

# General Terms and Conditions of Sale and Delivery of ECKART GmbH

(September 2010)

## 1. GENERAL

- 1.1 These General Terms and Conditions of Sale and Delivery (hereinafter called "General Sales and Delivery Conditions") shall apply only in relation to customers which are enterprises in terms of § 14 of the Civil Code (BGB) of the Federal Republic of Germany (hereinafter called "Customer").
- 1.2 In the event that our General Sales and Delivery Conditions are introduced into a transaction with the Customer, such General Sales and Delivery Conditions shall also apply to all further transactions between the Customer and us unless agreed otherwise in writing.
- 1.3 Our General Sales and Delivery Conditions shall apply exclusively. Any conditions of the Customer which are at variance hereto or which conflict with our General Sales and Delivery Conditions shall only apply if expressly accepted by us in writing.

## 2. OFFERS, ORDERS, CHARACTERISTICS OF GOODS

- 2.1 Our offers are subject to change and are non-binding unless expressly stated otherwise. Our offers are merely an invitation for the Customer to submit a binding order on this basis. A contract will be formed, also in relation to ongoing business transactions, only if the Customer's order is confirmed by us in writing (including per fax or email) or, if the goods are delivered. Our order confirmation shall determine the conditions of the contract. In case of immediate delivery our order confirmation may be replaced by an invoice.
- 2.2 Any duty to deliver fungibles alone shall not incur any risk of procurement. Any guarantee, in particular in relation to the characteristics and/or durability of goods, shall only be deemed to have been accepted by us if we describe such a characteristic as being guaranteed by us; this shall also apply to the acceptance of any risk of procurement.
- 2.3 In case of the electronic transmission of an order, the provisions of § 312e section 1, sentence 1, no.s 1 to 3 Civil Code (BGB) (Duties in Electronic Transactions) are hereby excluded. We shall not be obliged to confirm the receipt of any order by electronic means. Any emails received by us on business days between 0:00 and 16:00 h shall be deemed to have been received as of 16:00 h unless earlier receipt can be proven. Emails received by us between 16:01 and 23:59 h shall be deemed to have been received at 16:00 h on the next business day, unless earlier receipt can be proven.
- 2.4 In case of any purchase by the Customer according to sample, we reserve the right for minor variations in quality, colour and finish to occur in so far as such result from technical or product development reasons. Any such variation shall not constitute a defect.
- 2.5 Details contained in our data sheets or other information material are to be regarded as approximate average values and shall only be a binding element of a contract if such is expressly confirmed by us in writing. Any information concerning the processing and application possibilities of our products, any technical advice and other information are also provided on a non-binding basis and to the exclusion of any liability unless otherwise expressly agreed.

## 3. PAYMENT CONDITIONS, SECURITY

- 3.1 Unless otherwise agreed, invoiced amounts are due for payment to our bank account in Euro without any deductions within 10 days of the date of invoice. Any further expenses shall be borne by the Customer. In case of goods being exported, any costs related from the transfer or payments of moneys shall be borne by the Customer to the extent that such arise in the country of the Customer.
- 3.2 Any acceptance of an order and the performance of delivery may be made subject to requirements of security deposit or prepayment. We are also entitled to demand payment concurrently with the delivery of the goods.
- 3.3 In the event that there is any substantial deterioration in the financial situation of the Customer after concluding the contract, such as by way of filing for insolvency proceedings by the Customer, the commencement of insolvency proceedings, an application for a declaration of insolvency or an arrest warrant or, if there is a cessation of payment or similar, which is not based on any right of retention or other rights, we may, in addition to our rights under Art. 3.2, withdraw from the contract at any time.
- 3.4 Any rights of retention or set-off on the part of the Customer shall only exist in relation to those counterclaims which are undisputed or have been determined by final legal judgement unless the counterclaim relates to a breach of a substantial contractual duty (for definition see section 8.1) on our part. Any rights of retention may be exercised by the Customer, only if its counterclaim arises from the same contractual relationship.

## 4. DELIVERIES, FORCE MAJEURE, DEFAULT, DISPATCH, PACKING

- 4.1 Any binding delivery dates or deadlines shall be agreed expressly and in writing. The delivery dates detailed by us are only binding if we expressly specify such by the use of terms such as, for example, "fixed". Any unilateral directions of the Customer are not binding on us unless we have expressly agreed to such in writing. Any transactions where time is of the essence must be expressly described as such and confirmed by us in writing.

