

## **GENERAL TERMS AND CONDITIONS OF PURCHASE MISS BERRY B.V.**

Based in Noordhoek  
Chamber of Commerce no. 81160119

### **1. Definitions**

- 1.1. In these terms and conditions, "Miss Berry" will mean: Miss Berry B.V., a private company with limited liability having its registered office in Noordhoek;
- 1.2. In these terms and conditions, "Parties" will mean: Miss Berry and the Seller;
- 1.3. In these terms and conditions, "Agreement" will mean: any agreement between the Parties, regardless of whether this is a framework agreement or an individual agreement, which entails (a) that the Seller supplies goods to Miss Berry on payment of a price in money (purchase agreement), and/or (b) that the Seller makes goods available to Miss Berry in order to have these sold by Miss Berry on the Seller's instructions (commission agreement), and/or (c) that the Seller supplies goods to Miss Berry on payment of a minimum guaranteed price (MGP agreement), and/or (d) that the Seller provides services to Miss Berry, and/or (e) that the Seller delivers any other performance for the benefit of Miss Berry, any amendment or addition to this agreement, as well as all legal acts and acts without an intended legal effect in preparation for and implementation of this agreement, including proposals;
- 1.4. In these terms and conditions, "Products" will mean: all goods and/or services and/or other performances which are the subject of an Agreement;
- 1.5. In these terms and conditions, "Person" will mean: a natural person, legal entity or unincorporated company;
- 1.6. In these terms and conditions, "Seller" will mean: the Person with whom or which Miss Berry has concluded or is negotiating an Agreement;
- 1.7. In these terms and conditions, "in writing" and "written" will also mean: by email.

### **2. General**

- 2.1. These terms and conditions apply to all Agreements, to the express exclusion of all other general terms and conditions. If Miss Berry does not require strict compliance with these terms and conditions in a particular case, this will not mean that Miss Berry loses the right to require strict compliance with these terms and conditions in future cases, whether similar or otherwise. Any stipulations derogating from these terms and conditions will only be binding if they have been agreed in writing and will only apply to the case concerned.
- 2.2. All the stipulations of these terms and conditions have been made not only for the benefit of Miss Berry but also for the benefit of the following Persons, who can invoke this third-party clause at all times: (i) Miss Berry's directors and shareholders (including its indirect directors and shareholders), (ii) all Persons working for Miss Berry, (iii) all Persons engaged by Miss Berry in the performance of an Agreement, and (iv) all Persons for whose acts or omissions Miss Berry could be liable.
- 2.3. If one or more of the provisions of these terms and conditions and/or an Agreement should turn out to be void or be voided by a court, the remaining provisions of these terms and conditions and the Agreement will retain their legal force. The void or voided provisions will be replaced by valid provisions which resemble the original provisions as closely as possible in view of the tenor and purport of these terms and conditions and the Agreement.

2.4. These terms and conditions have been drawn up in several languages. If there should be a difference of opinion about the content or purport of these terms and conditions, the Dutch text will be binding.

2.5. Miss Berry will be entitled at all times to amend these terms and conditions.

### **3. Purchase, commission and MGP agreements; crop insurance**

3.1. If Miss Berry procures Products from the Seller without the Parties having concluded an express written purchase agreement, the Parties will be deemed to have concluded a commission agreement.

