

# General Conditions of Sale and Delivery

HEMA Heermann Maschinenbau GmbH, Date: January 2009

## I. Validity

1. Our General Conditions of Sale and Delivery apply exclusively. They will also apply to all future business and all business contacts with the buyer, such as the commencement of contract negotiations or the initiation of a contract, even if they are not expressly agreed to again or attention has not been expressly drawn to them again.

2. If, in a particular case, certain persons become subject to contractual obligations who are not themselves intended to be parties to the contract, the provisions relating to liability laid down in these General Conditions of Sale and Delivery will also apply to and towards these third parties in so far as these General Conditions of Sale and Delivery have become part of the legal relationship to the third party. This will apply in particular in a case where the third party is, or already was, familiar with the General Conditions of Sale and Delivery when the contractual obligations were established.

3. We do not recognise any terms or conditions of the buyer at variance with, or contrary to, our General Conditions of Sale and Delivery. Previous agreements and earlier versions of these Conditions are superseded by these General Conditions of Sale and Delivery.

4. The acceptance of goods and services will serve as a recognition of the validity of these General Conditions of Sale and Delivery.

## II. Concluding of contracts

1. Unless otherwise agreed, our offers are binding for two weeks from the date of issue of the offer.

2. We will only be bound to meet an order if it has been confirmed by us in writing or we commence to execute the order. This will apply in particular if the customer's order is not based on a specifically binding offer on our part.

3. If so requested by us, the buyer will be under an obligation, for his part, to confirm in writing the written acceptance of his order by us. If the buyer does not issue this declaration within five working days of receiving the corresponding request, we will no longer be bound to meet the order.

4. If our quotation or confirmation of order is based on technical data supplied by the buyer (illustrations, drawings, weights and dimensions, etc.), our offer will only be binding if the order can be executed in accordance with the technical data supplied by the buyer. If, following the concluding of the contract, it turns out that the order cannot be executed in accordance with the technical data supplied by the buyer, we will be entitled to withdraw from the contract if, and to the extent that, the buyer is not prepared to accept the technical alternatives suggested by us and, if necessary, to bear any additional costs which may actually arise. In the event of a withdrawal from the contract of this nature, caused by the culpable behaviour of the buyer, we will be entitled to demand 15 % of the net order value from our buyer by way of all-inclusive compensatory damages, except the buyer proves that we have suffered a lower damage.

5. If, before an order is placed, we supply sketches, draft designs or samples or undertake similar preliminary work, we will be entitled to invoice the buyer for same at cost if no order is eventually placed. All such drafts, samples, etc. will remain our property until they have been paid for in full.

## III. Deliveries

1. Our written quotation or confirmation of order is decisive for the scope of the goods or services we supply. Secondary agreements and amendments require our written confirmation.

2. We will be entitled, to a reasonable extent, to make part deliveries in respect of all orders. We will also be entitled to employ subcontractors as a means of fulfilling our contractual obligations.

3. We notify delivery periods and dates to the best of our ability but, in general, these are not binding. The commencement of the delivery period (dispatch of the confirmation of order) and adherence to delivery dates are subject to the proviso that the buyer carries out his obligatory co-responsibilities on time and in the correct manner, provides all the documents required of him and completes any agreed advance payments. When we hand over the ordered goods to a haulage contractor or notify the buyer of readiness for dispatch, the date of the handover or notification of readiness for dispatch shall count as the delivery date.

4. Unless expressly marked as binding, any documents accompanying our quotations, such as drawings, weights and dimensions, may only be considered as approximations.

5. If a delivery or service is agreed on a call-off basis, the buyer must take the entire delivery or service ordered within a reasonable period or within three months at the latest after the agreement of the call-off order. At the end of this period, we will be entitled to receive payment for the entire order on a concurrent against the provision of all the goods or services ordered.

6. If the delivery or service is delayed as a result of an act of God for which we are not responsible, such as industrial disputes, strikes, lockouts or other occurrences at home or abroad, the delivery period shall appropriately be extended by the length of time during which the disturbance and its after effects last. This will also apply if the said circumstances affect our subcontractors. If an act of God makes it impossible for the delivery or service to be supplied for an indefinite length of time, we will be entitled to withdraw from the contract. The underlying causes for an act of God, moreover, will not be attributable to us if they arise during an existing delay through no fault of our own. In serious cases, we will notify our customers without delay at the beginning and end of hindrances of this nature.

