**SUPPLY TERMS & CONDITIONS PLAYBOOK**

These “Supply T&Cs Playbook” guidelines are intended to cover the review of contracts proposed by counterparties (more and more in the form of general specifications or quality agreements, etc…), and the review of amendments to Mane’s supply agreement proposals that are made by counterparties.

**Our very first concern is liability: a provision to limit it is compulsory in any document under which Mane commits to sells products.**

**Other key concerns are IPR, applicable law, exclusivity, warranty.**

1. **LIABILITY: THE MANDATORY PROVISION**

* **Liability cap**. **We must always have a cap** **of some kind, related to the turnover for Mane**. Try first to limit to the amount of the order, or 50% of the amount of the products invoiced in the year preceding the claim. Then we can escalate to the amount of products invoiced in the preceding year. If the customer continues to push, then we should continue to push back, arguing for the legitimacy of a cap.
  + Arguments for the cap:
    - Mane does not sign supply agreements without a limitation of liability.
    - It is standard in our industry – and other industries – for the component supplier to cap its liability.
    - A cap establishes a proportion between the commercial relationship (i.e., revenues achieved) and the risk that Mane must accept.
    - Reflects risk sharing (rather than risk transfer), particularly as the customer inspected the products and accepted them for use.
    - Mane cannot take on the full liability for the customer’s products in the market. The customer has sole discretion over whether and how to process the products, and where and how to market and sell its products that incorporate Mane’s products. The consumer market is not Mane’s business, and we don’t achieve the revenues that correspond to the products in the market which would provide a natural form of insurance for product failures.
    - Mane does not carry insurance coverage at a sufficient level to protect against liabilities that arise from our customers’ activities in the consumer marketplace.
    - Mane’s prices are structured to reflect the risk that Mane is able to take. We would need to charge higher prices if we would be liable on our customers’ products in the consumer market.
  + **Consider that the liability cap bears no relationship to the insurance coverage that Mane carries. Customers – and even members of the Mane Sales group – will sometimes take the position that the cap can be higher because of the level of Mane’s insurance, but this is not valid.**
* **Exclusions from liability**. **We should always exclude consequential damages as the very minimum, under any applicable law.** Under other laws than French laws, we must also exclude indirect, punitive, incidental, and special damages. Punitive damages probably cannot be excluded by contract under certain US States applicable laws, but we usually state this anyway.
* **Indemnity**. We try to avoid use of “hold harmless,” (parties generally do not intend for this to mean something in addition to “indemnify,” but Courts will interpret in some meaning to “hold harmless” that is separate from “indemnify”). Indemnity is granted only as to direct damages. We also strive to avoid any commitment to “defend,” or to be responsible for costs or attorneys’ fees.

1. **IPR & EXCLUSIVITY**
2. **Intellectual property**.

Under no circumstances will Mane assign or transfer IPR. Some parties (including Mane contract managers) confuse this with exclusivity. Further, it should be expressly stated that the IPR in and relating to the products, their manufacture, development or creation (including any improvements, specifications, formulation and documentation) belong to Mane. A customer may argue for “joint development” terms, so that it can share in the IPR, but this is almost never truly the case, as Mane is the party actually developing the IPR.

1. **Exclusivity**.

Generally, we avoid exclusivity conditions in supply contracts, and would only agree upon specified commercial conditions in a separate agreement. If exclusivity has to be granted (to be validate by business management) several conditions must circumscribe it: restricted geographic scope, limited duration, limited to a specified product/reference (as identified by product code), limited to particular application, and either a minimum annual purchase requirement or a reciprocal commitment by the customer to purchase its needs for this flavor / fragrance in this application exclusively from Mane.

