

**GENERAL TERMS AND CONDITIONS OF SALE AND DELIVERY of**  
**Boomkwekerij Gebr. Van den Berk B.V.**

**1. Definition of terms**

- 1.1 Seller:  
Boomkwekerij Gebr. Van den Berk B.V., established at Sint-Oedenrode, Donderdonk 4, the Netherlands.
- 1.2 Buyer:  
Any natural person or legal entity that purchases goods from the seller and/or who concludes or wants to conclude an agreement with the seller respectively for the delivery of goods.
- 1.3 These terms and conditions do not apply to the delivery of services by the seller.

**2. Applicability**

- 2.1 All offers made by the seller and all purchase agreements concluded with him and the execution thereof will be subject to these terms and conditions.
- 2.2 The applicability of other terms and conditions including the general terms and conditions applied by the buyer, is expressly excluded.
- 2.3 Any deviation of these terms and conditions may only be invoked if the seller has explicitly agreed thereto in writing and will only relate to the agreement concerned.
- 2.4 Insofar as these general terms and conditions are also drawn up in another language than Dutch, the Dutch text will prevail in the event of discrepancies.
- 2.5 In these terms and conditions, "in writing" and "written" means: by letter, by fax or by electronic means.

**3. Offers and formation of the agreement**

- 3.1 All offers made and quotations submitted by the seller will be without obligations, also if these include a term for acceptance, subject to the proviso of interim sale and growth.
- 3.2 An agreement will only come into effect after the seller has confirmed the order in writing and until any agreed payment security, including an irrevocable (confirmed) letter of credit, has been accepted in writing by the seller. Any agreement will be entered into by the seller subject to the condition precedent that the buyer – and such exclusively at the judgement of the credit insurer of the seller – proves to be sufficiently creditworthy to fulfil the financial obligations of the agreement.
- 3.3 Any additional arrangements or alterations made at a later date as well as oral commitments by employees of the seller or made on his behalf by his agents or other representatives that work for him, will only be binding on the seller from the time that these are confirmed by him in writing.
- 3.4 Plant names will be described according to the List of Names of Woody Plants and the List of Names of Perennials issued by Applied Plant Research ("Praktijkonderzoek Plant & Omgeving") in Lisse (the Netherlands).

**4. Prices**

- 4.1 All prices for the goods will be determined in the agreed currency, exclusive of turnover tax and will be based on Free Carrier, Sint-Oedenrode, the Netherlands (FCA, Incoterms 2020) unless agreed otherwise in writing.
- 4.2 If one or more factors determining cost prices change after the order confirmation but before the delivery of the products, the seller reserves the right to adjust the agreed prices accordingly.
- 4.3. The costs concerning transport, packaging, insurance and the inspection by the Netherlands Food and Consumer Product Safety Authority ("NVWa") and/or the Netherlands Inspection Service for Horticulture ("Naktuinbouw") will be to the account of the buyer. All levies and/or

taxes due now or in the future on account of the agreement concluded by the seller with the buyer, both directly and indirectly, will exclusively and fully be to the account of the buyer and such levies and/or taxes may not be settled with amounts due to the seller.

- 4.4 If the seller and the buyer agree a price in a currency other than Euros, the exchange rate on the date of the order confirmation will be applicable.

