

## **General Terms and Conditions of Sale of**

### **Berkenhoff GmbH**

#### **§ 1 Scope of Application, Data Protection**

(1) Where the Customer is acting in the course of his business within the meaning of § 14 of the German Civil Code (BGB), the following standard terms and conditions shall govern exclusively all business relationships between ourselves and the Customer or any subsequent version in force at the time the order is placed. Any terms of the Customer which contradict or deviate from the terms and conditions below shall not apply except where we have expressly agreed to the same in writing

(2) A Customer acting in the course of his business is a private individual or a legal entity or a partnership with legal capacity, which is acting in the course of its business or profession. A partnership with legal capacity is a partnership capable of acquiring rights and liabilities.

(3) Insofar as is necessary for the handling of our business we are entitled to store and process the Customer's data in electronic form to the extent permitted by data protection laws (in particular §28 of the German Data Protection Act (BDSG)).

#### **§ 2 Quotations, Changes, Commercial Terms**

(1) Our quotations are without obligation; a contract shall be concluded where we acknowledge the order in writing or text form (§ 126b of the German Civil Code (BGB)) or where orders are executed by us.

(2) Any changes, supplements and/or cancellation of a contract or of these terms and conditions must be made in writing or text form.

(3) Where trade terms in accordance with the International Commercial Terms (INCOTERMS) are agreed, the INCOTERMS 2010.

#### **§ 3 Risk, Method of Shipment, Delivery Dates, Acceptance**

(1) Except where otherwise agreed we supply our goods and services EXW (ex works) our place of business.

(2) Supply of goods or services by installment is permitted except where unreasonable for the Customer.

(3) In relation to make and hold orders approximately the same quantities shall be called off each month except where otherwise agreed in writing. The entire order quantity shall be deemed called off one month after the expiration of the call off deadline, or in the absence thereof twelve (12) months after the contract date. Where the Customer fails to assign goods ordered to a certain delivery within one month after the expiry of the deadline for such

assignment, or in the absence of an agreed deadline, within one month of our request for such assignment, we reserve the right to assign the goods at our discretion and deliver the same

(4) The commencement of the delivery term quoted shall be subject to clarification of all technical matters and proper and timely performance by the Customer of his obligations.

(5) Where we fail to deliver upon an agreed delivery date and such failure is caused by an act or omission on our part the Customer shall grant us an extension in writing of not less than 3 weeks. Where upon the expiry of the grace period, delivery is still not forthcoming and the Customer desires to rescind the contract or demand damages in lieu of performance, the Customer shall prior thereto set a final and reasonable deadline in writing expressly indicating his intention. The Customer is obliged at our request to declare within a reasonable period whether he shall rescind the contract due to the delay in delivery and/or demand damages in lieu of performance or insist upon performance.

(6) Where a particular acceptance procedure has been agreed it shall be conducted at the production plant immediately upon notification of readiness for shipment. The cost thereof shall be borne by the Customer. Where the Customer fails to accept the goods on time, in whole or at all, we shall be entitled to ship the goods without acceptance or to store the same at the expense and risk of the Customer, whereupon the goods shall be deemed delivered in conformity with the contract.

#### **§ 4 Measurements, Weight, Quality**

(1) Quality and measurements shall be determined in accordance with German (DIN) or European (EN) standards. Any measurements and weights set out in quotations and order acknowledgements are stated to the best of our knowledge and are approximate values only.

(2) Deviations in weight and quantity due to manufacturing processes are permitted up to +/- 10% both in relation to entire order quantity and single installments.

(3) The quantities and weight set out in our delivery note shall be definitive for invoicing purposes. Complaints will only be considered when received by us immediately on delivery. Any quantities missing are to be noted by the Customer in writing on the delivery document.

#### **§ 5 Act of God**

In the event of act of god we are entitled to suspend performance of our obligation to deliver. Where there is a considerable change in the circumstances prevalent at the formation of the contract, we reserve the right to rescind the contract. Such changes shall include shortages of power or raw materials, strikes, official decrees, plant or traffic disruptions (e.g. fire, machinery or roller breakage) or where our suppliers fail to supply us on time for the reasons set out aforesaid.

