

ASM FOODS AB'S GENERAL TERMS AND CONDITIONS (SUPPLY OF GOODS) NOVEMBER 2008

- 1. SCOPE OF APPLICATION**
 - 1.1 These General Terms and Conditions ("GTC") shall always apply in all purchase and sale agreements and other agreement to which ASM is a party and shall thus be deemed to be an integral part of any such agreement unless otherwise agreed in writing, irrelevant of whether an explicit reference is given to these GTC or not.
- 2. DEFINITIONS**
 - 2.1 In addition to any capitalized terms defined in subsection 2.2 - 2.17 herein below and unless otherwise defined in these GTC, capitalized terms shall have the meaning set forth to them, all of which terms shall be equally applicable to the singular and plural forms of such terms.
 - 2.2 "Agreement" means the entire relationship of legal rights and obligations between ASM and Buyer with regard to each sale and purchase of Goods and/or Services, consisting of one or several of (i) a contract in writing or (ii) Confirmed Order and (iii) these GTC and appendices to said documents, such as Product Specifications.
 - 2.3 "ASM" means ASM Foods Sweden AB, 556583-4735, acting as supplier hereunder.
 - 2.4 "Buyer" means the purchaser of Goods and/or Services from ASM according to an Agreement.
 - 2.5 "Buyer Products" means such products made, produced or manufactured by Buyer which includes the Goods as an ingredient or component (regardless to what extent), which are sold and/or otherwise distributed by Buyer to third parties.
 - 2.6 "Co-Developed Goods" means such Goods wholly or partly developed by ASM upon the specific request of Buyer within the scope of Services.
 - 2.7 "Confirmed Order" means a purchase order from Buyer accompanied by an order confirmation from ASM. If the order confirmation from ASM deviates from Buyer's purchase order, the terms set forth in the order confirmation shall apply as Confirmed Order, unless Buyer has specifically and without delay contested the order confirmation in writing.
 - 2.8 "ASM Containers" means steel SS ASM Containers owned, leased or otherwise in the possession of ASM, which the Goods may be delivered within.
 - 2.9 "Defect" or "Defective" means, subject to Section 13 below, a defect or non-conformity of the Goods compared to the Product Specification due to faulty ingredient(s), incorrect manufacturing process and/or workmanship.
 - 2.10 "Excusable Delay" means a delay (i) caused by Buyer or any third party for whom Buyer is liable, (ii) caused by force majeure, (iii) caused by Buyer's request for changes with regard to the Product Specification, the scope of the Order and/or other aspects of an Agreement, (iv) approved by the Customer, or (v) other circumstances outside ASM's control.
 - 2.11 "General Terms and Conditions" means this document including any appendices hereto.
 - 2.12 "Goods" shall mean such goods ordered by Buyer from ASM and delivered or to be delivered by ASM to Buyer, as further specified in the Confirmed Order.
 - 2.13 "Product Specification" means a detailed specification of Goods delivered or to be delivered to Buyer by ASM if attached to, included in or otherwise referred to in an Agreement
 - 2.14 "GTC" means this document including any appendices hereto.
 - 2.15 "IPR" means either Party's trademarks, patents, designs, inventions (including applications pending for any of the foregoing), utility models, utility marks, domain names, trade and business names, copyrights, confidential information, trade secrets, and registered database rights.
 - 2.16 "Parties" means ASM and Buyer collectively.
 - 2.17 "Services" means research and development in the scope of recipes and manufacturing methods related to the type of products marketed and delivered by ASM in its ordinary course of business.
- 3. PRICE AND INVOICING**
 - 3.1 The price payable by Buyer to ASM for the Goods or Services shall be specified in the Agreement.
 - 3.2 Unless otherwise agreed by the Parties, ASM may not issue the invoice for Goods or Services earlier than delivery of the same.
 - 3.3 All amounts in an Agreement shall be deemed to be exclusive VAT and other governmental taxes and charges. Should any payment under an Agreement be subject to withholding tax or any similar reduction, all amounts shall be increased with an amount corresponding to such tax or reduction i.e. that ASM actually shall be receiving the amounts set forth in ASM's invoice.
