

Terms of Delivery and Payment of CMS-GmbH, Tuttlingen

I. Conclusion of contract

1. Unless otherwise agreed, our offers are non-binding and subject to confirmation. The purchaser's order is a legally binding offer to enter into the contract. We have the right to accept the purchaser's offer within a period of 14 calendar days. All supply contracts and other agreements do not become valid until we have confirmed them in writing. The content of the confirmation alone is authoritative. There are no collateral oral agreements.
2. Amendments or additions to the agreements are not valid unless we have confirmed them in writing. Any amendment to this written form requirement must be in writing. We reserve the right to make constructive changes on the delivery item deviating from our non-binding offer.
3. Apart from our directors and authorised officers (Prokurist) – acting according to the company rules on representation – our employees are not authorised to agree to amendments to these Terms of Delivery and Payment; any such agreements are irrelevant and are not binding on our part.
4. All agreements and offers are subject solely to these Terms of Delivery and Payment; they are deemed to have been accepted once the order has been placed or the delivery has been accepted. Any terms and conditions used by the purchaser are hereby expressly rejected. Unless expressly acknowledged in writing differing terms and conditions of the purchaser shall not become part of the contract and are to be considered non-binding even if we supply without reservation in the knowledge that the purchaser's terms and conditions or do not expressly object to supplementary or deviating terms and conditions.
5. The documents associated with the offer such as illustrations, drawings, weights and dimensions are only approximations. They do not constitute an agreement regarding the attributes of the item and are only descriptions or designations of the supply or service. We reserve title in cost estimates, quantities per time analysis, drawings and other documents. These shall not be disclosed to third parties.

II. Scope and term of delivery

1. The term of delivery begins as soon as all technical, design and commercial details have been finalised and both parties have agreed to the terms of the contract.
2. Delivery times and dates are only approximate. They are based on the date of dispatch and shall be deemed to have been fulfilled once the shipment has been reported as being ready for dispatch.
3. The terms of delivery shall be extended by the period during which the purchaser fails to meet its obligations towards us without prejudice to our rights associated with purchaser's default. This applies accordingly to delivery dates. If the purchaser is in default of acceptance, we are entitled to store the goods at the expense and risk of the purchaser.
4. Compliance with delivery dates shall be subject to punctual and correct delivery by our own suppliers, as long as we are not responsible for such delay. Should it become apparent that delays are likely, the purchaser will be notified as soon as possible.
5. If we are in default of delivery, the purchaser can demand not only delivery, but also reimbursement of any loss incurred by the delay. However, provided we have not acted with intent or gross negligence, this claim is restricted to 0.5 % of the value of the shipment concerned per week of default (*Verzug*) and to a maximum of 5 % of the value of the shipment concerned. The right of the purchaser, to rescind the contract and/or to demand damages for non-performance in accordance with IX. once a reasonable subsequent deadline has expired shall remain unaffected.
6. Part deliveries are permissible as long as this is reasonable for the purchaser. Each delivery shall be considered a separate transaction.
7. *Force majeure*, industrial action, unrest, official measures and other unforeseeable, external, unavoidable and serious occurrences shall release the parties from their performance obligations for the period of the disruption and the extent of its consequences. As far as can be reasonably expected the parties shall provide whatever information is necessary without undue delay and to adjust their obligations to the changed circumstances in good faith. Temporary hindrances only release the parties for the duration of the hindrance plus a reasonable start-up time. To the extent that one of the parties cannot be reasonably expected to proceed with execution of the contract as a result of the delay, it may withdraw from the contract by written declaration to the other party, at the earliest however after twelve weeks. The purchaser may not claim compensation from us in this context.

III. Dispatch and transfer of risk

1. Unless otherwise agreed in writing, risk shall pass to the purchaser on handover of the goods to the forwarding agent or freight carrier but no later than when the goods leave our premises or warehouse, even if carriage freight paid has been agreed. If despatch is delayed for reasons for which we are not responsible, risk shall pass on notification that the shipment is ready for despatch. In such cases any storage costs, which arise after the passage of risk, shall be borne by the purchaser unless this is a case of force majeure as set out in II. 7.
2. We shall decide on the method of despatch and packaging at our due discretion.
3. The shipment shall only be insured against transport damage and other risks at the express request and cost of the purchaser.