3.2. A commission agreement will be subject to the following provisions:

- a. Miss Berry will not have an obligation of inspection or an obligation to complain with regard to the Products;
- b. Miss Berry will sell and supply the Products to third parties in its own name, but always at the Seller's expense and risk;
- c. without guaranteeing any result, Miss Berry will endeavour to realise the highest possible sales proceeds in light of all the circumstances;
- d. the sales proceeds will depend on the quality of the Products and the situation on the - often volatile - market; insofar as Miss Berry provides indicative sales prices, these will be for information purposes only, without the Seller being able to derive any right from these prices;
- e. Miss Berry will pay the Seller the net sales proceeds apparent from its sales records, on the understanding that (i) Miss Berry will always be entitled to offset the net sales proceeds against any advances it has paid and to offset positive net sales proceeds against any negative net sales proceeds, and (ii) Miss Berry will always be deemed to make a reservation for subsequent claims received from its customers and subsequent credit invoices issued to its customers; in these terms and conditions, "net sales proceeds" will mean: the gross sales proceeds reduced by, on the one hand, the commission to which Miss Berry is entitled and, on the other, the costs incurred by Miss Berry in connection with the sale of the Products, including but not limited to the costs of sea freight, terminal handling charges (THC), documents, import duties, transport, handling, storage, refrigeration, quality control and laboratory analysis and, where necessary, sorting and repackaging;
- f. if it is established after the end of the programme or the season - taking into account the sales records, the payments made by Miss Berry, subsequent claims received from Miss Berry's customers and subsequent credit invoices issued to Miss Berry's customers - that on balance the Seller still owes an amount to Miss Berry, the Seller will pay or repay this amount to Miss Berry when the latter so requests;
- g. the Products will remain the Seller's property until Miss Berry has sold and supplied them to third parties; the risk attached to the Products will not pass to Miss Berry at any time; Miss Berry will not be required to insure the Products;
- h. Miss Berry will always be entitled to make the Products available again to the Seller in its warehouse, without having to state its reasons, in which case the commission agreement will be deemed to have been terminated without Miss Berry being obliged to pay any compensation, the Seller will take back the Products as soon as possible and reimburse the costs incurred by Miss Berry, including but not limited to refrigeration and storage costs. The other clauses of these terms and conditions will also apply (whether by analogy or otherwise) to commission agreements, except insofar as such applicability is not possible in view of the nature of a commission agreement. Insofar as this Clause 3(2) is inconsistent with any other clause or paragraph of these terms and conditions, the provisions of this Clause 3(2) will prevail.

- 3.3. An MGP agreement will be subject to the following provisions:
- a. the Seller is obliged to transfer the ownership of the Products to Miss Berry;
  - b. Miss Berry will in any case owe the minimum guaranteed price agreed, on condition that the Products are compliant with the Agreement in all respects and that the Seller also fulfils its other obligations;
  - c. if the amount of the net sales proceeds exceeds that of the minimum guaranteed price, Miss Berry will also owe the difference between these two amounts;
  - d. Clause 3(2)(c) to (f) of these terms and conditions will apply by analogy. The other clauses of these terms and conditions will also apply (whether by analogy or otherwise) to MGP agreements, except insofar as such applicability is not possible in view of the nature of an MGP agreement. Insofar as this Clause 3(3) is inconsistent with any other clause or paragraph of these terms and conditions, the provisions of this Clause 3(3) will prevail.
- 3.4. If Miss Berry undertakes to pay one or more advances with a view to the supply or making available of agricultural Products by the Seller in the context of a purchase agreement or commission agreement, the Seller will be obliged, to Miss Berry's satisfaction, to take out and maintain a crop insurance policy covering hail damage which provides that Miss Berry is the co-insured under the policy and that any insurance payouts will be made directly to Miss Berry. On request, the Seller will provide Miss Berry with a copy of the relevant policy and of the proof of premium payment in this respect.

#### **4. Proposals, Agreements**

- 4.1. In this clause, a "quotation" will mean: a proposal from the Seller.
- 4.2. In this clause, a "proposal from Miss Berry" will mean: a written order from Miss Berry which deviates from a quotation, or a written order which Miss Berry places with the Seller without having received a quotation.
- 4.3. All proposals from Miss Berry are free of obligation. Miss Berry is entitled to revoke its proposal within three working days of receiving the Seller's acceptance.
- 4.4. An acceptance by the Seller which differs from Miss Berry's proposal, whether on minor points or otherwise, will always count as a rejection of this proposal and as a new quotation. An Agreement will only be formed in accordance with this new quotation after Miss Berry has accepted this quotation in writing.
- 4.5. An Agreement will be formed at the moment when:
- a. Miss Berry accepts a quotation in writing; or
  - b. three working days have elapsed since Miss Berry received the Seller's acceptance of its proposal and Miss Berry has not revoked its proposal during this period; or
  - c. Miss Berry confirms the Agreement in writing; or
  - d. Miss Berry has started performing the Agreement.
- 4.6. Miss Berry will not be obliged to abide by a proposal and/or an Agreement for a specified price if this price is based on a misprint and/or typographical error.
- 4.7. The Seller will not be permitted to transfer an Agreement or one or more of its rights and obligations under an Agreement, either wholly or in part, without Miss Berry's prior written consent. This prohibition has effect not only under the law of obligations but also under property law (as referred to in Article 3:83(2) of the Dutch Civil Code (*Burgerlijk Wetboek*, "DCC")).