- 4.2 In the event that we do not receive any deliveries or services from our subcontractors, or do not receive them properly or in time, for reasons beyond our control and despite a reasonable stock being maintained, or in case of any event of force majeure, we shall inform our customers timely in writing or in text form. In such case, we are entitled to delay delivery for the period of the hindrance or to withdraw from the contract in whole or in part in relation to the non-performed part provided that we met our obligation to inform our customers and we have not assumed any risk of procurement. Force majeure includes strikes, lock-outs, actions of authorities, scarcity of energy and raw materials, transport difficulties which are not culpably caused by us, any hindrances to operations which are not culpably caused by us, for example, as a result of fire, water and machine damage, and any other hindrances which in objective terms have not been culpably caused by us. In the event that a delivery date or delivery deadline is agreed in a binding manner and as result of any event under this section 4.2 such agreed delivery date or delivery deadline is not met, the Customer may, after the expiry of a subsequent further reasonable deadline, withdraw from the contract with respect to the non-performed part of such contract, if it would be objectively unreasonable for the Customer to continue to be bound by such a contract. Any further rights to claim on the part of the Customer are excluded in such case.
- 4.3 Any claims for damages due to delays in delivery shall be limited to a maximum amount of 0.5 % of the net delivery price for the goods delayed per completed week of delay, but totalling no more than a maximum of 5 % of the net delivery price. In case such delay relates to a wilful act or gross negligence or a breach of a substantial contractual duty (for definition see section 8.1), the statutory liability shall apply, however such liability shall be limited to the foreseeable damage in the event of a negligent breach of a substantial contractual duty.
- 4.4 If a Customer sets a reasonable subsequent deadline after a delay in delivery and such deadline expires without performance, the Customer may withdraw from the contract; the Customer shall be entitled to claim damages due to non-performance to the amount of the foreseeable damage only if such non-performance relates to a wilful act or gross negligence or is a breach of a substantial contractual duty (for definition see section 8.1); in all other cases any liability for damages shall be limited to 50 % of the damage incurred.
- 4.5 The limitations of liability in accordance with sections 4.3 and 4.4 shall not apply in so far as a commercial contract where time is of the essence is agreed; the same applies if the Customer may claim that as the result of the delay for which we are responsible, an immediate claim for damages should apply instead of performance (§281, section 2 Civil Code (BGB)).
- 4.6 We shall not be in default delay for as long as the Customer is in default of performance of any obligations it may have towards us, even if resulting from other contracts.
- 4.7 Unless agreed otherwise, any loading and dispatching takes place on an uninsured basis at the risk of the Customer ex works or ex distribution warehouse.
- 4.8 We shall determine the means of transport and the transport route. We shall, however, attempt to take into account the Customer's preferences in regard to means and route of transportation; however, any additional costs resulting therefrom - also in relation to agreed free freight delivery – shall be borne by the Customer.
- 4.9 Part deliveries shall be permitted insofar as such are reasonable for the Customer.
- 4.10 The type of packing shall be determined by us. We shall, however, attempt to take into account the preferences of the Customer.
- 4.11 Packing is included in the price and such shall not be taken back by us. Any special packing or small packing required by the Customer shall be charged extra.
- 4.12 If returnable containers are necessary for the delivery of our products, we shall make such available to the Customer initially at no charge with a pro forma invoice. Any returnable containers made available by us shall remain our property and, insofar as such are stored at the business premises of the Customer, such shall be clearly labelled as such and kept separate from the property of the Customer. Returnable containers shall be stored correctly and shall be handled so as not to be damaged. The returning of such containers shall be at the expense of the Customer to our Güntersthal plant, Station Velden bei Hersbruck/Pegnitz. In case of any failure to return such containers by the Customer within six months, the Customer shall pay the costs detailed in the pro forma invoice.
- 5. PRICES**
- 5.1 Orders shall be carried out by us on the basis of the listed prices as of the respective date of delivery. Specific extra charges, depending on the metal commodity exchange price invoiced, may be agreed separately. All prices shall be subject to the addition of the applicable value-added tax. Delivery prices shall be pro net/kg ex works unless agreed otherwise.
- 5.2 We are entitled to reasonably increase prices unilaterally (§ 315 Civil Code (BGB)) in case of any increase in material procurement or production costs, taxes, wage or salary or social security costs as well as energy costs and costs for environmental protection provided that the time between the concluding of the contract and delivery is greater than two months. Any increase in terms of the above is not possible in so far as the increase of costs of any of the above named factors is set off by a decrease in costs of any of the above factors in relation to the total cost burden for the delivery.