IV. Prices

Unless otherwise agreed, our prices are net prices, ex works (EXW Incoterms 2010) and apply to the scope of supply and service set out in our order confirmations. Ancillary costs, e.g. expenditure for packaging, despatch, transport shall be borne by the purchaser.

V. Terms of payment

1. Unless otherwise agreed in writing, invoices must be paid immediately upon receipt, strictly net. Machines shall be subject solely to the following terms: Unless otherwise agreed, payment shall be in cash without deductions to the supplier's place of business as follows in three net instalments: 1/3 initial payment on receipt of order confirmation, 1/3 on notification to the purchaser that the shipment is ready for dispatch (before dispatch) and the remaining 1/3 within 30 days after dispatch. Supplies abroad shall be against letter of credit or subject to separate agreement.
2. If the purchaser is in default of payment we are entitled to demand interest at a rate of nine (9) percentage points above the respective base interest rate. We reserve the right to make further claims over and above this. If payment by instalments has been agreed and if the purchaser defaults on payment of an instalment, the residual debt from the contractual relationship shall be due for payment immediately.
3. Even if the purchaser has notified defects or if there are counterclaims the purchaser may only offset and retain part of the purchase price if the defects or counterclaims are undisputed or have been declared final and absolute by a court of law. Insignificant defects, which do not impair the functioning of the machine do not justify the purchaser to retention or offsetting.
4. If we become aware of a risk that the purchaser is unable to pay, we are entitled to provide goods or services only in return for an advance payment or a security. This shall not affect our right – if we are contractually bound to render advance performance – to refuse the performance incumbent on us or to withdraw from the contract if it becomes apparent after conclusion of the contract that our claim is jeopardised and the purchaser does not provide an advance payment or security within a reasonable grace period. The purchaser's ability to pay is particularly jeopardised if the consideration to which we are entitled is endangered owing to the purchaser's poor financial circumstances or if other impediments to performance are impending, e.g. if a purchaser's supplier becomes insolvent.

VI. Reservation of title

1. We reserve title in all goods supplied by us until the purchaser has settled all liabilities - regardless of the legal grounds- arising from its business relationship with us, including any liabilities, which arise in future.
2. The purchaser shall treat the goods with care; in particular, it shall insure the goods sufficiently against fire, water and theft at reinstatement value at its own cost.
3. In the event of a substantial breach of contract by the purchaser, in particular default in payment, we are entitled to withdraw from the contract if a subsequent deadline has not been met.
4. Provided that we have given the purchaser prior warning, we are entitled to realise the reserved goods which we have repossessed; whereby in so doing, we will take reasonably into account the legitimate interests of the purchaser. If we realise the goods after having repossessed them, the proceeds have to be balanced against the purchaser's liabilities minus reasonable realization costs and any surplus shall be paid to the purchaser.
5. If the purchaser or a third party acting on behalf of the purchaser processes or modifies the goods, which we own, this shall be deemed to have been carried out for us. If the purchaser acquires sole title in the new item created by way of such processing or modification, the parties shall be deemed to have agreed that the purchaser herewith transfers to us title therein in the ratio of the value of goods, which we own to the value of the combination or modification and we herewith accept such transfer. The purchaser shall hold the sole title or joint title so resulting in safe custody for us free of charge. If the goods in which we have title have not been inseparably combined or mixed with other items or otherwise processed or modified since supply, their value at the time of combining, mixing, processing or modification shall be deemed to be the amount which we billed for the goods including statutory value-added tax.
6. If the purchaser combines or mixes any goods in which we have title with other items to form a new single item in such a way that one of the new items must be regarded as the principal item, we shall have pro rata (co-) title in the new item thus created, such (co-)title being the ratio of the value of the goods (co-)owned by us to the value of the combined or mixed items at the time of such combining or mixing, and the customer herewith transfers title and possession therein. We hereby accept this transfer. The purchaser shall hold the item created by combination or mixing in safekeeping for us free of charge.
7. The purchaser is only entitled to resell the reserved goods in the context of usual business, i.e. not in the context of a cheque/bill of exchange procedure. In detail, the following applies:
 - a) If the payment of the selling price is deferred vis-à-vis customers the purchaser shall reserve title in the goods sold vis-à-vis such customers at the same conditions to which we have reserved title on delivery of the reserved goods. The purchaser is not authorised to re-sell the reserved goods unless it has reserved title in this way.
 - b) The purchaser hereby assigns to us any claims which may arise against its customers from resale of the goods supplied by us together with all ancillary rights until such time as all claims have been satisfied in full. We herewith accept such assignment. These shall serve as security to the same extent as the reserved goods. The purchaser is only entitled and authorised to resell or otherwise use the reserved goods if provision has been made to ensure that the resultant claims pass to us.

