

General Terms and Conditions of menian TRADING

Preface, Scope

Terms and Conditions of Sale for customers established in- and outside Germany

§ 1 Scope

(1) All supplies, services and quotations provided by menian AG (hereinafter referred to as "seller") shall be executed exclusively on the basis of these General Terms and Conditions which form an integral part of all contracts regarding supplies or services quoted by the seller which the seller concludes with his contractual partners (hereinafter referred to as "purchaser") as long as these are part of the legal relations between fully qualified merchants. They shall also apply to all future supplies, services or quotations to the purchaser even where they are not separately agreed on once more.

(2) Terms and Conditions of the purchaser or third parties (e.g. General Terms and Conditions or Incoterms) shall not apply even if the seller occasionally does not separately reject their applicability. Even if the seller refers to a letter containing or referring to Terms and Conditions of the purchaser or a third party, this shall not imply consent with the applicability of these Terms and Conditions.

§ 2 Quotation and Conclusion of Contracts

(1) All quotations from the seller shall be subject to change and without obligation unless they are expressly marked binding or comprise a term of acceptance. The seller may accept bids or orders within fourteen days on receipt.

(2) The written sales contract including these General Terms and Conditions shall be solely applicable to all legal relations between seller and purchaser as it completely reflects all agreements between the contracting parties regarding the subject matter of the contract.

Oral promises issued by the seller before the contract is concluded shall be legally unbinding and oral agreements between the contracting parties shall be replaced by the written contract.

(3) Additions to and modifications of the concluded agreements including these General Terms and Conditions shall be made in writing to be applicable. Employees of the seller – except for managing directors and registered managers with statutory authority – are not entitled to enter deviant oral agreements. To put something in written form, fax or email transmission shall be sufficient. All correspondence shall be conducted in English or German.

(4) Details given by the seller regarding the object of supply or service (e.g. weights, measures, present utilisation values, capacity, tolerances and technical data) as well as our respective illustrations (e.g. drawings and images) shall be only approximately definite unless the applicability for the contractually designated purpose requires an exact congruence. They shall be no warranted characteristics of state but descriptions or identifications of the supply or service. Variations which are customary or variations due to legal regulations or constituting a technical improvement as well as the substitution of components by equivalent parts shall be tolerable as long as they do not affect the applicability for the contractually designated purpose. The purchaser shall not be obliged to ensure that the goods are actually placed on a foreign market.

(5) The seller reserves his ownership of and copyright in and to all quotations and cost estimates he rendered as well as of, in and to all drawings, illustrations, calculations, brochures, catalogues, models, tools and other documents and devices he provided the purchaser with. The purchaser shall make neither these objects nor their content available or known to third parties nor use or reproduce them or have them used or reproduced by third parties without the seller's express written consent. Upon the seller's request he shall completely return these objects and destroy all possibly produced copies when he no longer requires them for his ordinary course of business or if negotiations do not result in the conclusion of a contract.

§ 3 Prices and Payment

(1) Prices shall apply to the range of services and supplies as stated in order confirmations. Additional or extra volumes shall be invoiced separately. Prices are quoted in Euro, ex works, excluding packaging, VAT, customs duty in case of exports and fees and other public charges.

(2) As far as the agreed prices are based on the seller's list prices and delivery is to be effected more than four months after the contract was concluded, the seller's list prices as at delivery date shall apply (each with a priorly agreed percentage or fixed deduction).

(3) The purchaser shall pay the invoice amount in advance unless something deviant was agreed on in writing. If payment on invoice was agreed on, invoice amounts shall be paid in full within ten days unless something deviant was agreed on in writing. Decisive for the date of payment shall be the seller's receipt of payment. Cheques shall be regarded as payment only after they were honoured. If the purchaser fails to pay the invoice amount when it falls due, interest of 5 % p.a. shall be paid on outstanding amounts as from the day of maturity; the assertion of higher interest and claims for damages in case of default shall remain unaffected.

(4) A set-off with the purchaser's counterclaims or the withholding of payments due to such claims shall only be permitted if the counterclaims are undisputed or res judicata and denominated in the same currency.

(5) The seller shall be entitled to provide remaining supplies or services only on payment in advance or against security deposits if he learns about circumstances which are suitable to significantly reduce the

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purchaser's creditworthiness and which endanger the payment of the seller's due receivables from the respective contractual relationship (including from other individual orders based on the same master agreement) after the contract was concluded.