## 6. RETENTION OF TITLE

- 6.1 We reserve the title of ownership to all goods supplied by us (hereinafter referred to generally as "retention of title goods"), until all our claims arising from the business connection with the Customer, including any future claims from contracts concluded at a later time, have been settled. This shall also apply to any balance in our favour, if any specific individual claim or all claims by us are included in a current invoice (current account) and a balance is drawn.
- 6.2 The Customer shall insure all retention of title goods adequately in particular against fire and theft. Any claims against an insurer arising out of a case of damage affecting retention of title goods shall hereby be deemed to have already been assigned to us to the amount of the value of the retention of title goods.
- 6.3 The Customer is entitled to resell the delivered goods in the normal course of business. Any other form of disposal by the Customer, and in particular any pledging or granting of any security rights shall not be permitted. If the retention of title goods are not paid for by a third party immediately during the course of resale, the Customer shall sell such only subject to retention of title. Any entitlement to resell retention of title goods shall be extinguished automatically, if the Customer ceases to make payment or is in default with any payment in relation to us. The same shall apply correspondingly if the Customer is part of a group of companies and/or if one of the circumstances described in the above sentence occurs in relation to the parent company or a holding company of the Customer.
- 6.4 The Customer hereby assigns in advance all claims, including any securities and supplementary rights, which it is entitled against any final purchasers or third parties as a result of or in connection with the resale of retention of title goods. The Customer shall not enter into any agreement with its customers which exclude or limit our rights in any manner whatsoever or which render void the advanced assignment of claims. In case of the sale of retention of title goods together with other items, the claim against the third party purchaser shall be deemed to have been assigned to us to the amount of the delivery price agreed between us and the Customer, to the extent that the individual amounts attributable to the relevant goods cannot be determined from the invoice.
- 6.5 The Customer shall remain entitled to collect any claims which have been assigned to us until such right is duly revoked by us to which revocation we are entitled at any time. Upon request, the Customer shall provide us with the information and documentation necessary to collect any assigned claims and, insofar as we do not do so ourselves, the Customer shall inform its customers immediately about the assignment of the claims to us.
- 6.6 If the Customer includes any claims from resale of retention of title goods in a current account relationship with its customers, it hereby assigns to us in advance any recognised final balance in its favour which corresponds with the total amount of the claim from the resale of our retention of title goods.
- 6.7 If the Customer has already assigned any claims from the resale of goods delivered or to be delivered by us to a third party, in particular on the basis of non-recourse factoring or recourse factoring or any other agreements, on the basis of which our current or future rights of security in accordance with this section could be limited, it shall notify us of such without undue delay. In case of recourse factoring we are entitled to withdraw from the contract and to demand restitution of any goods already delivered. The same shall apply in case of non-recourse factoring, if the Customer is unable to freely dispose of the purchase price of the claim under the contract with the factor.
- 6.8 In case of any contractual breach, in particularly in case of default in payment, we are – without us having to withdraw from the contract beforehand – entitled to recover all retention of title goods; the Customer is in such case automatically obliged to release such goods to the extent that not only a breach of a minor duty has occurred. In order to be able to determine the stock of goods delivered by us we may at any time during the normal hours of business enter the business premises of the Customer. Recovering retention of title goods shall qualify as withdrawal from the contract only if we declare such expressly in writing or if such is required by the mandatory provisions of law. The Customer shall notify us without undue delay in writing of any access of third parties to the retention of title goods or claims assigned to us.
- 6.9 If the value of the securities available to us under the above provisions exceeds the secured claims in total by more than 10 %, we shall, if requested by the Customer, release any security at our choice to such extent.
- 6.10 Any processing of retention of title goods shall take place for us as the manufacturer in terms of § 950 Civil Code (BGB) without imposing any obligations on our part. If the retention of title goods are processed with any other items not belonging to us or are irreversibly connected with such, we shall acquire co-ownership in proportion to the invoice value of our goods in relation to the invoice value of the other processed or connected items. If our goods are connected with other movable items to form one item, which may be regarded as the main item, the Customer hereby transfers to us in advance co-ownership of such in the same proportion. The Customer shall store for us any goods owned or co-owned by us at no charge. The resulting rights of co-ownership shall apply as retention of title goods. Upon our request the Customer shall at any time provide us with the necessary information for us to claim our ownership or co-ownership rights.
- 6.11 From the time of cessation of payment by the Customer or in case of the issuing of an application for insolvency of the Customer, the Customer shall no longer be entitled to sell, process, connect or mix any retention of title goods. The Customer shall in such case undertake separate storage and labelling of retention of title goods without undue delay and shall further keep for us on a fiduciary basis any moneys received from assigned claims arising from the delivery of goods.
- 6.12 If the above agreed retention of title is not recognised or is only recognised under certain preconditions under the law of the country into which the goods are delivered, the Customer shall notify us of such at the latest upon the concluding of the contract. If the laws of such country do not allow for retention of title or an extended retention of title, but would allow us other rights in similar manner to a retention of title for security purposes, we hereby declare, that we shall use such rights in relation to the delivered goods. The Customer shall assist in undertaking all necessary measures (in particular compliance with formalities).