7. In the event of delays in the provision of services, we will not have fallen behind if we or our vicarious agents are only culpable of minor negligence. We will not have fallen behind in cases of acts of God or other exceptional circumstances for which we are not responsible. In this event, we will also be entitled to withdraw from the contract if we have already fallen behind. If, in such cases, we do not respond to the buyer's enquiry, within a reasonable period of time, by declaring whether we will still supply the outstanding service, the buyer, for his part, will be entitled to withdraw from the contract in respect of that part of the service not fulfilled by the supplier.

8. If the buyer falls behind in taking delivery, or dispatch is delayed at the buyer's request, he will be charged for the costs incurred in storage on our premises or the premises of a third party, commencing with our notification of readiness for dispatch. We will be entitled to calculate these costs at the flat rate of 0.5 % of the invoice value (including value added tax) for each full week or a maximum of 10 % of the invoice value (including value added tax). The buyer will remain at liberty to prove a lesser amount of compensation. After setting a reasonable period of time and seeing this expire without result, we will be entitled to dispose of the goods elsewhere and subsequently to supply the buyer with new goods within a reasonably extended period of time.

9. If we fall behind, the buyer will be entitled to claim compensatory damages for the delay, subject to his providing proof thereof. In cases of minor negligence, compensation will be limited to 0.5 % of the value of the entire consignment for each full week of the delay or a maximum of 5 % of the value of the entire consignment.

10. If we fall behind in executing an order, the buyer will be entitled to set us a reasonable additional period of time in which to do so. If this period expires without result, he will be entitled to withdraw from the contract (unless, despite the period of grace, we had no reason to reckon on his withdrawal) or, in the event of culpable be-

haviour on our part, to demand payment of compensatory damages instead of the ordered goods or services. In cases of minor negligence, claims for compensatory damages will be limited in accordance with the previous clause.

11. If, as a provision of the implied contract, we are required to undertake preliminary work, we may decline to meet any further obligations if, after the contract has been concluded, it becomes evident that our claim for payment therefor is put at risk by a lack of ability to pay by the other party. This will apply, in particular, if the payment owing to us is at risk on the grounds of poor financial circumstances or is threatened by other obstacles to payment, such as export or import bans, warring incidents, the insolvency of suppliers or the loss of essential employees through illness.

12. We may reject our service or manufacturing obligations if these necessitate expenditure which, taking account of the content of the order and the precept of acting in good faith, is considerably at variance with the interests of the buyer in terms of payment. This will apply particularly if the service or manufactured product left incomplete or falling short of requirements does not adversely affect the buyer or does so only to a insignificant extent, e.g. the presence of minor blemishes.

## IV. Transfer of risk

1. The risk of the destruction or deterioration of the goods will pass to the buyer with the handover of the goods for dispatch; this also applies to part deliveries. If dispatch is delayed for reasons attributable to the buyer, the risk will pass to the buyer with the notification of readiness for dispatch.

2. If we are responsible for supplying an article or the process of acceptance has been agreed, the transfer of risk will take place with the acceptance of the article. If acceptance is delayed or fails to take place as a result of circumstances not attributable to us, the risk will pass to the buyer from the day of notification of readiness for acceptance.

## V. Changes in the delivery specification

We reserve the right, up to the time of delivery, to make minor changes to the goods, particularly improvements (which are normal in the trade), if the interests of the customer are not unreasonably affected thereby.

## VI. Prices

1. Our prices are net prices and are always quoted 'ex works' (EXW, Incoterms 2000). When invoicing, we add value added tax at the official rate currently in force. Transport costs, customs duty, insurance in transit and other costs associated with the delivery, including the costs for preparing officially specified certificates of safety and conformity are to be borne by the buyer. If the buyer requires insurance in transit, we will arrange this for him at his expense if requested by him to do so in writing.

2. If, during the period between the concluding of the contract and delivery, our suppliers increase their prices for basic materials or in any other manner relating to the product concerned, and in the event that more than four months elapse between the time the contract is concluded and the date agreed for our delivery or service provision, we will also be entitled to increase prices to the buyer accordingly.

## VII. Terms of payment

1. Debts become due for payment on receipt of our invoice. The buyer will fall into arrears of payment on the expiry of 30 days from receipt of invoice, even without any reminder. From that date onwards, he will be required to pay us compensation by default, specifically interest at the rate of 8 % above the base rate of the European Central Bank. If the buyer falls into arrears by more than 14 days in the payment of a due amount or partial amount, the entire sum of all his outstanding debts will become due for payment immediately.