## **§ 6 Price, Payment, Set off, Right of Retention**

(1) Our prices are EXW (ex works) our principle place of business. Except where otherwise agreed they do not include packing, coils, insurance, freight and VAT as well as customs duties, consular fees and any other levies incurred by the Customer.

Packaging and single use coils shall be invoiced at cost price and are not returnable. Returnable packaging shall be returned within 12 months of the invoice date undamaged and carriage paid whereupon the Customer shall be credited with two thirds of the price charged for the returnable packaging. Coils, excluding single use coils, shall be returned within 6 months of the invoice date whereupon the Customer shall be credited with the full price charged for the coil. Where rail containers are used for shipment the hire charges will be invoiced.

(2) The prices for non-ferrous metals set out in each order acknowledgement are based on the listed price valid at the date the order is received, except where otherwise agreed. Where no price is listed at the date the order is received the next price listed shall apply.

(3) Any price quoted for reworking is subject to the Customer placing at our disposal the material to be reworked six weeks prior to the delivery date carriage and duty free. Where the Customer fails to comply with the aforesaid we shall be entitled to supply the metal required at the expense of the Customer at the listed price without any obligation to set off any quantities received from the Customer late. Where any additional VAT becomes due as a result of the provision of materials by the Customer it shall be borne by him and shall be remitted immediately where claimed without deduction.

(4) Where the delivery or performance date is more than 3 months after the contract date we are entitled upon timely notification to the Customer and prior to delivery or performance to adjust the price in such a manner as is necessitated by any general price development beyond our control (e.g. exchange rate fluctuations, currency regulations, customs duties changes, increases in material and production costs) or by changes of suppliers. For supplies of goods or services within three months from the contract date the contract price shall apply in any event.

In relation to framework agreements with a price clause the three month period shall begin to run upon the effective date of the agreement.

(5) We shall be entitled to demand down payments or payment in advance where the Customer places an initial order, or has its place of business abroad or where we have reason to doubt that Customer will remit payment on time or in full. Where one of the circumstances aforesaid occurs after the contract has been concluded we shall be entitled to revoke the term of payment agreed and to declare any outstanding amount immediately due for payment

(6) Except where otherwise agreed the Customer shall remit payment of the agreed price without deduction within 30 days after supply of the goods or services. Upon expiry of the payment term the customer shall be deemed in default of payment in accordance with § 286 sub-section. 2 No. 2 of the German Civil Code (BGB).

(7) Cheques and bills of exchange shall only be accepted as conditional payment, bills of exchange by special agreement only. Bill charges and other costs of payment shall on principle be for the account of the Buyer and are due immediately

(8) The Customer may only set off undisputed counterclaims or counterclaims against which we have no further recourse to appeal. The Customer shall only be entitled to rights of retention in so far as these are based on the same legal transaction.

## **§ 7 Retention of Title**

(1) Goods sold shall remain our property until payment of all claims under the business relationship has been received from the Customer.

(2) If the Customer works or processes the goods our reservation of title shall be extended to cover the whole of the new article. In the case of processing, combining or mixing with external goods by the Customer we shall acquire title in the fraction that corresponds to the invoice value of our goods to that of the other objects used by the Customer at the time the processing, combining or mixing took place.

(3) If the goods subject to reservation of ownership are combined or mixed with a principle good belonging to the Customer, the latter hereby assigns in addition his rights in the new good to us. If the Customer combines or mixes the goods subject to reservation of title with a principle good belonging to a third party against payment, he hereby assigns his claims for payment against the third party to us.

