

Terms and Conditions of Sale and Delivery of Erich Utsch AG (As of: May 2019)

I. General, Scope

1. The following terms and conditions of sale and delivery ("GTC") apply to all our offers, deliveries and services. We do not recognise provisions of the client which are contrary to, or differ from, our GTC unless we expressly agree to their validity in writing. Our GTC shall also apply if we supply the Client without reservation despite being aware of contrary, or deviating conditions from our GTC on the part of the Buyer.
2. Our GTC apply only to companies (Section 14 German Civil Code), legal entities under public law and special funds under public law.
3. If any provision in these terms and conditions or a provision in the framework of other agreements is or becomes invalid or void, this shall not affect the validity of all other provisions or agreements.

II. Conclusion of Contract, Offer documents

1. Our offers are subject to confirmation and non-binding and subject to an intermediate sale unless they are expressly designated as binding. An order by the Client shall constitute a binding contract offer. Unless otherwise specified in the order we are entitled to accept this contract offer within two (2) weeks after first receipt.
2. The documents delivered by the Client (specifications, drawings, samples, models or the like) are decisive for us, the Client shall be liable for their correctness, technical feasibility and completeness; we shall not be obliged to conduct a review of the same.
3. All information and details in brochures, drawings, catalogs, price lists and similar documents are only binding if and insofar as these are expressly confirmed in writing in the respective contract, or order confirmation.
4. The Client is obliged to include all necessary information we need for full delivery with his orders, or order confirmations.
5. We retain our property rights and copyrights to illustrations, drawings, calculations and other documents. This also applies to such written documents which are designated as "confidential". Prior to their transfer to third parties the Client requires our express written consent. He must return these items to us in full upon our request and destroy any copies made, if they are no longer needed in the normal course of business or if negotiations do not lead to the conclusion of a contract.

III. Prices

1. Our prices are EXW (in accordance with Incoterms 2010, or in the applicable version) from our plant in Siegen plus freight and packaging, unless otherwise agreed.
2. If not expressly agreed otherwise our prices are net prices. Statutory VAT is not included in our prices. On the day of delivery, or performance the valid VAT will be shown separately in the invoice.
3. We retain the right to increase our prices appropriately if, in the case of contracts in which there is more than three months between the conclusion of the contract and the agreed delivery, or the last partial delivery, cost increases arise, which could not be foreseen by us, and for which we are not responsible, particularly due to material costs, an increase in raw material prices, auxiliary material costs, labour agreements, freights or public charges. In doing so we will offset cost reductions and cost increases against each other. We will verify the changes in cost for the client upon request.

IV. Delivery and Performance period

1. If not expressly agreed otherwise the information on delivery times are only approximate.
2. Delivery periods begin with the receipt of our order confirmation, however not before clarification of all execution details and are quoted from the place of delivery. Place of delivery is our plant in Siegen.
3. Compliance with our delivery obligation requires the timely and proper fulfilment of the Client's obligations including the clarification of technical and practical questions, for which, under the circumstances, his participation can be regarded as necessary.
4. If we are prevented from timely delivery due to force majeure, labour disputes for which we are not responsible, official measures, energy or raw material shortages, transport bottlenecks or problems, operational disturbances, e.g. as a result of fire, water and/or machine damage, or other disruptions in operation, or us or our suppliers/subcontractors, for which we are not responsible, which are demonstrably significant, we shall be obliged to inform the client immediately. In these cases we are entitled to extend the delivery time by the duration of the event of force majeure, or the disruption, if we have fulfilled our above obligation to inform. If the delivery becomes impossible as a result our delivery obligation shall no longer apply, damages to be excluded. If the Client demonstrates that the subsequent fulfilment as a result of the delay is of no interest to him he can withdraw from the contract, under exclusion of additional claims. If the force majeure event, or disruption lasts longer than one month we can withdraw from the contract with respect to the part not yet fulfilled if we have fulfilled our above obligation to inform and to the extent we have not assumed the risk of procurement or a delivery guarantee.
5. Paragraph 4 shall apply accordingly to the extent that prior to the conclusion of the contract we concluded a congruent hedging transaction which would have enabled us, in the event of proper implementation, to fulfil our contractual delivery obligations towards the Client, and we are not supplied, not correctly supplied and/or not supplied in a timely manner by our supplier, and we are not responsible for this.
6. For damages suffered by the Client arising from the delay in delivery we shall only be liable in accordance with the provisions of Section XI. The statutory provisions shall apply to withdrawal.

V. Qualities, Dimensions and Weights

1. Qualities and dimensions of the material supplied by us are governed exclusively by German material standards, deviations are allowed within the framework of the DIN.
2. The proof of weight shall be provided by presenting the weight note. The total weight of the consignment is decisive.