## 5. Payment

- 5.1 Unless the parties have agreed otherwise in writing, payment of the goods sold by the seller will take place in the agreed currency within 30 days on the invoice date.
- 5.2 The value date on which the seller receives payment, will apply as payment date. For payments by bank, the date on which the bank account of the seller is credited, will apply as payment date.
- 5.3 The buyer is not entitled to any deduction, suspension or payment discount on the grounds of alleged faulty delivery or on the grounds of the fact that the delivery is still incomplete or on account of any other alleged claim by the buyer and any setoff reliance is also expressly excluded unless agreed otherwise.
- 5.4 If the payment term is exceeded, the buyer will legally be in default as from the time that the payment term is exceeded.  
The seller has the right to charge the legal interest rate for commercial transactions as per the due date, whereby all costs related to the collection of the payment will be to the account of the buyer, including both the judicial and extrajudicial costs, which latter is set at a minimum of 15% of the amount to be collected, such with a minimum of 250 Euros. Extrajudicial costs include all costs of demand and notice of default in addition to the disbursements and fee of the person who is appointed by the seller to carry out the collection. If the bankruptcy of the buyer is petitioned, next to the principal and the attached extrajudicial costs and the contractual interest, the costs of the bankruptcy petition will also be due by the buyer.
- 5.5 In the event that an order is executed in parts, the seller is entitled to demand payment for the partial deliveries before carrying out the other partial deliveries.
- 5.6 No liberating payments may be made to persons employed by the seller who are not expressly authorised thereto.
- 5.7 On or after entering into the agreement, the seller has the right, before any (further) performance, to require security from the buyer that both the payment and other obligations ensuing from this agreement will be fulfilled. The seller is entitled to demand pro forma payment from the buyer. Refusal by the buyer to put up the required security, entitles the seller to suspend his obligations and will eventually entitle him to terminate the agreement entirely or in parts without any notice of default or judicial intervention, without prejudice to his right to compensation for any damages that may be suffered by him.
- 5.8 Despite any other payment allocation by the buyer, the seller has the right to first settle payments with debts from an earlier date. In the event of incurred costs and accumulated interest, the payment will first be settled with the costs, then with the interest and only then with the principal.

## 6. Delivery

- 6.1 Unless agreed otherwise in writing, all deliveries will take place Free Carrier, Sint-Oedenrode, the Netherlands (FCA, Incoterms 2020).
- 6.1.1. If the seller and the buyer have agreed delivery based on Delivered at Place (DAP, Incoterms 2020) in writing, the following will be applicable:  
**DAP:** plants will be transported by the seller to the agreed place based on full loads. Unloading, etc. will be carried out by the customer.

### Additional conditions:

**DAP combination:** if the seller assesses the amount of ordered goods as less than a full load, the delivery concerned can only be scheduled as a combination shipment. This means that scheduling the delivery date and time is less flexible and will be determined by the seller.

**DAP unloaded:** with deliveries in the Netherlands and Belgium, the seller will unload the goods immediately next to the lorry on a place that is accessible to the lorry. The buyer is obligated to assist with the unloading.

**DAP unloaded in planting hole:** with deliveries in the Netherlands and Belgium, the seller will unload the goods in the planting holes. The planting holes must be dug by the buyer in advance with access for the lorry-mounted crane. The goods will not be planted in the planting holes but merely unloaded. Straightening, anchoring, filling in, etc. will have to be done afterwards by the buyer.

\* In all cases the driver is responsible for reaching the unloading place free from damage. Therefore, the driver will be the person to assess whether the unloading place is accessible.