(4) The Customer may resell goods subject to reservation of ownership in the framework of due business activities. If the Customer sells these goods without receiving the full purchase price in advance or contemporaneously with the surrender of the item purchased, he shall agree a reservation of title with his customers in accordance with these conditions. The Customer hereby assigns to us his claims under this resale and the rights under the reservation of title agreed. He agrees at our request to notify the assignment to Customers and to provide us with the information required to claim our rights against the Customers and to hand over documents. Irrespective of the assignment the Customer shall only be authorised to collect payments under the resale as long as he properly complies with his obligations to us.

(5) If the value of the securities provided to us exceeds our claims by more than 20 percent, we undertake to release securities of our choice on demand by the Customer. If we claim reservation of title this shall only be deemed to be a withdrawal from the contract as well if we declared this expressly in writing beforehand.

(6) In the event of a levy of execution, sequestration or any third party intervention with the reserved goods the Customer shall inform us without delay.

(7) In the event that the above retention of title clauses are void or unenforceable according to the law of the state/country in which the goods are situated, the collateral security which corresponds to the retention of title in that state/country is deemed to be agreed

## **§ 8 Product Information**

Our liability for product information is limited as provided for under the terms of the respective contract. We retain the right to make technical changes in the course of our product development. Our product information describes the quality of the product but does not constitute a guarantee within the meaning of §433 of the German Civil Code (BGB). The Customer is obliged to test our products and services as to their suitability for the purpose intended.

## **§ 9 Customer's Rights in the case of Defects**

(1) The goods supplied by us correspond to the German regulations and standards currently in force. We give no guarantee that the goods comply with other national regulations. Where the goods are to be put into operation overseas it is the responsibility of the Customer to ensure that the goods are in conformity with the relevant legal requirements and standards and where required to make appropriate adaptations.

(2) The Customer shall not be entitled to make a claim based on defective delivery or performance where the reduced value or merchantability of the goods delivered or services supplied is nominal.

(3) Where the goods delivered by us are defective and the Customer has notified us of the same in writing within a reasonable period after receipt of the goods we shall at our option deliver a replacement or remedy the defect. The Customer shall grant us a reasonable period of not less than 15 working days to carry out the same.

(4) The Customer is entitled to demand reimbursement of the costs incurred by reason of the replacement delivery or remedying of the defect insofar as such costs are not increased due to the subsequent transportation of the goods delivered to a location other than the original shipment location unless the purpose for which the goods are intended requires the same.

(5) In the event that we are not in a position to remedy the defect or deliver a replacement the Customer is entitled to rescind the contract or to demand a reasonable reduction in the purchase price. Rescission of the contract is only permissible where the Customer prior thereto sets a final and reasonable deadline in writing expressly indicating his intention.

(6) The Customer shall retain a right of recourse against us within the meaning of §478 of the German Civil Code (BGB) insofar as the Customer has not agreed terms with its customer which exceed the statutory liability for defects.

## **§ 10 Damages**

(1) Except where otherwise provided below any claim of the Customer for damages other than those claims set out in § 9 aforesaid are hereby excluded irrespective of the legal grounds upon which it is based. Accordingly we do not accept liability for any damage not incurred by the goods themselves nor do we accept any liability for loss of profit or any other pecuniary loss suffered by the Customer. To the extent that our contractual liability is excluded or limited, such

exclusion or limitation shall apply in relation to the personal liability of employees, representatives and vicarious agents.

(2) The aforesaid limitation of liability shall not apply where the damage incurred has been caused by willful default or by gross negligence or where personal injury has been suffered, or to claims based on the German Product Liability Act (Produkthaftungsgesetz). The same shall apply in relation to any limitation of liability of a guarantee of quality given with regard to the goods or services supplied.

(3) Where we are in negligent breach of a material term of the contract our liability to compensate damage to property shall be limited to such loss as was typically foreseeable at the time the contract was made. A material term of the contract shall be any term which places the Customer in the legal position provided for under the contract in terms of its content and purpose and any term which must be complied with in order to ensure proper performance of the contract and upon the performance of which the Customer relied or could be reasonably expected to rely.

(4) Any other liability in damages is hereby excluded.