(6) Allowed terms for payment shall cease to exist and outstanding receivables shall fall due immediately if insolvency proceedings against the purchaser's assets are instituted or refused due to insufficient assets. The same shall apply if the purchaser falsely declared his creditworthiness or does not perform significant duties due to the seller without presenting exculpatory reasons.

(7) The purchaser affirms that all preconditions for the VAT treatment for deliveries outside Germany are fulfilled. In case that VAT incurs, it shall be borne by the purchaser.

§ 4 Delivery and Time of Delivery

(1) Deliveries are effected ex works.

(2) Terms and dates for supplies and services which are announced by the seller shall always apply only approximately unless a fixed term or fixed date is expressly assured or agreed on. If shipment was agreed on, delivery terms and dates shall refer to the time of handover to the carrier, forwarding agent or other third party commissioned with transport.

(3) The seller may without prejudice to his rights resulting from a default of the purchaser demand from the purchaser an extension of delivery and performance terms or a postponement of delivery and performance dates by the period in which the purchaser does not perform his contractual duties towards the seller.

(4) The seller shall not be liable for impossibility of delivery or for delays in delivery as far as these have been caused by reasons beyond control or other incidents which could not be foreseen at the time when the contract was concluded (e.g. all kinds of disruptions, difficulties in the procurement of materials or energy, transport delays, strikes, legitimate lock-outs, lack of staff, energy or raw material, difficulties in obtaining necessary official licences, official measures or the absence, falseness or unpunctuality of supplies from his contractors) and which the seller is not responsible for. If such incidents significantly complicate or preclude the seller's ability to deliver or perform and if this disability is not of a temporary nature, the seller is entitled to cancel the contract. In case of temporary obstacles, terms of delivery or performance shall be extended resp. the dates of delivery or performance will be postponed by the period of the interference plus an adequate start-up period. If the purchase of the delivery or service is unacceptable for the purchaser due to the delay, he may cancel the contract by issuing a prompt written statement towards the seller.

(5) The seller shall only be entitled to effect partial deliveries in such cases when the purchaser can use the partial deliveries for the contractually designated purpose, when the delivery of the remaining ordered goods can be guaranteed and when this does not cause significant additional work and expenditure for the purchaser (unless the seller agrees to bear these costs).

(6) Should the seller fall behind with a delivery or performance or should a delivery or performance become unfeasible for him for any reason whatsoever, the seller's liability for compensations shall be limited according to sec. 8 of these General Terms and Conditions.

(7) The purchaser shall deliver all documents the seller requires for delivery (in particular authorities, permissions and consents) in reasonable time before delivery shall be effected. The seller shall not be obliged to provide any documents or certificates which have not been expressly warranted. This shall apply in particular to documents required for export or customs purposes.

(8) Should the purchaser significantly delay or completely fail to accept the goods, the seller shall be entitled to claim without proof a compensation of flat 15 % of the respective delivery value. An exculpation of the purchaser regarding the effectively incurred expenses shall be possible.

§ 5 Place of Performance, Shipping, Packaging, Passing of Risk, Acceptance

(1) Unless something deviant is specified, the place of performance for all obligations arising from the contractual relationship shall be Stapelfeld.

(2) The mode of shipment and packaging shall be subject to the seller's best judgement.

(3) The risk shall be passed to the purchaser when the delivery item is handedover to the carrier, forwarding agent or other third party commissioned with transport at the latest, governed by the moment when the process of loading is initiated. This shall also apply to partial deliveries or in cases when the seller assumed other services (e.g. shipment). Should shipment or handover be delayed due to circumstances which have their cause in the purchaser's sphere, the risk shall pass to the purchaser on the day when the delivery item is ready for shipment and the seller has notified the purchaser of this fact.

(4) Storage costs after passing of risk shall be borne by the purchaser. If the seller stands for the storage, costs shall be at 0.25 % of the invoice amount of the stored delivery items per expired week. The assertion and evidence of additional or lower storage costs shall be reserved.

(5) The seller will only insure the shipment against theft and pilferage, breakage, transport, fire and water damages or other insurable risks on the purchaser's express request and at his expense.

(6) In cases when an acceptance is required, the sold item shall be deemed accepted if delivery is completed, the seller has notified the purchaser of this referring to the deemed acceptance according to this sec. 5 subsec. 6 and inviting him to accept the sold items and twelve working days have passed since the delivery or if the purchaser has started to use the sold item and six working days have passed since delivery in that case and if the purchaser has failed to accept the sold item within the named period unless the reason for this failure was a defect which the seller was notified of and which made the utilisation of

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the sold item impossible or affected it significantly.