- 6.2 Deliveries in which the seller is responsible for the transport of the goods, will take place through full loads. If the buyer only calls part of his orders which leads to a partial load, the seller is entitled to charge the ensuing additional costs to the buyer. Orders that are not full load, will be delivered when combination possibilities allow it, at the discretion of the seller.
- 6.3 For deliveries arranged by the seller, the buyer will ensure unloading in a competent manner unless expressly agreed otherwise.
- 6.4 If the seller is responsible for the unloading, the maximum unloading time of a full load will amount to three hours, unless expressly agreed otherwise in writing. The unloading time of partial deliveries will be calculated proportionate to the number of load metres. If this unloading time is exceeded or any unloading addresses are added, the seller is entitled to charge the additional unloading hours/waiting hours at cost price. These extra hours will be charged as extra per start of the hour. The applicable rates are included in the transport conditions at [www.vdberk.com](http://www.vdberk.com).
- 6.5 Packaging material is charged to the buyer in accordance with the prices as published by the Foundation for Ancillary Materials ("Stichting Hulpmaterialen"). The buyer may return the packaging material, clean and in good condition, during the same season of delivery, upon which Van den Berk boomkwekerijen will pay a fixed reimbursement to the buyer.
- 6.6 Ancillary materials supplied by the seller such as straps, chains, holsters, etc. will be charged by the seller and will only be credited when these are returned to the seller by the buyer, to his own account and risk, within one month after delivery.
- 6.7 Although the stated delivery term will be observed as much as possible, this delivery time is only approximate and may never be considered as a fatal deadline. The seller will only be in default concerning the delivery time after a notice of default by the buyer in which the seller is given the opportunity to remedy the delivery within a reasonable term, and the seller has not complied.
- 6.8 The agreed delivery term starts as soon as an agreement comes into effect in accordance with article 3.2.
- 6.9 The seller will not be liable for damages as a result of overdue delivery, if and insofar as this overdue delivery is caused by circumstances that are not to the account and risk of the seller including noncompliance or late compliance by suppliers.
- 6.10 Noncompliance or late compliance with any payment obligation by the buyer, will suspend the delivery obligation of the seller.
- 6.11 If no delivery terms have been agreed and the delivery takes place on a call-off basis, the seller will be entitled to make autumn deliveries before 15 December of the year concerned and spring deliveries after 1 April.
- 6.12 Plants with naked roots must be delivered before 15 April, wire root balled trees before 30 April and pot and container plants before 15 May. Any changes must be notified in writing. With respect to deliveries on a call-off basis, the seller always has the right to deliver root balled and pot plants after 15 May. With agreements that come into effect after 15 May, the seller has the right to deliver within 14 days.
- 6.13 In the event of a request to postpone the spring delivery until autumn, all costs incurred to enable this, will be to the account of the buyer. In addition, a minimum of 50% of the invoice will already at that time be charged to the buyer.
- 6.14 The seller reserves the right to deliver the goods in parts, in which case the (payment) terms referred to in article 5 will also be applicable to each partial delivery.

## **7. Force Majeure**

- 7.1 In the event of force majeure, including growth failure, phytosanitary restrictions, viruses, natural disasters, industrial actions, fire, import and export restrictions, and/or in the event of other circumstances as a result of which fulfilment of the agreement or fulfilment by the stipulated date by the seller cannot be required, the seller will have the right, without judicial intervention and without being held to any compensation for damages, and by mere written

notification, to either terminate the agreement in part or in full, or to suspend the execution of this agreement, at his discretion, until such a time that the situation of force majeure ends.

7.2 If the seller has already partially executed the agreement, the buyer will pay the selling price of the delivered goods.

7.3 Insofar as the suspended term (pursuant article 7.1) lasts longer than four weeks, the buyer will have the right to terminate the agreement insofar as the seller has not yet performed, after the buyer has set a reasonable written term for delivery and the seller has not complied with this term. In such a case, the buyer will never be entitled to any form of compensation (for damages).

## **8. Complaints**

8.1 The buyer is obligated to inspect the goods on delivery on visible and/or directly observable defects. As such are considered all defects that can be detected with the unaided senses or through a simple random check. Furthermore, the buyer is obligated to check whether the delivered goods are in accordance with the order with respect to other aspects. The buyer will lose all rights to claims on the seller in the event that he fails to fulfil this inspection duty. (state on CMR).

8.2 If the delivered goods deviate less than 10% in number, quantity and weight from what is agreed, the buyer will nevertheless be held to accept the delivered goods. The seller will have the right to deliver comparable and/or equivalent species, either in higher or lower thicknesses and/or sizes against the corresponding higher or lower price for species that cannot be delivered. Such a delivery will not constitute a faulty delivery.