(5) Any assignment of the Customer's claims provided for in §9 and § 10 (1), (2) and (3) above is not permitted.

## **§ 11 Limitation**

The limitation period for claims based on the supply of defective goods and services as well as for claims for damages is one year from the date of delivery or acceptance. The limitation period aforesaid shall not apply in relation to claims based on wilful default, gross recklessness, or to personal injury claims and to claims under product liability laws nor shall the limitation period apply where longer limitation periods are prescribed by law.

## **§12 Provision of Materials**

(1) Where it is agreed that the Customer shall provide materials, the Customer shall provide the same free of charge, in good time and ensure that they are of proper quality. The aforesaid shall apply in relation to any technical documentation or specifications required for performance. Any materials and documentation provided shall remain the property of the Customer.

(2) Our liability under warranty, under product liability laws or for default of delivery shall be excluded insofar as such liability is caused by materials, documentation or specifications supplied by the Customer with hidden faults or late supplies despite requests for supply in good time. The same exclusion of liability shall apply where the Customer prescribes the materials in accordance with his specifications and/or prescribes the source of supply, including where we are bound by the terms of the agreement to order the same at our own cost.

### **§ 13 Intellectual Property Rights**

(1) The supply of goods or performance of works shall not be deemed to confer the grant of a licence to use any of our intellectual property rights or copyright. Any such grant of licence shall be subject to a separate agreement.

(2) Any damages claims made by the Customer shall be subject to the provisions set out in §§ 9 und 10. The Customer shall not be entitled to claim damages where the Customer is responsible for the breach of the intellectual property right, in particular where breach of the intellectual property right is caused by a use of the goods which was not anticipated by us, any change to the goods by the Customer or the use of the goods in conjunction with other goods not supplied by us.

(3) In the event that the goods supplied violate third party intellectual property rights we shall be entitled at our option to obtain the required intellectual property rights or a licence to use the same within a reasonable period or to supply the Customer with an acceptable alternative

### **§ 14 Non Disclosure**

(1) During the term and after termination of this contract the parties shall not disclose to third parties or use for their own business aims without authorisation any confidential information (to include without limitation quotations, documents, samples, sketches, business intentions, personal data, problems, data and/or problem solutions, or any other know-how of any kind as well as information visually gained by the inspection of plants or facilities) received from the other party or of which the parties became aware by reason of their collaboration. The aforesaid non disclosure obligation shall also apply in relation to the existence and content of this contract. The parties shall also impose this obligation upon their employees.

(2) This non-disclosure obligation shall not apply to information which

- was already known to the other party prior to the contract ;
- was legally acquired from third parties;
- is or comes into the public domain or is the state of the art ;
- cleared for disclosure by the disclosing party.

The non-disclosure obligation for technical information shall cease 5 years after termination of the parties collaboration.

(3) Upon termination of the contract the parties shall return all confidential documents and information to the disclosing party or at their request destroy the same and provide evidence thereof.

(4) The parties shall comply with data protection law requirements, in particular where access is granted to the premises of hardware or software of the other party. They shall ensure that vicarious agents and third parties acting on their behalf shall also comply with the same and in particular shall ensure that they are bound to keep data secret prior to the commencement of their works. The parties do not intend to process or use personal data, only in exceptional circumstances as an ancillary effect of the parties contractual performance. Personal data shall be treated by the parties in conformity with statutory data protection requirements.

### **§ 15 Choice of Law, Jurisdiction**

(1) For Customers whose principle place of business is situated in the European Union all disputes arising out of these terms and conditions shall be resolved before the courts in Gießen, Germany.

For Customers whose principle place of business is situated outside the European Union all disputes arising out of these terms and conditions shall be finally settled in accordance with the Rules of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary courts of law. The place of arbitration shall be Frankfurt am Main, Germany.

We reserve the right to sue the Customer at its principle place of business.

(2) The laws of the Federal Republic of Germany shall govern all the legal relationships between us and the Customer.

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