VI. Acceptance

1. If the relevant material standards include an acceptance, or if acceptance is agreed, this shall be carried out in our plant in Siegen immediately after notification of readiness for shipment.
2. The costs incurred by the acceptance shall be borne by the Client.
3. In addition, the statutory provisions of contract for work and labour law shall apply for the acceptance.

VII. Shipping and Transfer of Risk

1. Unless expressly agreed otherwise delivery is EXW (in accordance with Incoterms 2010, or in the respective applicable version), from our plant in Siegen. Delivery and performance location is our plant in Siegen. This also applies if we have assumed the transport costs, or have advanced them for the Client as an exception.
2. If we ship the goods to a place other than the place of fulfilment at the request of the client, the risk of accidental loss and accidental deterioration of the goods transfers to the client as soon as the goods are handed over to the shipper, the hauler, or another person or institution specified for executing shipment. This also applies if we have assumed the transport costs, or have advanced them for the Client as an exception.
3. If we ship the goods with our own vehicles the risk of accidental loss or accidental deterioration of the goods transfers upon loading of the goods onto our motor vehicle.
4. Goods ready for shipment must be retrieved immediately. If the shipment, or transfer is delayed for reasons caused by the client, the risk transfers to the client with the receipt of the notification of readiness for shipment.
5. If the client is in default of acceptance, or if the delivery is delayed for reasons for which the client is responsible, we are entitled to claim reimbursement of the resulting damages including additional expenses. In addition we are entitled to store the goods at the expense and risk of the client.
6. We are entitled to make partial deliveries if these are reasonable for the client taking into account his interests.

VIII. Payment terms

1. Unless otherwise agreed, our invoices are to be paid, net, within 14 days after invoicing and receipt of the invoice with 2% discount, or within 30 days after invoicing and receipt of the invoice. Payments can be made with discharging effect only directly to us, or to our bank/postal cheque account specified on the invoice.
2. The client is not entitled to withhold payments due to counter-claims or offset with counter-claims, unless these are recognised by us, are undisputed, or have been legally established. Counter-claims of the client from the same contract due to defects, non-performance and/or incomplete, or incomplete performance shall remain unaffected by this.
3. In the event of late payments, if the client is a merchant he must pay interest at a rate of 5% p.a. beginning from the payment due date.
4. If the client is in arrears with the payment we may calculate interest on arrears in the amount of 9% -percentage points - above the base interest rate. The right to claim further damages caused by delay is re-served.
5. We expressly reserve the right to decline bills of exchange and checks. Acceptance is always only based on performance. Any costs, particularly discount and exchange fees shall be borne by the client and are due and payable immediately. Our claims shall only be considered paid with final payment.
6. If the client does not provide any information to be provided by him in a timely manner and we incur additional costs as a result we are entitled to charge the client for this additional costs. This applies accordingly if we interrupt the order processing on the instructions of the client.

IX. Retention of title

1. All delivered goods remain our property until fulfilment of all claims arising from this business relationship with the client (goods subject to the retention of title).
2. The client is obliged to provide adequate insurance against fire, water and theft to the new value of these goods, for the goods subject to the retention of title, at his own expense. Upon request the conclusion and maintenance of this insurance must be verified.
3. The client is obliged to treat the goods subject to retention of title with care. If maintenance and inspection work is required, the client shall perform it in a timely manner at his own cost.
4. If the client is in default of payment or otherwise fails to fulfil his obligations we can withdraw from the contract under the statutory provisions and demand the goods subject to the retention of title from the client.
5. The processing or conversion of goods subject to retention always takes place for us. In the event of pre-processing of other goods, not belonging to us, by the client we are entitled to joint ownership of the manufactured object in proportion to the invoice value of our processed goods subject to the retention of title to the sum of the invoice values of all other goods used during the manufacturing. The client holds the resulting joint ownership or for us free of charge. Moreover, the same provisions apply to the item resulting from the processing as to the goods delivered under retention of title.
6. If the goods are inseparably mixed with other objects, or connected in such a way that they form an integral part of a single object we shall acquire the joint ownership of the new item in proportion to the invoice value of the goods subject to the retention of title to the sum of the invoice values of all other mixed or connected objects/substances. If the connection, or mixing is done in such a way that the client's item is considered the principal object it is already deemed agreed that the client transfer proportional joint ownership to us. The client holds the resulting joint ownership or for us free of charge. Moreover, the same provisions apply to the item resulting from the connection, or mixing as to the purchase item, delivered under retention of title.
7. The client may only sell the goods subject to retention of title in the ordinary course of business.