8.3 Complaints concerning the quality and the quantity of the delivered goods must be submitted in writing within eight calendar days on delivery.  
Complaints that are not submitted in a proper manner, will not be taken into consideration. As soon as this term is exceeded, the buyer is considered to have approved the delivered goods and complaints will not be taken into consideration. The date of the postmark, fax or email will serve as proof in determining whether a complaint was submitted in time.

8.4 The complaint must contain a description of the fault and, at his first request thereto, the seller must be given the opportunity to investigate the complaint.  
The buyer will allow the seller to have the goods concerned inspected by an expert or independent inspection body. If the complaint is declared well-founded by the expert, the inspection costs will be to the account of the seller. If the complaint is declared unfounded the costs will be to the account of the buyer.

8.5 The right of complaint lapses at the latest one month after the written rejection of the complaint by the seller, unless the buyer has submitted a written objection against such rejection. In that case, the seller is obligated to point out to the buyer the consequences of his silence.

8.6 The right of complaint may only be exercised by the direct contracting party of the seller. The right of complaint cannot be transferred.

8.7 All rights of complaint lapse if the buyer does not treat the goods rejected by him with due care during the time that they are on his site.

8.8 If the buyer has timely reported a complaint with the seller, who finds the complaint founded, the seller, at his discretion, is only held to deliver what is missing, to replace the delivered goods or to repay the proportionate part of the purchase price. The seller must be granted a reasonable term for replacement deliveries.

8.9 Submitting a complaint will not suspend the payment obligation of the buyer, unless the seller expressly agrees to such a suspension.

8.10 Returning the goods will be to the account and the risk of the buyer and will only take place after prior written permission from the seller.

## **9. Liability**

9.1 If necessary, the buyer is obligated to inform customers on the proper treatment of the delivered products and, where applicable, especially inform them of any dangers attached to the goods such as toxicity of the goods, intolerance on intake of the goods and/or parts of the goods.

9.2 The buyer indemnifies the seller against any form of third-party liability in the event of any damage as a result of noncompliance of the buyer with the obligations stated under the above article 9.1.

- 9.3 The seller will never be liable for the re-growth, flowering nor the unsuccessful rooting or growing of the goods supplied, unless otherwise agreed in writing.  
In addition, the seller may at no time be held liable for damage arising from pests or diseases that may strike the goods after delivery. This applies to pests and diseases that are classified as quarantine organisms in certain countries or regions of Europe as well as to any other pests and diseases.  
It is, at all times, the buyer's responsibility to assess whether the conditions, including climatological conditions, are suitable for the goods.
- 9.4 With the exception of statutory liability on the grounds of mandatory legal provisions and with the exception of deliberate intent or wilful recklessness, the seller will never be liable for any damage suffered by the buyer. Liability for indirect damage, consequential damage, immaterial damage, trading loss, environmental damage, losses on account of lost profits or damages as a result of third-party liability, are expressly excluded.
- 9.5 If and insofar as, despite what is stipulated under article 9.4, any liability rests with the seller for any reason whatsoever, this liability will be limited to the amount equal to the net invoice amount for the goods concerned, provided that the seller will only and exclusively be liable for a maximum amount of 20,000 Euros per claim.
- 9.6 The buyer indemnifies the seller against third-party claims for compensation for damages for which the seller is not liable pursuant these terms and conditions.

## **10. Cancellation**

- 10.1. The seller has the right to annul an order if, at the time of delivery, the buyer has not timely fulfilled his payment obligations from an earlier date with respect to the seller or any other creditors. The seller may also exercise this right if the information concerning the credit worthiness of the buyer is considered insufficient by the seller. The buyer cannot derive any rights from such annulments and the seller can never be held liable by the buyer.
- 10.2. In principle, the buyer cannot annul any order. When the buyer nevertheless annuls an order entirely or partially, for any reason whatsoever, the seller will only have to accept this when the goods have not yet been released to the carrier for transport and subject to the condition that the buyer pays annulment costs that are at least equal to 50% of the invoice amount of the annulled goods to be increased by VAT. In that case, the seller will also have the right to charge all costs incurred up to that time (including preparation, care and storage costs and suchlike) without prejudice to the right of the seller to compensation for loss of profit and other damages.
- 10.3. The buyer is obligated to take delivery of the purchased goods at the time that these are made available to him. Should the buyer refuse to accept these, the seller has the right to sell the goods elsewhere and the buyer will be responsible for the price difference as well as for all other ensuing costs for the seller, including storage costs.