1. **APPLICABLE LAW AND JURISDICTION/ ARBITRATION**
   1. **Specify governing law and exclusive jurisdiction for resolution of disputes**
      1. U.S.: (1) Ohio (Hamilton County); (2) New York (Southern District of New York); (3) Delaware. NO to California.
      2. Europe: (1) France; (2) Switzerland (Geneva).
      3. Asia: (1) France; (2) Hong Kong; (3) Singapore.
      4. **Exception:** Contracts between PTMI & Indonesian parties to be governed by the laws of Republic of Indonesia and must be submitted to BANI arbitration.
   2. **Governing law and jurisdiction should align** (in U.S., for instance, it is probably not advisable to specify a California court may hear the case but should apply New York laws).

We try for order shown below.

We assert that we always seek **“neutral” laws and jurisdiction** with our customers (if we cannot get our own home laws), arguing that the customer should not be privileged with a “home court advantage.”

* 1. **Arbitration**. We generally try to avoid mandatory arbitration.

Main advantage = confidentiality

Main disadvantage = expensive especially when we contract with much bigger companies.

In the U.S. more particularly:

* + - More expensive.
    - May be faster than litigation (although it probably just depends), but it may be better for Mane (especially if it is a claim against Mane, and/or is particularly complex) to not rush to a decision.
    - Arbitrator is motivated to extend controversy, because payment is higher, whereas courts are motivated to move claims off docket.
    - Riskier, because it highly depends on quality and experience of the arbitrator.
    - Arbitrators are known to “split the baby,” meaning that notwithstanding how speculative a claim might be, they will say “you each have your points,” and divide the claim. Counterparties know this and use mandatory arbitration as a way of enhancing the likelihood of achieving at least some kind of award.
    - Rules – especially in terms of discovery and admission of evidence – are more permissive than in standard litigation (needs to be organized in the arbitration clause).
    - No appeals possible.
    - There seems to be greater right for the arbitrator to make a subjective determination, rather than being bound by precedent in quite the same way that a court would be.

1. **PRODUCT SPECIFICATIONS, INSPECTION & WARRANTY**
2. **Product specifications: necessary definition and inspection**

* **Specifications**. Mane’s specifications (technical data sheets) govern. If the customer argues, we can accept “mutually agreed-upon” specifications. In any case customer’s specifications must be validated and agreed in writing by Mane to be applicable.
* **Time limit for inspection**. We must *always* state a time limit for the customer’s inspection of the products for obvious / patent defects. We start at 5 days. Next is 10 days. Then we might go to 10 working days, or 14 days. Anything longer is too much to accept.

1. **Remedies and warranties for non-conformity**

* **Claims for defects**.
* Defects noticeable upon unloading: shortages, excess or apparently damaged products must be notified to the carrier and Mane within 3 days maximum.
* Other defects: specify a time limit to notify of a claim for defect (whether patent or latent) after discovery, and generally should insist on a maximum of 5 days after discovery. There shouldn’t be argument on why the customer would require a much longer period to notify Mane of a discovered defect.
* **Mane’s acknowledgment of non-conformity**. We cannot accept that the customer unilaterally decides that the products are defective – it must be proven defective. Our preferred approach: (1) customer files its claim with Mane; (2) Mane inspects on-site or receives a sample to inspect; (3) if Mane confirms the claim, a remedy is followed, but if Mane disputes the claim, an independent lab (agreed upon by the parties) makes the determination.
* **Consequences of non-conformity**. The customer may not send the products back to Mane without Mane’s consent. The customer cannot be entitled to cancel the order or charge a fee.
* **Remedies for non-conformity**. If Mane acknowledges the claim, Mane will either replace the product or reimburse the amounts paid in respect of the defective / non-conforming product. This is offered as the “sole compensation” or “sole remedy.” If the customer insists and strongly objects to this as the “sole remedy,” we can withdraw. But we will not accept that the customer expressly reserves the right to invoke rights in addition to one of these remedies.
* **Warranties**.

Mane should only warrant that the products will comply with the specifications.

The warranty is linked to the time limit for claims but could be made for the shelf life stated by Mane (if unlimited duration is required, this is the maximum that we can accept).

We will also warrant to compliance with applicable laws and regulations, although we should probably avoid further warranting to industry standards. These are the sole warranties.