2. Unless otherwise expressly agreed, the buyer is not entitled to make any deductions.

3. Payment by bills of exchange, cheques or bills of acceptance is only allowed by express agreement and only then on account of payment. Discounting and bank charges, stamp duty and collection charges are to be paid by the buyer; they are due for payment immediately. In the case of payments by cheque, payment will be deemed to have been made not on the receipt of the cheque but only when it is honoured.

4. Our claims for payment may only be offset with undisputed or legally established claims. The same applies to the assertion of a right of retention. Furthermore, the buyer is only entitled to exercise a right of retention in so far as it relates to the same contract.

5. The transfer of debts owing to us by the buyer is excluded.

## VIII. Retention of title

1. We reserve title to goods supplied by us until all outstanding debts arising out of the order have been cleared. If other debts are owing to us by the buyer in addition to the debt arising out of the order at the time of delivery, we reserve title to the goods supplied by us until all the debts specified above have been settled (extended reservation).

2. If the buyer makes payments by cheques or bills of exchange, the debt arising out of the order and delivery will continue in effect until the amount due is conclusively available at our disposal.

3. The extended reservation likewise applies to the balance if debts are settled by way of a current account.

4. If the buyer processes the delivered goods, the said processing shall benefit us in such a way that we acquire co-ownership of the new article as a proportion corresponding to the purchase value of the delivered article relative to the overall sales value of the new article at the time of processing. If the buyer combines our goods with others not belonging to us, we will be entitled to co-ownership of the newly manufactured article as a proportion of the purchase value of our reserved goods, used for the manufactured article, relative to the sales value of the new article at the time of processing.

5. If the goods subject to retention of title are combined or mixed inseparably with other goods, we will acquire co-ownership in the entire quantity in proportion to its value of our consignment (Articles 947, 948 BGB - German Civil Code). If, as a result of the combining or mixing process, the buyer acquires sole ownership, he automatically transfers co-ownership to us as a proportion of the purchase value of the reserved goods relative to the sales value of the newly manufactured goods at the time of the combining or mixing process. We will accept this transfer. In such cases, the buyer will be responsible for the safekeeping of the goods in our ownership free of charge.

6. The retention of title will extend to all debts owing to the buyer from the resale of the delivered goods or from the resale of the newly manufactured goods. The debts are to be assigned to us in the sum of the outstanding invoiced amount. We will assign these future debts at the time they arise as a form of security. We will accept this assignment. The buyer will only be entitled to dispose of the reserved goods or the newly manufactured goods on condition that his purchasing or wages liability is transferred to us in accordance with the foregoing provisions. The buyer is not entitled to undertake any other forms of disposal.

7. The buyer may neither pledge the delivered article nor assign it as a security. The buyer is to inform us immediately in the event of any attachments, seizures or other dispositions by third parties.

8. Our rights to security do not prevent the buyer from disposing of articles belonging to us or debts assigned to us as security in the normal course of business. A normal course of business will no longer exist if the buyer defaults on his payment obli-

gations to us one month after falling into arrears, or if one of his bills of exchange is protested, payment stops or an application for insolvency is lodged. In this case, the buyer has a duty, at our request, to notify his customers of the assignments, to cease and desist from collecting the debts and to permit collection to be carried out by us. Likewise at our request, the buyer also has a duty to inform us of the addresses of his own customers at the first time of asking.

9. If normal business dealings cease entirely, we will be entitled to recover the reserved goods at the buyer's expense. Neither a recovery of this nature nor the assertion of reservation of title or the pledging of the delivered article implies a withdrawal from the contract, in so far as this is legally allowed.

10. At the supplier's request, we undertake to release securities of our choosing, acquired in accordance with the foregoing provisions, to the extent that the realisable value of the said securities exceeds the secured debts.

## IX. Liabilities

1. If the buyer is a trader, he must inspect the goods immediately after receipt, in particular in respect of all visible damage, defects, weight and quantities. Obvious defects in the delivered goods are to be notified by the buyer immediately on receipt of the delivery. Concealed defects are likewise to be notified to us by the buyer immediately after they have been discovered by him. If the buyer fails to lodge a complaint within an exclusion period of 7 days, the delivered goods will be deemed to have been approved, even given the presence of a defect.