#### **5. Prices**

- 5.1. Unless the Parties have agreed otherwise in writing, the prices are shown in euro.
- 5.2. The prices exclude VAT. Otherwise, the prices are "all inclusive".

5.3. All agreed prices are fixed prices. Price increases occurring after the formation of the Agreement, on whatever grounds, are and will remain at the Seller's expense, regardless of the period that has elapsed between the dates of the conclusion and the performance of the Agreement.

## 6. Guarantee

6.1. The Seller guarantees:

- a. that the Products comply with the Agreement in all respects, which will mean in any case that they:
  - correspond to any sample shown or provided;
  - originate from GlobalGap-certified growers;
  - were not treated with crop protection agents prohibited by law;
  - meet the highest food safety standards;
  - are of optimum quality, freshness and durability;
  - are free from diseases (including but not limited to rot), vermin, foreign bodies, pollutants, (other) substances harmful to health and (other) visible and invisible defects;
  - comply with the specifications and requirements formulated by Miss Berry or, insofar as Miss Berry has not formulated any specifications and requirements, with the specifications and requirements applicable to Products of Class I;
  - comply with (i) all the requirements ensuing from the relevant Dutch and European laws and regulations in force at the moment of supply or making available, and (ii) any supplementary and/or stricter requirements which are imposed in this respect by Miss Berry's customers and about which Miss Berry informed the Seller prior to the supply or making available;
- b. that the Products are packaged adequately and properly and, where applicable, in conformity with Miss Berry's instructions, that the packaging and packaging materials do not pose a risk to food safety, that the packaging bears all the indications prescribed by law and that all statutory labelling requirements were complied with;
- c. that the Products are transported at optimum temperature and otherwise under optimum conditions throughout the transport journey, without interruption of the refrigeration chain;
- d. that complete traceability of the Products is guaranteed and that the Seller will provide all relevant information regarding the Products in digital format within 24 hours after a request to this effect from Miss Berry, which information will include but not be limited to the details of the growers and plots, as well as a complete and up-to-date registration of the crop protection agents used;
- e. that the Seller will immediately notify Miss Berry in writing of an emergency, and will immediately inform Miss Berry in writing if it (otherwise) foresees or is aware that the Products and/or the packaging materials do not or will not meet the requirements referred to in this clause.

6.2. Miss Berry's taking delivery of, approval of or payment for Products will not imply an acknowledgement that the Products comply with the Agreement, will not release the Seller from any other guarantee obligation or liability and will not affect Miss Berry's rights pursuant to the Agreement, these terms and conditions and the law.

## 7. Delivery date, delivery, ownership

7.1. The agreed delivery date is a final deadline. By failing to meet the delivery date, the Seller will be in default by operation of law. As soon as the Seller knows or should know that it is

unable to perform the Agreement, or to do so properly or in time, the Seller will immediately notify Miss Berry of this in writing.

- 7.2. Deliveries will be made Delivery Duty Paid (DDP) to the delivery location specified by Miss Berry. "DDP" will be interpreted in accordance with the latest version of the Incoterms.
- 7.3. Miss Berry may refuse partial deliveries and deliveries made before the agreed time if it has not consented to this in writing.
- 7.4. Miss Berry is entitled at all times to return packaging materials at the Seller's expense and risk.
- 7.5. The ownership of Products will pass to Miss Berry at the moment of delivery. The Seller guarantees that the full and unencumbered ownership of the Products will be transferred.