* The warranties do not extend to defects that result from the customer’s improper storage, handling or use, including such that does not conform to the specifications and/or Mane’s instructions.
* We do not warrant free from defects (“defects” is ambiguous and subjective term).
* We expressly exclude the warranties of merchantability and fitness for the particular purpose. If the customer insists on fitness for the purpose, we can accept, provided it is stated that such specific purpose must have been delivered in writing by the customer.
* We resist as much as we can to warranty against infringement. If it becomes a dealbreaker not to warrant that the products do not infringe upon third party IPR, then we strive for (i) “to the best of Mane’s knowledge” and (ii) that “the warranty applies only to Mane’s products “as such” or “in themselves,” and ensure we are excluding the possibility of a warranty as to Mane’s product in application (i.e., Mane’s product after customer’s processing or combination with something else).

1. **ORDERING & DELIVERY PROCESS**

* **Order**.

Mane must confirm an order (we usually offer three working days, better five for Europe) for it to be binding. Upon such acceptance, the order is a contract binding upon both parties, and may not be cancelled.

Mane should implicitly reserve the right to reject orders, but if the customer resists the possibility of Mane having the right to turn down orders, then we can accept to state that Mane may not reject orders except if the order states a quantity that is so substantially large that we cannot produce to that level (or upon the lead-time asserted), or if the order includes non-agreed terms.

If the customer strongly insists upon the right to cancel open orders, we can sometimes accept, but strictly upon the condition that Mane has not begun production of the goods under the order.

* **Forecasts**.

Either binding on both, or binding on neither. Mane cannot accept to be contractually bound to produce to forecasts if the customer is not obliged to purchase accordingly.

Better not to mention in the contract any forecast from the customer if the customer has no intention to be bound by it.

If the parties will have a mutually binding forecast, Mane’s supply agreement template provides guidelines on requirements (flexibility rules of rolling forecast).

* **Stock**.

If the customer requires Mane to hold stock, it should be set up in a separate stock keeping agreement. This independent contract will impose obligations on the customer to ensure the stock is purchased.

* **Delivery**.

Mane specifies the delivery lead-time on an EXW basis (meaning lead-time until we place the products at the disposal of the customer at Mane’s premises, not cleared for export and not loaded).

We prefer selling our products on an FCA Mane production facility basis, as per ICC 2010 incoterms (meaning “delivery” occurs when we load the goods on the means of transport provided by the carrier at Mane’s premises).

We strive to avoid penalties for delays or quantity defects. If from the business perspective we cannot reject the principle of such penalties for delayed delivery or quantity defects, penalties must be negotiated as follows. Penalty calculation must be clearly defined in the contract, and can only apply to product defects or delayed delivery. Penalty requirement:

-Penalties must only apply to late deliver or product defect.

-Never more than 10% the total associated sale value.

-No more than 2% per week delivery is delayed.

-Mane requires 30 day right to object.

-Penalty must be expressly stated as liquidated damage (and exclusive remedy).

-Strive to prevent customer right to cancel.

-Method of payment/deduction from future invoices must be spelled out.

We also strive to avoid “time is of the essence,” because then on-time delivery becomes a material condition, and since delays do occur, it can be a big risk area.

Any provisions on transport and delivery must align with the agreed-upon Incoterm.

Also, risk of loss is determined by the applicable Incoterm.

* **Transfer of title**.

Our starting point is transfer at time of full payment for the goods. But if the customer argues, we can generally accept title transfer upon delivery.

1. **FINANCIAL CONDITIONS**

* **Prices**.

We cannot accept to refer to the order to determine the prices. The prices should either be in the supply agreement itself, or in a separate offer sent by Mane.

Applicable ICC 2010 incoterm to be specified, preferred: FCA Mane production facility.

* **Price changes**.

Prices are only locked during a validity period stated by Mane, and after such time Mane can update the prices at its discretion. During the price validity period, Mane should reserve the right to update prices in case of a substantial rise in the cost of the raw materials (hardship clause).