§ 6 Guarantee, Defects regarding Quality

(1) Warranty period spans one year from the date of delivery or, if acceptance is required, from the date of acceptance.

(2) The delivered items shall be thoroughly inspected immediately after their handover to the purchaser or a third party appointed by him. They shall be deemed accepted unless the seller receives a written notice of defects within seven working days after handover of the delivery item in case of apparent defects or other defects identifiable at an immediate thorough inspection or otherwise within seven days after the detection of the defect or after any earlier moment in which the defect was identifiable without closer inspection for the purchaser during the normal use of the delivery item. On the seller's request, the rejected delivery item shall be returned to the seller free of carriage charges. Should the notice of defects turn out to be legitimate, the seller shall refund the costs of the most favourable route of transport; this shall not apply if the costs increase because the delivery item is not located where it shall be normally used.

(3) In case of defects as to quality of the delivered items, first of all the seller shall be obliged and entitled to opt within a reasonable time for either rectification or replacement. In case of failure, i.e. if the rectification or replacement is impossible, unacceptable, rejected or unreasonably delayed, the purchaser may cancel the contract or reduce the purchase price appropriately.

(4) If a defect is the seller's fault, the purchaser may claim compensation according to the conditions regulated in sec. 8.

(5) Regarding defects of parts from other manufacturers which the seller cannot eliminate due to legal licencing or actual reasons the seller shall at his own option either assert his warranty claims against the manufacturers and suppliers for the purchaser's account or assign them to the purchaser. Warranty claims from such defects against the seller shall according to other conditions and these General Terms and Conditions only exist if the legal enforcement of the above mentioned claims against the manufacturer and supplier was to no avail or is futile, e.g. due to insolvency. As long as the legal proceedings continue, the statute of limitation of the respective warranty claims of the purchaser against the seller shall be suspended.

(6) Warranty shall be inapplicable if the purchaser modifies the delivery item without the seller's consent or has it modified by a third party and the rectification of the defect is precluded or unacceptably complicated by this modification. In any case the purchaser shall bear the additional rectification costs caused by the modification.

(7) A delivery of used items which may have been agreed on individually with the purchaser shall be effected excluding any guarantee regarding defects as to quality.

§ 7 Property Rights

(1) According to this sec. 7, the seller warrants that the delivery item is free and clear from any industrial property rights or copyrights of third parties. Each contractual partner shall promptly inform the other partner in writing if claims arising from the infringement of such rights are asserted against him.

(2) In case that the delivery item infringes an industrial property right or a copyright of a third party, the seller shall at his own option and expense either modify or replace the delivery item in a way that no third party rights are infringed any longer but still ensuring the contractually agreed use of the delivery item or provide the purchaser with the right of use by concluding a licence agreement. Should he fail to do so within a reasonable period, the purchaser shall be entitled to cancel the contract or to reduce the purchase price appropriately. Possible compensation claims of the purchaser shall be limited according to sec. 8 of these General Terms and Conditions.

(3) If the seller delivers products from other manufacturers and if these products infringe such rights, the seller shall at his own option either assert his claims against the manufacturers and pre-suppliers for the purchaser's account or assign them to the purchaser. Claims against the seller shall in such cases according to this sec. 7 only exist if the legal enforcement of the above mentioned claims against the manufacturers and presuppliers was to no avail or is futile, e.g. due to insolvency.

§ 8 Liability for Compensation due to Fault

(1) The seller's liability for compensations for whatever legal ground (in particular impossibility, default, faulty or incorrect delivery, breach of contract, violation of duties during contract negotiations and tortious acts) as far as depending on fault shall be limited according to this sec. 8.

(2) The seller shall not be liable for slight negligence of his organs, legal representatives, employees or other persons whom he uses to perform his obligations unless essential contractual obligations are violated. Essential contractual obligations are those to timely deliver and install the delivery item free from significant defects as well as those to provide advice, care and custody which shall either provide for the purchaser's contractual use of the delivery item or aim to protect the purchaser's employees' life or physical condition or his properties against significant damages.

(3) As far as the seller provides technical information or consultatory services and as far as this information or consultancy is no part of the scope of performance he owes according to the contract, this shall be free of charge and excluding any liability.