- 4. PAYMENT**
 - 4.1 Unless otherwise agreed upon in writing, payment of ASM's invoice shall be effected by Buyer no later than thirty (30) days from the date of ASM's invoice. In case of late payment, ASM shall be entitled to
 - 4.1.1 a penal interest on overdue amounts calculated as the applicable Swedish Reference Rate, set by the Swedish Central Bank (*Sw. Sveriges Riksbank*) plus eight percentage units, calculated from the due date of the payment until full payment has been received by ASM;
 - 4.1.2 immediately suspend and/or cancel, in whole or in part, any orders for Goods not yet produced and/or delivered to Buyer until full payment has been received by ASM; and/or
 - 4.1.3 immediately suspend performance of all Services regarding Co-Developed Goods until full payment has been received by ASM.
- 5. DELIVERY OF GOODS**
 - 5.1 Unless otherwise agreed in writing, delivery of Goods are made FCA (INCOTERMS 2000) ASM's site in Mjölby, Sweden or any other site as specified in an Agreement.
 - 5.2 Subject to Sections 10 – 11 below, Delivery shall be made on the delivery date as agreed between the Parties in an Agreement.
- 6. RETENTION OF TITLE**
 - 6.1 The Goods shall, to the extent permitted under mandatory law, remain ASM's property until the entire price for the Goods has been paid by Buyer.
- 6.2 Unless otherwise agreed between the Parties, ASM Containers shall in relation to the Parties remain ASM's property at all time.
- 7. SERVICES**
 - 7.1 Any Services to be provided by ASM to Buyer shall be specified in detail in a separate agreement in writing.
- 8. ASM CONTAINERS**
 - 8.1 ASM Containers are provided to Buyer as-is, without any warranty or guarantee of its condition and/or suitability as carriers of Goods. ASM Containers shall at all times remain ASM's property in relation to Buyer. Buyer is always obligated to return ASM Containers to ASM. The dispatch of such a ASM Container to ASM shall be performed so that it arrives to ASM's site in Mjölby, Sweden, as soon as possible.
 - 8.2 An ASM Container shall arrive to ASM's site in Mjölby, Sweden in substantially the same condition as it was on arrival at Buyer's site and always empty and flushed. ASM is entitled to charge and invoice Buyer for any additional costs due to Buyer's non-compliance of this provision.
- 9. INTELLECTUAL PROPERTY RIGHTS**
 - 9.1 Unless otherwise agreed in writing or is evident from the nature of an Agreement between the Parties, neither Party is hereby granted any license or right to use the other Party's IPR. All IPR and/or other proprietary rights to (i) the Goods (if any), (ii) ASM's production process, (iii) ASM's recipes, and/or (iv) ASM's other trade secrets shall remain with and vest with ASM.
 - 9.2 When Buyer and ASM are performing Services jointly with ASM – or if Buyer performs Services independently – Buyer is liable to ensure that such Services do not infringe any third party's intellectual property rights, and Buyer shall indemnify and hold ASM harmless from any such third party claim.
- 10. DELAYS**
 - 10.1 If ASM finds that it will not be able to deliver the Goods on the agreed delivery date, or if delay on ASM's part seems likely, ASM shall without delay notify Buyer thereof, stating the reason for the delay and if possible the time when delivery can be expected.
 - 10.2 Subject to the limitations set forth in Sections 14 - 15 below, Buyer is entitled to claim weekly liquidated damages equal to 2 % of the price for the delayed Goods. Such liquidated damages shall however not under any circumstances exceed 20 % of the order value of the delayed Goods.
 - 10.3 Should the delay be manifested during a consecutive period of ten (10) weeks following the agreed delivery date, at which point Buyer is entitled to maximum liquidated damages according to these GTC, and should the Goods still not have been delivered and this is not attributable to an Excusable Delay, then Buyer may, by notice in writing to ASM, without cost terminate Buyer's order for the delayed Goods.
 - 10.4 The remedies provided in this Section 10, shall be Buyer's sole and exclusive remedies in case of ASM's delay.