* + In respect of price changes during the validity period, we argue that such fluctuations in raw material prices are out of our control, and we must avoid being bound to continue to honor contracts at existing prices if becomes prohibitively expensive to sell the products. Considering that our customers are other businesses, they should understand this fundamental economics precept, and acknowledge that they would likewise not want to be prevented from passing on additional costs they incur in their own sourcing.
* **Payment**. Payment terms 30, 45 or 60 days from date of invoice. Anything longer than 60 days is invalid in Europe. In Asia, Mane might accept a period up to 90 days but should be confirmed first by local management. Terms run strictly from date of invoice, not receipt of invoice or receipt of goods. We state no discount is granted for early payment (unless management has expressly approved a discount).
* **Late payments**. We try to state that Mane reserves the right to suspend further delivery of products until all overdue payments are collected. We also sometimes state that overdue payments bear interest per applicable laws, although if applicable law like French law entitles Mane to charge interest, then it seems unnecessary to require the mention of this implicit right.
* **Set off**. Some customers include a clause entitling it to set off amounts that it asserts Mane owes to it against payments due to Mane. Generally we reject these clauses. If the customer insists, then we state that Mane must first validate the amount that the customer claims that Mane owes to it. It should not often be the case that Mane owes the customer money anyway.

1. **MANE CONTRACTING PARTY**

The contracting party to a supply agreement among the Mane entities must be the invoicing Mane company.

All Mane companies are invoicing, except as follows:

* Asia : Mane Korea is not invoicing;
* EMEA : only the following companies, on top of VMF, are invoicing, as follows:

|  |  |
| --- | --- |
| **Country** | **Mane affiliate** |
| Switzerland | MANE SA |
| Italia | MANE ITALIA SRL |
| Spain | MANE IBERICA SA |
| Poland\* | MANE POLSKA SP ZOO\* |
| Turkey | MANE AROMA VE ESANS SANAYI VE TICARET (LIMITED SIRKETI) |
| Russia | MANE VOSTOK LLC |
| South Africa | MANE SOUTH AFRICA PROPRIETARY LIMITED |
| MANE SAVOURY SOUTH AFRICA |
| Ukraine | LIMITED LIABILITY COMPANY “MANE UKRAINE” |
| USALVIA LLC |
| Kazahkstan | MANE (KAZAKHSTAN) LLP |
| Moldavia | MOLSALVIA S.R.L. |

\* Only the following products: ice cream flavors and mixes (former Gelcrem products) and products manufactured in Rubi

All other sales in EMEA are invoiced from VMF.