(4) As far as the seller is on the merits liable for compensation according to sec. 8 subsec. 2, this liability shall be limited to damages which the seller anticipated as possible effects of breaches of contract or

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which he should have anticipated applying due diligence when the contract was concluded. Additionally, indirect damages and consequential damages resulting from defects of the delivery item are only indemnifiable as far as such damages can be typically expected as a result of the normal use of the delivery item.

(5) The seller shall neither be liable for lost profit and non-material damage nor for consequential harms caused by defects of semi-finished products if the seller was not involved in the production and/or processing of these semi-finished products and/or if the seller is unable to affect their quality characteristics.

(6) In all other respects, compensation for delayed or outstanding deliveries shall be limited to 0.5 % per week expired after the deadline, maximum 5 %, and compensation for violations of other obligations to 100 % of the value of that part of performance which was not performed as it was agreed on in the contract.

(7) The above mentioned exemptions from and limitations of liability shall to the same degree apply in favour of the seller's organs, legal representatives, employees and other persons whom he uses to perform his obligations.

(8) The limitations stated in this sec. 8 shall neither apply to the seller's liability due to intentional conduct or injury to life, body or health nor to his liability regarding assured characteristics of state or for claims according to the Product Liability Act.

§ 9 Retention of Title

(1) The seller shall retain the title of the delivered item until all claims arising from the delivery contract have been completely paid. The seller shall be entitled to take back the sold item if the purchaser acts in breach of the contract.

(2) The purchaser shall be obliged to treat the sold item with care as long as the title has not been transferred to him. As long as the title has not been transferred, the purchaser shall be obliged to promptly inform the seller in writing if the delivered item is distrained or exposed to any other interference from third parties. Should the third party be unable to compensate the seller for the judicial and extrajudicial costs of a claim according to sec. 771 ZPO (German Code of Civil Procedures), the purchaser shall be liable for the loss incurred for the seller.

(3) The purchaser shall be entitled to resell the retained goods in his ordinary course of business. The purchaser shall already assign a part of his claims against the recipient arising from the resale of the retained goods to the seller; that part shall cover the amount of the invoiced final amount (including VAT) as agreed with the seller. This assignment shall be valid irrespective of whether the sold item has been resold without or after further processing. The purchaser shall be entitled to collect the claim even after this assignment. The seller's title to collect the claim himself shall remain unaffected. The seller shall, however, not collect the claim as long as the purchaser meets his payment obligations from the collected proceeds, is not in default and in particular as long as neither insolvency has been filed nor payments have ceased.

(4) If the retained goods are processed by the purchaser, it shall be deemed agreed that this processing is done in the name and for the account of the seller as a manufacturer and that the seller directly acquires the ownership or – if the processing involved materials belonging to several owners or if the value of the processed item is higher than the value of the retained goods – the joint ownership (proportionate ownership) of the newly created item. If the retained goods are combined with other material forming an integrative item or an inseparable compound and if one of the items may be regarded essential, the seller shall proportionally assign the joint ownership of the integrative item to the purchaser at the ratio stated in sentence 1 as far as the seller holds the ownership of the essential item.

§ 10 Final Clause

(1) All disputes arising with regard to this contract shall be finally settled according to the rules of arbitration as stipulated by the IHK (Chamber of Industry and Commerce) Hamburg excluding the jurisdiction of a court of record. Arbitration shall take place in Hamburg; three arbitrators shall be appointed. German law shall be applicable; the language of arbitration shall be German. The seller shall be at liberty to appeal to a court of record before initiating arbitration. Both parties shall not be permitted to refer to a court of record after arbitration was initiated.

(2) If a court of record is appealed to, the place of jurisdiction for all possible disputes arising from the business relations between the seller and the purchaser shall be either the seller's choice (Hamburg) or the location of the purchaser's domicile. Mandatory legal regulations regarding exclusive places of jurisdiction shall remain unaffected by this regulation.

(3) The relations between the seller and the purchaser shall exclusively be governed by the law of the Federal Republic of Germany. The United Nations' Agreement regarding Contracts concerning the International Purchase of Goods dated 11 April 1980 (CISG) shall not apply.

(4) As far as the contract or these General Terms and Conditions fail to provide for any unforeseen eventuality, the legally effective regulation of this eventuality which the contractual partners would have agreed on according to the contract's entrepreneurial objectives and the purpose of these General terms and Conditions if they would have foreseen the eventuality shall be deemed agreed.

(5) As this version of the General Terms and Conditions is a translation of the original version, the German version shall prevail.

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