- 11. CANCELLATION AND CHANGES OF ORDERS**
 - 11.1 ASM or Buyer may immediately cancel an Agreement, and ASM may suspend any producing of Goods, and/or suspend performance of Services by giving notice in writing to the other Party if the other Party:
 - 11.1.1 commits a material breach to the provisions of an Agreement and does not remedy the breach within thirty (30) days from written notice thereof;
 - 11.1.2 commits a material breach to the provisions of an Agreement which is non-curable; or
 - 11.1.3 is declared bankrupt, is subject to company reorganization including liquidation, seeks a composition of creditors, suspends payments or in any other way is deemed to be insolvent.
 - 11.2 If an Agreement is terminated by ASM in accordance with subsection 11.1, any outstanding monies not yet paid to ASM shall immediately become automatically due and payable by Buyer.
 - 11.3 Buyer may cancel an Agreement or order on delivery of Goods prior to delivery, provided that Buyer notifies ASM of such cancellation in writing. Upon receipt of such cancellation, ASM is – unless otherwise agreed in an Agreement – entitled to
 - 11.3.1 If and to the extent the cancelled Goods has not yet been produced by ASM: (i) full compensation for ASM's direct costs and expenses, including without limitation compensation for purchase of raw materials and ingredients for the cancelled Goods (also including compensation for non-usage of ingredients in ASM's stock), and (ii) loss of profit corresponding to twenty-five (25) percent of the total value of the cancelled order, or
 - 11.3.2 If and to the extent the cancelled Goods has been produced by ASM: full payment of the total value of the cancelled order.
 - 11.4 Buyer may postpone the delivery date by a maximum period of thirty (30) days, provided that Buyer
 - 11.4.1 obtains ASM's written approval of such postponement in writing at least two (2) days before the delivery date previously agreed in an Agreement, and
 - 11.4.2 agrees to advance payment of an amount corresponding to forty (40) percent of the total order value for the postponed Goods. ASM shall be entitled to invoice such advance payment immediately upon ASM's receipt of Buyer's request for postponement according to this subsection 11.4.

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- 11.5 Any delivery of Goods prior to the agreed delivery date is subject to separate written agreement between the Parties.
- 11.6 Except as explicitly set forth in this Section 11, any other changes of the terms of an Agreement are subject to ASM's written approval.
- 12. LIMITED WARRANTY**
- 12.1 Subject to the limitations set out in Section 14 - 15 herein below ASM warrants that the Goods will correspond to the Product Specification.
- 12.2 THE LIMITED WARRANTY PROVIDED IN SUBSECTION 12.1 IS ASM'S SOLE AND EXCLUSIVE WARRANTY BOTH IN RELATION TO THE GOODS AND ANY SERVICES PROVIDED BY ASM AND ASM MAKES NO ADDITIONAL WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF (I) MERCHANTABILITY OR (II) FITNESS FOR A PARTICULAR PURPOSE OR USE, WHICH WARRANTIES ARE HEREBY EXPRESSLY AND SPECIFICALLY DISCLAIMED. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY ASM, ITS DEALERS, DISTRIBUTORS, AGENTS, OR EMPLOYEES SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF ASM'S WARRANTIES HEREUNDER.
- 13. INSPECTION AND DEFECTS**
- 13.1 Upon arrival of the Goods to Buyer's premises, Buyer is obligated to diligently examine the Goods to the extent reasonably possible. Any visible damages to the Goods, and/or the packaging of the Goods, shall be duly noted on the freight bill for the Goods in order for Buyer to be entitled to any remedy for such visible damages. BUYER SHALL IN ANY EVENT MAKE SAMPLE TESTS OF THE GOODS. Buyer shall notify ASM in writing of any Defect within ten (10) business days from the day when Buyer discovered or should have discovered the Defect. Buyer may not claim compensation or any other remedy due to Defects if such notice is not received by ASM within said period of time.
- 13.2 Buyer acknowledges that due to ASM manufacturing process, the quantity of delivered Goods may deviate +/- ten (10) percent from the agreed quantity of Goods in the Confirmed Order. The price payable for Buyer shall be based on the actually delivered quantity of Goods to Buyer. For avoidance of doubt, Buyer acknowledges that neither Party is entitled to any price reduction nor other compensation for quantity deviation within the interval set out above.
- 13.3 Goods or Services produced and delivered in compliance with Buyers instructions and specifications shall in no case be deemed to be Defective.
