of the Contract and the remainder of the provision concerned will not be affected.

**26. Proper Law**

The Contract will be governed by the laws of England and the Buyer agrees to submit to the non-exclusive jurisdiction of the English courts.