2. If the buyer or a third party carries out modifications or repair work without our prior approval, we will accept no liability for the consequences arising therefrom. We offer no guarantee in respect of unsuitable or inexperienced use (particularly faulty assembly or commissioning by the buyer or a third party), or in cases of natural wear, faulty or negligent treatment, the use of unsuitable operating consumables, etc., in so far as they are not attributable to any negligence on our part.

3. If the article delivered by us is faulty and the buyer is a consumer within the meaning of the BGB (German Civil Code), the buyer may demand repair or replacement, a price reduction or withdrawal from the contract. Claims of this nature will be time-barred two years from the commencement of the legal period of limitation. A claim for compensation by reason of slightly negligent behaviour which does not infringe a fundamental contractual obligation (cardinal duty) will be excluded, provided no injury is caused posing a threat to life or limb or harm to the health. Claims for compensation by reason of non-fulfilment or the delayed or deficient fulfilment of the contract will be time-barred one year from the commencement of the legal period of limitation.

4. In all other cases not involving the purchase of consumer goods, claims for repair or replacement, a price reduction, withdrawal from the contract or compensatory damages will only exist subject to the following provisions.

a. If the buyer accepts a defective article, even though he is aware of the defect, he will only be entitled to the rights to repair or replacement, withdrawal from the contract, a price reduction or compensatory damages if he reserves these rights in respect of the defect at the time of acceptance.

b. If the article fails to meet the agreed quality standard or exhibits any other defect as described in Articles 434 and 633 II (p. 2) of the Federal Law Gazette, and provided the complaint is notified within the specified period of time, we will undertake to rectify the defect or supply a fault-free article (repair or replacement) within a period of one year, at our discretion.

c. If we have attempted to rectify the defect twice or have supplied a fault-free article once without these actions succeeding in rectifying the said defect, the buyer may demand a reduction in the purchase price or, after a reasonable period of grace, cancel the contract concluded with us, instead of our rectifying the defect or supplying a fault-free article.

d. If we fail to fulfil a delivery or service for which we are contracted, or fulfilment is delayed or deficient, the buyer may only demand compensation for a period of one year from the transfer of risk:

aa. in respect of damages arising out of a fatal or physical injury or harm to the health arising out of a malicious or negligent breach of duty by us or by one of our legal representatives or vicarious agents;

bb. in respect of other damages arising out of a malicious or grossly negligent breach of duty by us or by one of our legal representatives, senior employees or vicarious agents or a malicious or negligent breach of fundamental contractual duties (cardinal duties) by us or by one of our legal representatives, senior employees or vicarious agents;

cc. in respect of damages covered by the terms of a warranty (assurance) or guarantee of quality or durability issued by us.

Any further liability arising out of fraudulent behaviour will remain unaffected hereby.

In the case of a negligent breach of a fundamental contractual duty, liability will be limited to the amount of compensation which can typically be expected. Compensatory damages for a fatal or physical injury or harm to the health are excluded herefrom.

Unless otherwise agreed in these provisions, all claims by the buyer for compensatory damages of any kind whatsoever, particularly such damages as are not attributable to the delivered article itself, and claims arising out of tort, are excluded. This also applies to claims in respect of and against our vicarious agents. The limit on liability will not apply if we or our vicarious agents are guilty of malicious intent or gross negligence or in the event of fatal or physical injuries or harm to the health.

5. If third parties are appointed or involved in the initiation or fulfilment of contractual obligations, the guarantee and liability limitations specified above will also apply to the said third parties.

## X. Product liability

If, by comparison with German law, different and, in particular, more stringent product liability or product safety regulations apply in the countries in which the buyer intends to dispose of our products, he must point this out to us when placing his order. In such cases, we will be entitled to withdraw from the contract within one month. If the buyer fails to make this declaration, we may withdraw from the contract within one month of learning of the corresponding legal position. In the latter case, the buyer will be under an obligation to release us from third party claims which go beyond our contractual obligations in a comparable case of product liability in Germany. This will also apply even if we abide by the contract.

## IX. Assembly/Design/Services

1. In so far as we accept obligations within the framework of an order for work in the form of assembly or design or other services, we are liable for the provision of a service, not for its specific success.

2. The buyer is responsible for all ancillary operations outside our industry, including the requisite building materials, at his expense, and to make these available in good time.

3. The buyer is to take the necessary measures to protect our possessions and our assembly personnel on the construction site.

4. Before any assembly work begins, the buyer must provide us with the requisite information concerning the position of concealed electrical cables, gas and water pipes or similar installations.