## 7. WARRANTY, NOTIFICATION OF DEFECT, PROPRIETARY RIGHTS

- 7.1 The Customer shall inspect the goods without undue delay after receipt for any defects in relation to quantity or quality and shall notify us without undue delay, but no later than within 14 days of receipt, of any recognisable defect; otherwise the goods shall be deemed to have been accepted.

Any notice of defects which is late shall exclude the right of the Customer to claim for breach of contract due to insufficient performance.

Any hidden defect shall be notified by the Customer without undue delay after detection, but no later than within the limitation period set down in section 8.6.

Any complaints as to defects shall provide details of the order and the invoice and dispatch numbers. Any notice of defects must always give a detailed description of the defect.

- 7.2 Any notice of defect under section 7.1 must be in writing. Any notice of defect not complying with the formalities, shall also exclude any right of the Customer to make a claim based on defect.

- 7.3 Liability is excluded in so far as any defect and the resulting damage cannot be related to defective materials, defective design or defective workmanship for which we are responsible. In particular, any warranty or liability is excluded in case of unsuitable or incorrect use of products by the Customer or third parties, in case of the use of our products after the expiry dates or in case of incorrect or negligent handling or in so far as any unsuitable foundation is used or the products are made subject to any chemical, physical, electrochemical or electrical influences, which go beyond the normal levels.

- 7.4 Upon the commencement of the processing, connecting or mixing with other goods, the delivered goods shall be deemed to have been duly accepted by the Customer in case of any recognisable defects. The same shall apply in case of the goods being further transported on from the original place of destination.

- 7.5 In case of any recognisable defect, the respective goods must be left in the transport container, so that we are able to check the correctness of any complaint, unless we expressly waive the right to such by way of written declaration and the Customer ensures the separate storage of the respective goods.

- 7.6 If justified defects have been notified in time, we shall at our choice rectify the defect or deliver defect-free goods free of charge (subsequent performance). In case of any delivery recourse (§§ 478, 479 Civil Code (BGB)), the Customer shall have the right of choice. Before sending back any goods, our permission is to be obtained. Any replaced goods shall become our property. If we do not rectify any defect or we do not provide a replacement delivery for the defective goods within a subsequent reasonable deadline set, or if any subsequent performance is not successful (whereby we are permitted to make two attempts), or if we refuse to provide subsequent performance or if such is not reasonable for us, the Customer may in accordance with the provisions of law withdraw from the contract, reduce the price, claim compensation for expenses as well as damages within the terms set out in section 8. Any right to withdraw from the contract or right for a price reduction shall only apply in case of defects which are not insignificant.

- 7.7 Unless otherwise agreed, we shall be obliged to deliver the goods only in the Federal Republic of Germany free from any proprietary rights and intellectual proprietary rights of third parties. If any third party makes a claim based on infringement of proprietary rights of goods delivered by us to the Customer, we shall be liable to the Customer within the deadlines set out in section 8.6 as follows:

(1) We shall attempt initially at our choice and at our expense in relation to the respective deliveries to either acquire a right of use or we shall so modify the goods that proprietary rights are not infringed or we shall exchange such. If this is not possible for us under reasonable conditions, the Customer is entitled to its rights at law subject to the provisions of these General Sales and Delivery Conditions.