- 13.4 In case of a breach of ASM's warranty set out in subsection 12.1 due to a Defect, and subject to Buyer giving notice of the Defect as set forth in subsection 13.1, ASM shall at its sole discretion:
- 13.4.1 replace the Goods, without any additional expense for Buyer; or
- 13.4.2 (if possible) repair the Goods, without any additional expense for Buyer; or
- 13.4.3 refund Buyer with the price paid by Buyer for the Goods.
- 13.5 In addition to subsection 13.4, and subject to the limitations in Sections 14 and 15, Buyer is also (in case of ASM's breach due to a Defect), entitled to liquidated damages as set forth in subsection 10.2, for each complete week of delay between the date of Buyer's written notice of a Defect in the Goods according to subsection 13.1 and ASM's supply of replacement Goods (subsection 13.4.1) or repair of Goods (subsection 13.4.2).
- 13.6 If any Buyer Product is defected, and it is evidenced that the relevant defect is directly attributable to a Defect in the Goods, ASM shall upon Buyer's written request:
- 13.6.1 refund Buyer with the order value of the Defected Goods, and
- 13.6.2 refund Buyer for Buyer's indirect costs (including without limitation loss of savings, anticipated savings, loss of profit, loss of use, loss of business, interruption of business, any special, incidental, punitive or consequential damages of any kind, whether in contract, tort, product liability or otherwise) WITH A MAXIMUM AMOUNT EQUIVALENT TO THE ORDER VALUE OF THE DEFECTED GOODS.
- 14. PRODUCT LIABILITY**
- 14.1 ASM and Buyer shall take out and maintain product liability insurance policies covering reasonable product liability risks related to Goods in the relevant jurisdictions.
- 14.2 ASM shall not have any obligations to any party, including Buyer, for product liability in excess of ASM's liability in the applicable mandatory legislation in the jurisdiction where liability occurs.
- 14.3 If one of the Parties is obligated to indemnify a third party for product liability damages and the other Party is liable for said damages due to its faulty instructions, faulty goods, a provision in an Agreement (e.g. subsection 9.2 in these GTC) or due to any other circumstance within its control the liable Party shall reimburse the indemnifying Party for such indemnification costs. If the product liability is based upon a Buyer's Product the indemnification shall always be borne in full by Buyer.
- 14.4 Goods or Services produced and delivered to Buyer in compliance with Buyer's instructions, or jointly with Buyer, shall be produced on Buyers full responsibility and any ASM's product liability towards a third party based upon such Goods or Services shall be reimbursed by Buyer.
- 15. LIABILITY**
- 15.1 ASM shall not be liable for Defects, delays and/or other faults related to:
- 15.1.1 Defects arising as a consequence of defects in third party products (including without limitation other ingredients than the Goods in Buyer Products),
- 15.1.2 Defects caused by incorrect information provided by Buyer if the information received has been verified by Buyer to a reasonable extent and the incorrectness has nevertheless not been discovered,
- 15.1.3 Defects occurred after modifications or interventions of the Product Specification made by Buyer or any third party other than ASM,
- 15.1.4 Defects caused by non-commercial/laboratory use of the Goods,
- 15.1.5 Defects caused by Buyer's manufacturing process, unsuitable storage or handling of the Goods,
- 15.1.6 Defects caused by use of the Goods in conflict with ASM's reasonable instructions or recommendations with regard to the use of the Goods, and/or
- 15.1.7 Excusable Delays.
- 15.2 ASM SHALL HAVE NO LIABILITY TO BUYER OR IN RESPECT OF ANY DEFECTS, DELAYS OR DEFAULTS UNLESS BUYER HAS SERVED WRITTEN NOTICE OF THE SAME UPON ASM WITHOUT UNDUE DELAY AFTER THE DATE IT BECAME AWARE OF THE CIRCUMSTANCES GIVING RISE TO THE DEFECT, DEFAULT OR THE DATE WHEN BUYER OUGHT REASONABLY TO HAVE BECOME SO AWARE. SPECIFICALLY, ASM SHALL HAVE NO LIABILITY FOR BACTERIOLOGICAL DEFECTS OR DEFECTS RELATING TO THE CONSISTENCY OR SUBSTANCE OF THE GOODS, UNLESS BUYER CAN EVIDENCE THE EXISTENCE OF SUCH DEFECTS IN BUYER'S TEST SAMPLES OF THE GOODS AS SET FORTH IN SUBSECTION 13.1 ABOVE.