8. The client hereby assigns to us all claims arising from the resale of the goods subject to retention of title together with all ancillary rights in the amount of the final invoice amount (including VAT) of our claims as a security, irrespective of whether the purchase item was resold without, or after, processing, mixing, or connection. The client remains authorised to collect this claim even after assignment. Our authority to collect the claim ourselves remains unaffected thereby. However, we commit to not collect the claim as long as no bill of exchange and cheque protests occur, the client is not in default of payment and no application for opening insolvency proceedings for his assets has been made. However, if this is the case we can demand that the client disclose to us the assigned claims and the respective debtors, provide him with all information required for collection, hand over to him the associated documents, and notify his debtors (third parties) of the assignment.

9. The goods subject to the retention of title may not be pledged nor assigned by way of security to third parties without our express written consent prior to payment in full of the secured receivables. In the case of seizures or other intervention by third parties the client must notify us immediately in writing. If we make claims against third parties and the claim was successful and the third party is not capable of reimbursing use for the judicial or extra-judicial costs the client shall be liable for the costs we incurred.

10. In the event of the loss or damage of the goods subject to retention of title the client shall, in this context, assign any claims to insurance payments in the amount of the final invoice amount (including VAT) of our claims to us as an additional security in advance.

11. If, in the case of deliveries to foreign countries, specific measures and/or declarations on the part of the client are necessary in the importing state for the efficacy of the above regulated property retentions, or other rights referred to in the preceding paragraphs, on our part, the client must immediately inform us of this in writing, or in text form, and implement or declare these immediately at his own expense. If the law of the importing State does not permit a retention of title the client is obligated to immediately provide us with other suitable securities on the delivered goods, or other securities at its reasonable discretion, (Section 315 German Civil Code) at his own expense.

12. If the realisable value of the securities of our claims we are due exceeds more than 10% we are obliged to release the securities of our choice at the client's request.

13. The client is obligated to keep and store the goods subject to the retention of title separately as well as those items resulting from the connection, mixing or processing of the goods subject to the retention of title.

X. Warranty

1. For the rights of the customer in the event of material defects and defects of title (including incorrect and short delivery) the statutory provisions if nothing else is determined in the following.
2. Upon final delivery of the goods to a consumer (Sale of Consumer Goods within the meaning of Section 474 German Civil Code), the statutory Special Provisions of Sections 445a, 445b, 478 Paragraph 1 German Civil Code always remain unaffected. In all other cases the special provisions for suppliers' recourse shall not apply.
3. For the warranty rights of the client to be recognised, he must have duly met his obligations as regards inspection and notification of objections which are required in accordance with Section 377 of the German Commercial Code. A claim must be made in writing. If the contractual relationship between us and the client is a contract for work and labour Section 377 of the German Commercial Code applies mutatis mutandis.
4. Claims for material defects shall not exist in the case of natural wear and tear or damages which are incurred after the transfer of risk from fault or negligent handling, lack of maintenance, excessive strain, unsuitable or improper use, faulty assembly, or commissioning by the client or third parties (who are not acting on our behalf), unsuitable operating materials, improper operation, non-compliance with the operating manual or those which occur due to special external influences which are not provided for in the contract.
5. If the client or a third party (who is not acting on our behalf) conducts improper modifications or repair work, claims for material defects can not be made as a result.
5. If we are performing in accordance with the drawings, specifications, samples, specifications etc. of the client's he shall bear the risk of suitability for the intended purpose.
6. We must be given the opportunity to check a claim of defect on the spot.
7. If the delivered product is defective and the client has properly fulfilled his duty to inspection and objection according to Section X.3 of these GTC the client is entitled to the statutory rights according to the following stipulations:

(I) We initially have the right, at our discretion, either to remedy the defect, or to deliver goods free of defects to the client (subsequent performance). Our right to refuse subsequent performance under the statutory preconditions remains unaffected. To be able to perform the subsequent performance the client must give us sufficient time and opportunity to do so within our normal working hours.

(II) We are obliged to bear all the expenses required for the purpose of subsequent performance, in particular transportation, road, labour, and material costs, if a defect actually exists. If the request for re-removing a defect from the client is determined to be unjustified we are entitled to demand that the client reimburse us for the resulting expenses. The subsequent performance does not include the costs for the removal of the defective goods nor the re-installation if the client already knew of the defect upon installation, or the installation was not conducted as intended. This also applies if the client does not detect the defect prior to installation due to gross negligence, unless we have fraudulently concealed the defect or provided a guarantee.

(III) We are entitled to make the subsequent performance dependent on the client paying the agreed price for the delivered goods. The client is, however, entitled to withhold a proportionate amount of the price.

(IV) In the event of replacement delivery, or re-manufacture in the case of contracts for labour and services the client must return the defective product at our request.

(V) If the subsequent performance fails, or we refuse it, the client pay withdraw from the contract after fruitless expiry of a reasonable deadline, or reduce the purchase price. If the defect is not substantial the client is only entitled to the right to reduce the price.

(VI) For claims of the client for compensation for damages, or reimbursement of fruitless expenses we shall only be liable in accordance with Section XI of these GTC.