(2) The Customer is entitled to such rights only if it informs us without undue delay in writing as to the claims of the third party, does not acknowledge any such infringement and allows us to undertake all measures for a defence and the conducting of any settlement negotiations. If the Customer ceases to use the goods for reasons of minimisation of damage or other important reasons, the Customer shall notify the third party that the cessation of use does not constitute a recognition of any alleged infringement of proprietary rights. If the Customer, as result of using any goods delivered by us, is made subject to a claim by third parties for infringement of proprietary rights, the Customer undertakes to notify us as to such without undue delay and to provide us with an opportunity to participate in any resulting legal disputes. The Customer shall fully support us in the conducting of any such legal dispute. The Customer shall not undertake any steps which could adversely affect our legal position.

Any rights of the Customer shall be excluded in circumstances where the infringement of proprietary rights is the Customer's responsibility. Any rights of the Customer are further excluded in so far as the proprietary right infringements result from special instructions of the Customer or from any use not envisaged by us or if such infringements result from a modification of the product by the Customer or use with other products not delivered by us.

- 7.8 Our liability in accordance with section 8 shall not be affected hereby.

## **8. LIABILITY, EXCLUSION AND LIMITATION OF LIABILITY**

8.1 We shall be generally liable only for any wilful act or gross negligence by us or our legal representatives or vicarious agents. Our liability and that of our legal representatives and vicarious agents for minor negligence is excluded only insofar as such does not relate to (1) a breach of a substantial contractual duty, (2) breach of any duty in terms of § 241, section 2 Civil Code (BGB), if it would no longer be reasonable for the Customer to accept our performance, (3) any injury to life, personal injury or injury to health, (4) the acceptance of any guarantee for the quality of any performance, for the successful performance or for any risk of procurement, (5) deceit, (6) initial impossibility, (7) claims in accordance with the German Product Liability Act (Produkthaftungsgesetz) or (8) any other cases of mandatory legal liability.

"**Substantial contractual duty**" is any duty which contractually protects the substantial legal position of the Customer, such being entitled to be protected in terms of the content and purpose of the contract; substantial duties also refers to those contractual duties, which must be performed in order to allow the due performance of the contract itself and the compliance with which the Customer regularly relies on, and may rely on.

8.2 To the extent that we cannot be made liable for intentional breach of obligations and there is no case of injury to life, personal injury or injury to health or any other case of mandatory legal liability, we shall be only liable for typical and foreseeable damage.

8.3 Any liability for indirect damage and consequential damage is hereby excluded insofar as such is not the result of a wilful act or gross negligence or a breach of a substantial contractual duty (for definition see section 8.1).

8.4 Any further liability for damages other than that set out in the above sections shall be – regardless of the legal nature of such – excluded. This shall apply in particular for any claims for damages resulting from fault at the time of the concluding of the contract, due to any other breaches of duties or any claims under torts for compensation for damage in terms of § 823 Civil Code (BGB).

8.5 Any exclusions or limitations of a liability in terms of the above sections 8.1 to 8.4 shall apply to the same extent in favour of our managers and non-managerial employees as well as our vicarious agents and our subcontractors.

8.6 Any claims of the Customer for damages arising out of this contractual relationship may be made only within a period of one year from the commencement of the statutory limitation period. The same shall apply for any competing claims arising out of torts as well as any claims for consequential damage. This shall not apply in case of deceit, gross negligence or wilful acts on our part. The limitation period in case of any recourse for delivery in accordance with §§ 478, 479 Civil Code (BGB) shall not be affected.

8.7 The above provisions shall not constitute a reversal of the burden of proof.

## **9. JURISDICTION AND APPLICABLE LAW**

9.1 The place of jurisdiction for any and all disputes arising out of this contract shall be Hersbruck, Germany, or – at our discretion – the general place of jurisdiction of the Customer.

9.2 The law of the Federal Republic of Germany shall apply to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

9.3 If any of our order confirmations contains a clause from INCOTERMS, the respective applicable provision of INCOTERMS in the latest version shall apply unless otherwise stated in our respective order confirmation.

## **10. SEVERANCE CLAUSE**

In the event that individual provisions hereof should be invalid for any other reason than those in §§ 305 – 310 Civil Code (BGB) the remaining provisions shall not be affected. Any invalid provision shall be deemed to have been replaced by a valid substitute provision which most closely reflects the originally-intended commercial purpose.

### **Please note:**

**In accordance with the provisions of the German Federal Data Protection Act (Bundesdatenschutzgesetz) we must inform you that we operate IT-systems and that data received from the Customer on the basis of the commercial relationship will be electronically recorded and stored.**