## **8. Inspection and complaints**

- 8.1. Prior to the delivery of the Products to its warehouse, Miss Berry will always be authorised, but never obliged, to inspect or arrange an inspection of the Products, which in this clause will mean: conduct or arrange the conduct of a random visual inspection. Where applicable, the Seller will fully cooperate in the inspection.
- 8.2. After the delivery of the Products to its warehouse, Miss Berry will inspect or arrange an inspection of the Products within a reasonable period. If Miss Berry has not rejected the Products within four days of the aforesaid delivery, the Products will be deemed to have been approved, provided that they have a normal shelf life and are not affected by hidden defects.
- 8.3. In the event that an inspection is carried out prior to the delivery of the Products, Miss Berry will not have an obligation to complain. In all other cases, Miss Berry's obligation to complain will be such, that it must claim within 14 days of the delivery, or as much later as it detected this, that the Products do not comply with the Agreement or that the Seller's performance is faulty in other ways.
- 8.4. Miss Berry will also be deemed to have made a detection as referred to in Paragraph 3 of this clause if it received a complaint about the Products from one of its customers and an investigation has shown that this complaint is well founded. In that case, Miss Berry will be authorised to reject the Products after all.
- 8.5. Any breach of Miss Berry's obligation of inspection or obligation to complain will only have legal consequences if this has been detrimental to specific interests of the Seller.
- 8.6. The breach referred to in Paragraph 5 of this clause will not cause the lapse of any right on Miss Berry's part.

## **9. Refusal and rejection**

- 9.1. Without prejudice to its other rights pursuant to the law and/or the Agreement and/or these terms and conditions, Miss Berry will, in the event of refusal or rejection of the Products, be authorised to:
  - a. return the Products delivered at the Seller's expense and risk and demand subsequent compliance, whether or not in combination with compensation;
  - b. terminate the Agreement and claim compensation;
  - c. terminate the Agreement in part and claim subsequent compliance in respect of the part concerned, whether or not in combination with compensation;
  - d. terminate the Agreement in part by reducing the price (which also applies to any minimum guaranteed price agreed);or
  - e. sell the Products at the Seller's expense and risk on a commission basis.

9.2. From the moment when the Products are refused or rejected wholly or in part, the Seller will bear the risk attached to the Products.

## **10. Third-party rights**

10.1. The Seller guarantees that the Products and the associated packaging and packaging materials, all this in the broadest sense, do not infringe a third party's intellectual property right or any other right, and that Miss Berry has the unconditional and irrevocable right to import, store, offer for sale, sell or otherwise market, export or otherwise use the Products and the associated packaging and packing materials, all this in the broadest sense.

10.2. The Seller must indemnify Miss Berry against third-party claims in relation to an infringement or alleged infringement of one or more of the rights referred to in Paragraph 1 of this clause. The Seller will reimburse Miss Berry for any and all losses arising for Miss Berry from such an infringement or alleged infringement, including the reasonable costs of putting up a defence against the third-party claims.

## **11. Payment**

11.1. All the Seller's invoices must be addressed to Miss Berry for the attention of the accounts payable department, refer to the relevant order number, be properly itemised and meet the statutory invoicing requirements in force in the Netherlands. Miss Berry reserves the right not to process invoices that do not meet all the aforesaid requirements and return these to the Seller.

11.2. Unless the Parties have agreed otherwise in writing, payment will be effected within 30 days of receipt of the relevant correct and complete invoice or, if the delivery and approval of the Products occurs at a later date, within 30 days of the delivery and approval of the Products concerned.

11.3. A payment by Miss Berry will first be offset against the principal sum, subsequently against any interest owed and finally against any costs owed.

11.4. Any compensation owed by Miss Berry on account of a delay in the payment of a monetary sum will consist in statutory commercial interest as referred to in Article 6:119 DCC, rather than statutory commercial interest as referred to in Article 6:119a DCC.

11.5. Any cost reimbursement owed by Miss Berry as referred to in Article 6:96(2)(c) DCC will consist in the minimum amount referred to in Section 2(2) of the Extrajudicial Collection Costs (Fees) Decree (*Besluit vergoeding voor buitengerechtelijke incassokosten*), rather than be determined on the basis of the graduated scale laid down in Section 2(1) of that Decree.

11.6. In the event of full or partial prepayment or the payment of one or more advances, Miss Berry will have the right to require the Seller to furnish adequate security for the fulfilment of its obligations, whether or not in the form of a bank guarantee due and payable when Miss Berry so requests, provided by a first-class Dutch bank.

11.7. Miss Berry is entitled at all times to offset the amounts which it owes on any grounds to the Seller or any Person affiliated to it ("the Seller *et al.*") against the amounts which Miss Berry or any person affiliated to it ("Miss Berry *et al.*") is owed by the Seller *et al.* This authority to offset will also exist if the payment of the claims is not yet enforceable and if the performance owed to Miss Berry *et al.* is not commensurate with its debt.