8. Section XII of these GTC apply for the statutes of limitations.

XI. Liability

1. Subject to the provision in Section XI.2 we shall be liable for compensation for damages - in contractual, non-contractual, or other claims for compensation, regardless of the legal basis, in particular due to defects, delay and impossibility, culpability in contract negotiations and offence - only in cases of intent and gross negligence, including intent and gross negligence on the part of our representatives and vicarious agents. Furthermore, we shall also be liable in the event of simple negligence, including simple negligence on the part of our representatives and vicarious agents, for damages resulting from the violation of an essential contractual obligations, e.g. an obligation whose fulfilment initially enables the proper implementation of the contract and upon whose fulfilment the client can therefore regularly rely (cardinal obligation). Except in cases of intent, including intent on the part of our representatives and vicarious agents, the liability for compensation for damages is, however, limited to the foreseeable, typically occurring damage.
2. Claims for damages resulting from an injury to life, limb and health as well as claims of the client in accordance with the Product Liability Act, the statutory special provisions for the final delivery of goods to a consumer and other mandatory liability regulations, remain unaffected by the statutory exclusions and limitations of liability regulated in Section XI.1. The above limitations, or exclusions of liability shall also not apply insofar as we have fraudulently concealed a defect, or as far as we have are liable from the assumption of a guarantee or due to the assumption of the procurement risk.
3. Sections XI.1, XI.2 also apply if the client requests reimbursement of fruitless expenditure instead of a claim for compensation of damages.
4. As far as the liability for damages towards us is excluded or limited this also applies with regard to the personal liability for damages of our staff, workers, employees, representatives and vicarious agents, which is based on the same legal basis.

XII. Limitation period

1. Claims of the client from material and legal defects come under the statute of limitations one year from the date of delivery. Insofar as an acceptance has been agreed the statute of limitations begins with acceptance.
2. Mandatory statute of limitations provisions remain unaffected. The reduced statute of limitations period specified in Section XII.1 therefore does not apply in particular for claims due to the injury of life, limb and/or health, for claims based on intent / or gross negligence, for claims based on the assumption of a guarantee or the assumption of the procurement risk. The longer limitation periods also remain unaffected according to Section 438 Paragraph 1, No. 1 German Civil Code (rights in rem of a third party), Sections 438 Paragraph 1, No. 2, 634a Paragraph 1 No. 1 German Civil Code (buildings, building materials, and building components as well as planning services for a building) and Sections 438 Paragraph 3, 634a Paragraph 3 German Civil Code (malice). If the last contract in the supply chain is a consumer goods purchase within the meaning of Section 474 German Civil Code (i.e. in case of final delivery of the goods to a consumer), the statutes of limitations according to Section 445b German Civil Code remain unaffected.
3. The statute of limitation periods resulting from claims for material defects and legal defects according to Section XII.1, XII.2 apply accordingly for competing contractual and non-contractual claims for damages of the client which are based on the defect of the contract goods. If, in an individual case, the application of the legal statute of limitations provisions should lead to an earlier statute of limitations of the competing claims the legal statute of limitations applies to the competing claims. The legal statute of limitation periods according to the product liability act remain unaffected in any case.
4. Insofar as the limitation of claims towards us is reduced in accordance with Section XII.1 – XII.3 this reduction applies accordingly for any claims of the client against our legal representatives, staff, employees, representatives and performing and vicarious agents which are based on the same legal basis.

XIII. Withdrawal/Termination Rights

1. Due to breach of duty which does not result in a defect the client shall only be entitled to withdraw from the contract if we are responsible for the breach of duty.
2. If the contract is a contract for labour and services, or a work delivery contract regarding movable, unjustifiable items the client's free right of termination (§Sections 651, 649 German Civil Code) is excluded.

XIV Processing of personal data

1. We process personal data which we collect within the scope of deliveries, services and offers exclusively in compliance with the applicable privacy policy. Information in accordance with Articles 13, 14 of the General Data Protection Regulation (EU) No. 2016/679 on this processing of personal data can be found at www.utsch.com/en/Privacy-Policy. If you wish, we can also send you these in writing.
2. In the case of a transfer of personal data to us, the client is obliged to inform the persons concerned in time about the data processing in accordance with Article 14 of the EU Basic Data Protection Regulation No. 2016/679; we refrain from informing the person concerned.

XV. Place of performance, Jurisdiction, Applicable law

1. The place of performance for our deliveries and all payments is Siegen.
2. If the client is a merchant, legal person under public law or a public special fund the place of jurisdiction for all disputes arising directly, or indirectly, from the contractual relationship is Siegen; we are, however, entitled to sue the client at the court in his place of business.
3. The validity of the law of the Federal Republic of Germany under exclusion of the UN Convention on Contracts for the International Sale of Goods is agreed.