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- c) If the assigned claim is included in a current invoice (current account), the purchaser hereby assigns the claim from the balance of the current account to us in an amount corresponding to the claims assigned to us and included in the balance; if interim balances are drawn and the parties have agreed that they be carried over, the claim due to us under the above provision from the interim balance shall be treated as if had been assigned to us.
- d) If the purchaser sells the reserved goods along with others, which were not supplied by us, the claim from the sale shall only be deemed to have been assigned to us in the value of the reserved goods sold by us to the purchaser. If goods in which we have joint ownership pursuant to VI. 5. and 6. are sold, assignment shall be restricted to that portion of the claim which corresponds to our share in the title.
- e) In addition to us, the purchaser remains authorised to collect the claims assigned to us until we revoke such authorisation. We shall not make use of our right to collect the claim or to revoke the purchaser's right to collect the claim as long as the purchaser fulfils its payment obligations arising from the business relationship with us, is not in default of payment, has not filed a petition to initiate insolvency proceedings and its ability to pay is not impaired in any other manner. However, if this is the case we may demand that the purchaser notifies us of the claims assigned and their debtors, that it provides us with all data required to collect the claims, the associated documents and notifies the debtors (third parties) of the assignments.
8. In the event of seizure or any other measure taken by third parties, the purchaser shall notify us in writing without delay so that we can initiate legal proceedings pursuant to § 771 of the German Code of Civil Procedure in order to prevent execution of any court order. If the third party is unable to reimburse the court and out-of-court costs of a claim pursuant to § 771 of the German Code of Civil Procedure incurred by us, the purchaser is liable for the damages incurred hereby.
9. If the realisable value of the securities with which we have been provided exceeds the total value of the claims secured by more than 10 % we may release securities at our discretion if so requested by the purchaser.
10. The purchaser shall provide us with information at our request at any time on the location of the reserved goods and on the claims which resulted from the resale.
11. If the reservation of title is invalid under the law of the country in which the reserved goods are located, the parties shall be deemed to have agreed to the security which corresponds most closely to the law of that country.

VII. Software

1. The software is only supplied in machine-readable form (object code). The source code is not subject of the contract and is not supplied with the software.
2. We grant the purchaser the non-exclusive right to use, i.e. install, load and run the software in accordance with the provisions below. The right of use is limited to the agreed period, or if an agreed period has not been agreed, the software may be used for an indefinite period.
3. We grant the purchaser the right to transfer the above right to third parties, in which case the purchaser must ensure that the third party is not granted broader rights of use in the software than those granted to the purchaser under its contractual agreement with us and that the third party is subject at least to the same obligations in respect of the software as stipulated under this contractual agreement with us. In doing this the purchaser may not keep copies of the software. The purchaser is not entitled to grant sub-licences. If the purchaser passes the software on to a third party, it is responsible for compliance with any export licences and will indemnify us from any related obligations.
4. The purchaser may only make a copy of the software for back-up purposes (back-up copy). Apart from cases stipulated in section 69e German Copyright Act (Urheberrechtsgesetz) (decompiling), the purchaser may not modify, reverse engineer, translate or extract parts of the software.
5. We are not liable for losses caused by the purchaser culpably modifying the software itself or having it modified by third parties without our express written consent, using it in or with hardware or software other than that agreed or stated in the documentation or using it for purpose not stated in the documentation.
6. We are not obliged to perform any software service work such as maintenance, hotline or updates which goes beyond the scope of what is covered by warranty. Any such additional work must be agreed separately.
7. The purchaser will make all necessary and reasonable efforts to prevent or limit damage caused by the software. In particular, the purchaser must ensure that programs and data are backed up at regular intervals. As far as the purchaser breaches this obligation we will not be liable for any consequences, particularly not for replacing lost or damaged data or programs. The above provision has no effect on the burden of proof.
8. If the goods supplied by us (e.g. machines) contain third-party software from other manufacturers then the software conditions of the respective manufacturer of the third-party software apply in addition to supply and use of this third-party software. On request in written or electronic form we will provide the purchaser with these software conditions.