## **12. Right of retention and right of pledge**

12.1. Until the moment when the Seller has fully discharged all its obligations on any grounds towards Miss Berry, Miss Berry will have a right of retention and a right of pledge to all items which Miss Berry holds or will hold, either directly or indirectly, in connection with



an Agreement. In this clause, "items" will mean: movable items, bearer rights and rights to order, securities, documents and monies.

12.2. These terms and conditions becoming applicable means that the Seller undertakes to grant Miss Berry the right of pledge referred to in Paragraph 1 of this clause. The right of pledge will be created by bringing the items under the control of Miss Berry or of a third party holding the items for Miss Berry, including but not limited to a carrier or a storage and transshipment company.

12.3. The right of summary foreclosure will be exercised in the manner provided by law. A private sale will be possible if the Parties agree on this or if the goods have such a short shelf life that Miss Berry cannot reasonably be expected to apply to the Interim Relief Judge, this being on condition that Miss Berry has a proper valuation report at its disposal. All judicial and extrajudicial costs incurred by Miss Berry with a view to the exercise of the right of summary foreclosure, including but not limited to the costs of legal assistance and the costs of the valuation actually incurred by Miss Berry, will be borne by the Seller and will be recouped from the (gross) sales proceeds.

### **13. Prohibition on assignment and pledging**

The Seller is not permitted to assign, pledge, transfer by any other title or encumber its claims against Miss Berry without Miss Berry's prior written consent. This prohibition has effect not only under the law of obligations but also under property law. The Seller's claims against Miss Berry are non-transferable (as referred to in Article 3:83(2) DCC) and non-pledgeable (as referred to in Article 3:83(2) DCC in conjunction with Article 3:98 DCC).

### **14. Force majeure**

14.1. The Seller will only invoke force majeure if:

- a. the Seller's (imminent) failure is not due to its fault and should not be at its expense pursuant to the law, the Agreement or these terms and conditions, or according to generally accepted standards; and
- b. the circumstance constituting the force majeure commenced prior to the moment when the Seller must fulfil its obligation; and
- c. the Seller notifies Miss Berry in writing immediately, but in any case within 24 hours of the situation of force majeure arising, of the circumstance constituting the force majeure, setting out the reasons.

14.2. In the event of temporary force majeure on the Seller's part, Miss Berry will be authorised:

- a. to grant the Seller a reasonable period of no more than two months in which the fulfilment of its obligations under the Agreement is postponed. If the Seller is still unable to fulfil its obligations under the Agreement after the end of this period, Miss Berry will be authorised to terminate the Agreement;

or, at Miss Berry's discretion:

- b. to terminate the Agreement. In the event of permanent force majeure on the Seller's part, Miss Berry will be authorised to terminate the Agreement.

14.3. Force majeure on the Seller's part will in any case not include: lack of staff, sickness among staff, industrial action, and force majeure and/or breach of contract ("imputable non-performance") and/or unlawful acts on the part of the Seller's suppliers or carriers, or on the part of other third parties involved in the performance of the Agreement.

14.4. In the event of force majeure on Miss Berry's part, Miss Berry will be entitled to suspend the fulfilment of all or part of its obligation. If the period of force majeure on its part lasts longer or is expected to last longer than one month, Miss Berry will be authorised to

terminate all or part of the Agreement. Force majeure on Miss Berry's part includes: any circumstance not due to Miss Berry's fault in a subjective sense which makes it impossible or too impractical for Miss Berry to fulfil or continue fulfilling its obligation or a part thereof, including - but expressly not limited to - force majeure on the part of Miss Berry's customers, as well as government measures which obstruct the import, export or transit of Products or make this financially unattractive.

14.5. Termination of the Agreement as referred to in this clause will take place by means of a written notification to the Seller, without any notice of default or judicial intervention being required and without Miss Berry being obliged to pay any compensation.

## **15. Suspension, termination**

15.1. Without prejudice to its other rights pursuant to the law and/or the Agreement and/or these terms and conditions, Miss Berry will be authorised to suspend its obligation or to terminate all or part of the Agreement by means of a written notification to the Seller, without any notice of default or judicial intervention being required, if:

- a. the Seller fails to fulfil any of its obligations, or fails to do so properly or in time;
- b. Miss Berry has good reason to fear that the Seller will fail to fulfil one or more of its obligations;
- c. the Seller has been declared bankrupt, or a petition has been filed for the Seller's bankruptcy;
- d. the Seller has been granted a provisional or final moratorium, or an application has been made for a moratorium;
- e. a statutory debt restructuring scheme has been declared applicable to the Seller, or an application has been made for such a scheme;
- f. the Seller's business is wound up; or
- g. assets of the Seller have been the subject of an executory attachment or a pre-judgment attachment which has not been lifted within one month of the date on which the assets were attached.