5. If the completion of the design, setting-up, assembly or commissioning is delayed by circumstances for which we are not responsible, the buyer must bear all the costs of waiting time and any additional travel on the part of the installers or our assembly personnel. The other provisions laid down under Article III of these General Conditions of Sale and Delivery remain unaffected hereby.

6. We will only be liable for the correct handling and setting-up or assembly of the delivered articles or for the supply of the commissioned design in accordance with our obligations. If we are culpable of a breach of duty and are notified accordingly within the specified period, we may rectify the defect or supply a fault-free article/design (repair or replacement), at our discretion. If we have attempted to rectify the defect twice or have supplied a fault-free article/design once without these actions succeeding in rectifying the said defect, the buyer may demand a reduction in the purchase price or, after a reasonable period of grace, cancel the contract concluded with us, instead of our rectifying the defect or supplying a fault-free article. Any claim for the payment of compensatory damages will only exist under the terms laid down in Article IX, Clause 4 d.

7. We accept no liability for the work of our installers or assembly personnel or any other vicarious agents if the work is not directly associated with the goods delivered by us and installation was arranged by the buyer. The same applies if faults in the design result from incorrect information being supplied by the buyer or from failures on his part to fulfil his collaborative obligations.

8. The buyer is to reimburse to us the costs agreed on the placement of the order for working hours, travel costs and supplements for overtime, night-time working and work on Sundays and public holidays.

## XII. Acceptance

1. If we are liable to carry out work within the framework of the respective purchase order, or the acceptance of our service is otherwise agreed, the buyer will have a duty to declare in writing that our contractual services have been supplied following the corresponding notice of completion from our company.

2. If acceptance is delayed for reasons for which we are not responsible, our service will be deemed to have been accepted on the expiry of seven calendar days following notification of its completion. Unless the buyer has reserved the right to assert a claim in writing for a specific defect, our liability for visible defects will cease to apply with the acceptance. Payment in full will remain due irrespective of any reservation of this nature.

3. Part-acceptances are to be undertaken at our request. The foregoing conditions apply analogously.

## XIII. Termination of contracts for assembly, design or services

1. A contract may be terminated for a serious reason. For us, a serious reason will arise in particular if:

- the buyer suffers a financial collapse;
- the buyer fails to make performances which should be made within contractually agreed periods, despite the existing right of termination being pointed out when the period for payment is set;
- the buyer infringes his duty of secrecy;
- the buyer fails to fulfill certain essential elements of the contract or does not complete them despite being given an extension of time in which to do so.

2. Termination is to be notified in writing.

## XIV. Copyrights

1. All the copyrights arising within the framework of the execution of orders will remain our property.

2. No documents, company logos or other pictorial presentations and/or text may be used, circulated or reproduced by third parties without our consent.

## XV. Secrecy

During the period of the contract and for three years following its termination, the buyer is to fulfill a duty of secrecy in respect of any information made accessible to him in association with the contract which is designated as confidential, or any business or operating secrets made known to him as a result of other circumstances and (in so far as it has not been expressly approved in

writing or is necessary to achieve the purpose of the contract) not to record these, disclose them to third parties or make use of them in any way.

Exceptions to this comprise information,

- which is known to the buyer before the commencement of contractual negotiations or disclosed by third parties as non-confidential, in so far as these do not infringe any duties of confidentiality on their part;
- which the buyer has formulated independently of us;
- which has been or will become public knowledge without the buyer being to blame therefor or assisting therein;
- which is to be disclosed by the buyer as a result of official or court orders. In the last-named case, the buyer is to notify us immediately, prior to disclosure. Other legal duties of confidentiality remain unaffected hereby.

## XVI. Concluding provisions

1. The place of fulfillment and legal venue for any disputes between the parties arising out of the contract shall be Frickenhausen, subject to the buyer being a trader or a body corporate or separate entity under public law, or if the buyer has no general legal venue in the Federal Republic of Germany or the buyer's court of jurisdiction is situated abroad.

2. The buyer is aware that data from business transactions and personnel-related data must be stored, processed within the framework of business requirements and passed to third parties. The customer is in agreement with the acquisition and processing of these data.

3. If any provision in these General Conditions of Supply and Payment or a provision within the framework of other agreements is or becomes invalid, the validity of all the other provisions or agreements will not be affected thereby.

4. German law will apply to the contractual and other legal relationships with our customers. The United Nations Convention on Contracts for the International Sale of Goods is excluded.