VIII. Claims for defects

1. The purchaser shall carefully inspect the goods, which we deliver without undue delay after their arrival, provided this is possible in the usual course of business and shall inform us in writing of any obvious defects without undue delay at the latest however within seven (7) calendar days after delivery. The purchaser shall notify the freight carrier of any obvious signs of transport damage and these must be confirmed by the freight carrier upon delivery. Any other transport damages must be reported to the freight carrier within seven (7) calendar days after delivery. The purchaser shall notify us in writing of any defects, which were not detected in proper incoming goods control without undue delay, at the latest within three (3) working days after discovery. In all other respects, statutory provisions apply. Otherwise the goods shall be deemed to have been accepted unless defects were fraudulently concealed.
2. Statutory provisions shall apply in the event the goods supplied have material or legal defects unless otherwise provided for in the following; in particular, at our due discretion we shall either render subsequent performance by remedying the defect or supply a replacement. Replaced parts shall become our property. The purchaser shall grant us access to the goods we supplied so that we can examine the goods and remedy the defects.
3. Claims owing to defects shall become statute-barred one year after delivery of the goods, with the exception of any claims pursuant to IX. or in the event of fraudulent concealment of a defect.

IX. Liability for damages

1. We are liable for intent and gross negligence on our part, on the part of our legal representatives and vicarious agents.
2. We shall also be liable in the event of negligent injury to life, body and health caused by us, our legal representatives or vicarious agents and in the event of fraudulent concealment of a defect or assumption of a guarantee (*Garantie*). In the latter case the extent of liability depends on the wording of the guarantee.
3. We shall also be liable if we, our legal representatives or vicarious agents negligently breach duties which are material for fulfilling the contract and which the purchaser relies or is entitled to rely on being fulfilled. If we have not acted with intent or gross negligence, our liability is restricted to typical, foreseeable damage in these cases.
4. We shall also be liable in instances of mandatory statutory liability, for example pursuant to the Product Liability Act (*Produkthaftungsgesetz*).
5. Otherwise liability is excluded irrespective of the legal ground.
6. The purchaser shall notify and consult us comprehensively and without undue delay if it intends to claim for damages in accordance with the aforementioned provisions. The purchaser shall provide us with an opportunity to examine the loss occurrence. The purchaser shall be obliged to minimise and limit potential damages resulting from defective goods.

X. Final provisions

1. Unless otherwise agreed, the place of performance shall be Tuttlingen, Germany. The place of jurisdiction for any disputes arising from or related to the business relationship between us and the purchaser shall at our discretion either be Rottweil or the purchaser's place of business. Exclusive place of jurisdiction for action filed against us shall be Rottweil, Germany.
2. The relationships between us and the purchaser shall be subject exclusively to the law of the Federal Republic of Germany. The United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980 shall not apply.
3. The headings in these Terms of Delivery and Payment serve only for better orientation. They have no relevance to interpretation of the provisions.
4. If one or more provisions of these Terms of Delivery and Payment should be or become invalid this shall not affect the validity of the other provisions. The parties shall then agree to a new provision, which as far as possible reflects the economic intent of the invalid provision.