## **11. Retention of title**

- 11.1. The ownership of the goods delivered by the seller will only pass to the buyer after payment in full of all amounts invoiced by the seller with any interest, fines and costs as well as all claims for failure to comply with the obligations for the buyer under this agreement or any other agreements. Presentation of a cheque or any other commercial paper will not serve as payment in this respect.
- 11.2. The seller has the right to immediately take back the sold goods if the buyer in any manner fails to fulfil his (payment) obligations. In such an event, the buyer is held to grant the seller access to his site and premises.
- 11.3. The buyer will store the goods subject to retention of title separately from the other goods, so that the goods of the seller can be distinguished from such other goods.
- 11.4. As long as the delivered goods are subject to retention of title, the buyer, outside the normal course of business, may not alienate, encumber or pledge these or place these in any other manner under the control of third parties. However, the buyer is not allowed to alienate the goods in the normal course of business at the time that the buyer has applied for a suspension of payment or when the buyer is declared bankrupt.

## **12. Termination and suspension**

- 12.1 In the event that the buyer does not fulfil his obligations under the concluded agreement or does so untimely or improperly, or there is reasonable fear that this is the case, as well as in the event of an application for a suspension of payments, bankruptcy or liquidation of the

businesses of the buyer and in the event of his death or, as the case may be, the dissolution or termination of the buyer, if the buyer is a company, or when there is a change in the form of undertaking or in the administration of the company or in capital brought into the activities of the company, the seller will have the right without any notice of default and without any judicial intervention, to suspend the agreement with a reasonable term or to terminate the agreement without any obligation for compensation for damages.

- 12.2 The claim of the seller concerning the part of the agreement that has already been executed as well as any damage, including loss of profit, ensuing from the suspension or termination, will be immediately due and payable.

### **13. Intellectual property rights**

- 13.1. The seller reserves all rights that the seller has in the intellectual property domain in relation to the goods supplied by the seller.
- 13.2 In those cases in which it is clear from the catalogue applied by the seller or from the agreement concluded between the parties, that a species is grower-protected or design-protected, which is indicated by stating (R) behind the name of the species concerned, the buyer is held to all obligations related to that right. Violation of this condition will result in liability of the buyer for all ensuing damage for the seller and any third parties.

### **14. Conflict with statutory conditions**

Should any condition of these General Terms and Conditions of Sale and Delivery not be applicable or in conflict with the public order or the law, only the condition concerned will be considered as not included and this will leave the remaining conditions in full force. The seller reserves the right to change any contested conditions into legally valid conditions.

### **15. Competent court / governing law**

- 15.1 All disputes, even if only designated as such by one of the parties, will be submitted to the judgement of the court that has jurisdiction in the place of business of the seller, such without prejudice to the right of the seller to submit the dispute, if so desired, to any other competent court.
- 15.2 The conditions of article 15.1 do not affect the rights of the seller to obtain a decision by the International Chamber of Commerce through arbitration in accordance with the Arbitration Regulations of the International Chamber of Commerce, by a single arbitrator. The seat of arbitration will be Amsterdam, the Netherlands. The arbitration proceedings will be conducted in the English language.
- 15.3 All offers made and quotations submitted by the seller as well as all agreements concluded between the seller and the buyer will exclusively be governed by Dutch law.
- 15.4 The applicability of the Vienna Sales Convention (CISG) is excluded.