1. **MISCELLANEOUS**

* **Legal entity**. Confirm the entity is indeed an active registered entity in a certain jurisdiction. It is generally best to state the company’s jurisdiction and principal physical address.
* **Recitals**. If the contract contains a preamble, including “Whereas” clauses, it is advisable to avoid placing operative terms in this section, as this is generally regarded as the place to “set the table” for the contract, rather than begin establishing binding contractual conditions. Sometimes terms are defined in the preamble, which is usually okay, since their use occurs in the operative part of the contract.
* **Applicable documents**. Check for all references to the applicability of an external document (e.g., supplier expectations, code of conduct, etc.). All external documents must be submitted to the contract review procedure (including review by Legal), and in some cases (e.g., specifications) should be attached as exhibits to the contract. General Terms & Conditions of both parties are excluded.
* **Purpose**. It is prudent to state the purpose of the contract, which should be to establish the terms and conditions for Mane’s sale, and the customer’s purchase, of the goods identified to the contract. Further, we generally should state that the products are intended to be integrated into the customer’s own products, and may not be resold as is, provided to a Mane competitor, or repackaged for distribution to third parties. Make sure that agreement is a supply contract as some customers attempt to consider Mane as a toll manufacturer or service provider.
* **Confidentiality**. It is generally advisable to state that the parties will keep technical and commercial information confidential. For instance, the customer may learn things about Mane’s pricing, cost inputs (although this is not something the business should be disclosing), and administrative information. Be watchful if we have an existing CDA with the customer, however, as we may need to specifically state that the CDA applies (particularly so we don’t inadvertently supersede the CDA by including confidentiality obligations here).
* **Force majeure**. Mane cannot have liability of any kind in case of true force majeure circumstances. We can accept that the customer may terminate the agreement with immediate effect if the force majeure condition persists for more than 90 days.
  + It is advisable to state periods of time in either days or years, because a “month” can be more ambiguous. Does it mean 30 days? 31 days? 28 days, because of four seven-day weeks? It could also arguably be interpreted to mean full calendar months must elapse – e.g., if the contract is effective July 10th, and specifies some right accrues after 3 months, perhaps all of August, September and October (i.e., 3 months) must pass. Probably what is meant is the right occurs on October 10th, but using “90 days” just avoids all that interpretation.
* **Term**. It is probably prudent to state a term (anywhere from 1 to 5 years, depending on the circumstances and management’s opinion). We can structure to automatically renew, or renew only upon mutual agreement. In any case, the prices if mentioned in the agreement, must be valid for the price validity period only.
* **Termination**. Termination of the supply agreement does not end the customer’s obligation to fulfill its purchase commitment under outstanding orders. We generally seek a thirty day cure period for termination due to default.
* **Assignment**. No assignment without consent. Generally we want to have the ability to negotiate separately with a different party.
* **Amendment**. State that amendment is possible only upon mutual written agreement.
* **No waiver**. State that failure to insist upon strict compliance does not constitute a waiver.
* **Severability**. State that if a provision is held invalid or unenforceable, the other provisions are not affected, and only the offending provision is excluded.
  + Some counterparties instead state that the offending provision is to be construed to most closely approximate the parties’ intent while taking a legally valid form. It is fine as an alternative.
* **Entire agreement**. State that the contract constitutes the entire agreement, and supersedes previous agreements. Confirm that this is the case, and there aren’t active agreements that we want to keep but could be impacted by this contract.
* **Signatures.** MANE prefers “wet” signatures when feasible. However, situations will arise where an electronic signature is required due to counterparty demands or practicalities of the situation. In these situations, a variance from the wet signature requirement may be granted by the assigned Legal Counsel on a case-by-case basis, subject to the requirements of this section.

In order for MANE to accept an electronic signature, the agreement must be governed by laws that allow for electronic signatures to be binding on the parties. The signature itself must be validated to both European Union and local requirements. This means that the signature must use two-factor authentication or a digital certificate meeting the requirements of the eIDAS Regulation.

The electronic signature services selected by many MANE counterparties do not comply with these requirements. In order to facilitate the collection of compliant signatures, MANE has contracted with DocuSign to provide a platform for collecting and validating electronic signatures.

If a contract is approved for electronic signature and the counterparty does not provide a compliant method of signing the contract, then the MANE contract manager shall request the regional DocuSign account holder to generate an electronic “envelope” containing the document. The contract manager will supply the person generating the envelope with the name, title, and email address of the signer. In order to meet EU electronic signature requirements, the signer will either have to supply their mobile phone number to the MANE contact to receive an SMS password, or obtain a digital certificate at their own expense.

* **Originals**. Require that the counterparty execute two originals (so that each party may receive its own original hard copy) if the signatures are not to be electronic.
  + We may accept to language that specifies a facsimile or electronic copy qualifies as an original, provided we make it clear to the counterparty that we nevertheless require to receive a hard copy original.
* **Individual signers**. The parties should have authorized representatives execute. Beware of “duly authorized” and make sure it is the case.
  + Theoretically, counterparty might be able to avoid a contract if it can successfully claim that an unauthorized employee entered into a commitment. Nevertheless, it is helpful to keep in mind that we should be looking for individuals with appropriate titles as the signatories.
  + When French laws are applicable, in case of doubt on the capacity of the signatory to sign the contract in the name and on behalf of the company, the following is to be sent in an e-mail to the counterparty (by Mane Contract Manager):

*Thank you for confirming that Mr./Mrs…………….. in his/her quality of ………….. is entitled to sign the contract for and on behalf of the company……………before the…….*