- 15.3 THE REMEDIES PROVIDED IN THESE GTC ARE THE SOLE AND EXCLUSIVE REMEDIES OF EACH PARTY. EXCEPT FOR SUCH LIABILITY EXPLICITLY STATED HEREIN, NEITHER PARTY WILL BE LIABLE FOR ANY ADDITIONAL DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY; UNLESS SUCH LIABILITY ARISES AS A CONSEQUENCE OF WILFUL MISCONDUCT OR GROSS NEGLIGENCE FROM THE BREACHING PARTY.
- 15.4 REGARDLESS OF THE OTHER PROVISIONS OF THESE GTC, BUYER ACKNOWLEDGES THAT THE GOODS ARE SUBJECT TO NATURAL DETERIORATION UNLESS STORED IN A SUITABLE ENVIRONMENT. HENCE, ASM'S LIABILITY TOWARDS BUYER FOR THE GOODS (INCLUDING CO-DEVELOPED GOODS, IF ANY) IS LIMITED TO A PERIOD OF FOURTEEN (14) DAYS FOLLOWING BUYER'S OPENING OF THE PROVIDED PACKAGING FOR THE GOODS (E.G. ASM CONTAINERS).
- 16. FORCE MAJEURE**
- 16.1 Neither Party hereto shall be responsible or liable in any way for failure, delay or omission carrying out the terms of an Agreement resulting from any cause or circumstance beyond its reasonable control, including, but not limited to, fire, flood, other natural disasters, war, labour strike, interruption of transit, terrorist acts, accident, general interruptions of data- or telecommunication facilities, general and unforeseen computer virus attacks, explosions, civil commotion, and acts of any governmental authority, provided, that the Party so affected shall give prompt notice thereof to the other.
- 16.2 No such failure, delay or omission shall terminate an Agreement, and each Party shall complete its obligations hereunder as promptly as reasonably practicable following cessation of the cause or circumstance of such failure or delay, provided, however, that if any of the above conditions continues to exist for more than three (3) months after the date of any notice given with regard thereto, either Party may terminate an Agreement forthwith upon written notice to the other Party. In such case no Party shall have any liability to the other Party.
- 17. MISCELLANEOUS**
- 17.1 No alteration, amendment or modification of any provision of an Agreement shall be binding on the Parties unless made in writing and signed by duly authorized representatives of both Parties.
- 17.2 If for any reason a court of competent jurisdiction finds any provision of an Agreement, or any portion thereof, to be invalid, null or unenforceable, that provision or portion shall be enforced to the maximum extent permissible so as to affect the original intent of the Parties, and the remainder of the Agreement shall continue in full force and effect.
- 17.3 All notices and other communications required or permitted under an Agreement shall be in writing and in the English language (or in Swedish, if Buyer is based in a Scandinavian country) and shall be delivered by (a) hand, (b) commercial express delivery courier with tracking capabilities, (c) certified or registered mail, return receipt requested, or (d) facsimile or electronic mail with confirmation sent by one of the methods set forth in (a), (b) or (c) within three (3) days of such transmission, all of the foregoing must be with costs and postage prepaid and addressed to the Party to be notified at the address set forth above or at such other address or addresses that the receiving Party provides for the purpose of notice in accordance with this subsection 17.3. Such notices or other communications shall be deemed to have been given on the date of such delivery or, if delivery is not accomplished by reason of some fault of the addressee, when tendered.
- 17.4 The Parties shall at all times act as independent contractors and nothing contained in an Agreement shall, unless explicitly stated in a written contract, be construed or implied as creating a partnership, agency or similar relationship.
- 18. GOVERNING LAW AND DISPUTES**
- 18.1 All Agreements and the documents included under the definition in subsection 2.2 herein above shall be construed in accordance with and be governed by Swedish law.
- 18.2 Any dispute, controversy or claim arising out of or in connection with an Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules for Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce. The language to be used in the arbitral proceedings shall be English and the place for such proceedings shall be Stockholm.