15.2. If the Seller's failure pursuant to the law, the Agreement or these terms and conditions only commences after notice of default, Miss Berry will, in the situation referred to in Paragraph 1(a) of this clause, not proceed to terminate all or part of the Agreement before it has sent the Seller a written reminder providing a reasonable period in which to comply, and the Seller has failed to comply within this period.

15.3. In the event that Miss Berry terminates all or part of the Agreement, Miss Berry will not be obliged to pay any compensation and all its claims against the Seller will become immediately due and payable in full.

## **16. Liability**

16.1. The Seller will be liable for all direct and indirect losses sustained by Miss Berry and/or third parties as a result of an imputable failure by the Seller to fulfil an obligation, or as a result of an imputable unlawful act or omission by the Seller itself or by an employee, non-employee or representative of the Seller.

16.2. Losses as referred to in paragraph 1 of this clause will comprise, but not be limited to, all penalties imposed on Miss Berry (including contractual penalties), all losses and costs associated with a product recall on the initiative of the competent authorities and/or the Seller and/or Miss Berry, and all internal and external costs incurred by Miss Berry in connection with the assessment of the loss and liability and with the collection of loss amounts, including but not limited to the fees of lawyers, bailiffs, experts and translators actually incurred by Miss Berry.



- 16.3. The Seller must indemnify Miss Berry against third-party claims for compensation of losses as referred to in Paragraph 1 of this clause. The Seller will reimburse Miss Berry for the reasonable costs of putting up a defence against the aforesaid claims. The Seller will not be obliged to indemnify Miss Berry insofar as the losses are a direct result of wilful misconduct or deliberate recklessness on the part of Miss Berry or managing employees holding managerial positions in its business.
- 16.4. For the purposes of this clause, persons such as staff members, employees and customers of Miss Berry will be regarded as third parties.
- 16.5. The Seller will take out and maintain adequate insurance in respect of its liability for losses as referred to in Paragraph 1 of this clause. On request, the Seller will provide Miss Berry with a copy of the relevant policy or policies and of the proof of premium payment in this respect.
- 16.6. If Miss Berry is liable for losses sustained by the Seller and/or third parties, its total liability on any grounds will be limited to the amount that can be claimed in the case concerned under the liability insurance it has taken out, increased by the amount of the excess not payable by the insurers according to the policy conditions. If, for whatever reason, there should be no payout under the aforesaid insurance, Miss Berry's total liability on any grounds will be limited to the amount of the net invoice value of the Products in question, that is, the price excluding VAT and other taxes and levies and excluding transport costs, with a maximum of EUR 5,000. Miss Berry will only be obliged to pay compensation for damage to persons and goods as described in the policy conditions of its liability insurance. Therefore, Miss Berry will not be liable for - and the Seller must take out insurance against - indirect losses, consequential losses, trading losses, business interruption losses, lost profits, missed savings, losses due to claims from customers of the Seller, loss of customers, reduced goodwill and reputational damage. Miss Berry will not invoke a limitation of its liability insofar as the losses are a direct result of wilful misconduct or deliberate recklessness on the part of Miss Berry or managing employees holding managerial positions in its business.

## **17. Applicable law, disputes and costs**

- 17.1. The legal relationship between the Parties is governed by Dutch law, to the exclusion of the Vienna Sales Convention.
- 17.2. Any and all disputes arising between the Parties as a result of or in connection with an Agreement and/or these terms and conditions will initially be resolved exclusively by the District Court of Rotterdam (proceedings on the merits) or by the Interim Relief Judge of the District Court of Rotterdam (interim relief proceedings and other interim measures), without prejudice to Miss Berry's authority to submit disputes as referred to in this clause to any other competent court.
- 17.3. The costs associated with legal proceedings, including but not limited to the fees of lawyers, bailiffs, experts and translators actually incurred by Miss Berry, will be borne in full by the Seller if the latter is fully or predominantly found against.