

General Terms and Conditions of Delivery of MIKROPUL GmbH as of August 2009

§ 1 Application of the Terms and Conditions

- (1) Our deliveries, services and offers shall be made exclusively on the basis of these General Terms and Conditions of Delivery. These shall be an integral part of all contracts which we conclude with our contractual partners regarding our offered deliveries and services. They shall also apply – in the respectively applicable version – for all future business relationships even if not expressly agreed upon again. They are recognised by issuance of an order or the acceptance of contractual performance. We object to the application of the Customer's general business terms and conditions unless we have expressly agreed to their application in writing; they shall also not be considered to be applicable if we – even with knowledge of these terms and conditions – render our deliveries/services without any further reservation or accept payments.
- (2) Insofar as reference is made in these General Terms and Conditions of Delivery or in any other agreements to the Incoterm provisions, the 2000 version thereof shall apply.

§ 2 Offer and conclusion of contract

- (1) Our offers are subject to change without notice and non-binding unless expressly designated to be binding or specifying a fixed time frame for acceptance in favour of the Customer. No contract shall enter into force until we have provided confirmation of the order in writing or electronically. The scope of the delivery shall be determined by our written or electronic order confirmation. Any drawings and other documents which are part of our offers shall be considered only as approximations with regard to measurements, weights, performance data and other data. They are neither guarantees nor do they constitute a description of specific quality unless we have made an express commitment in this regard either electronically or in writing. They constitute merely non-binding descriptions or designations of the goods or services of which deviations are thus permitted in accordance with the following paragraphs of this section.
- (2) The right to modify the goods with regard to design and form is reserved insofar as the goods are not substantially altered thereby, the modifications are reasonable to the Customer and the parties have not expressly agreed that the representations made by us as regards the specifications of the delivery item or service (e.g. weights, measurements, values in use, load-bearing capacity, tolerances and technical data) or depictions of the same shall be binding. We shall be permitted to make changes even in this case insofar as the changes made are necessary due to mandatory statutory regulations and are reasonable to the Customer. In the event that they are unreasonable to the Customer, the Customer shall be entitled to rescind the contract. Any further claims are excluded.
- (3) Unless otherwise agreed, our initial offer shall be free of charge. Any additional offers and drafts shall, however, only be free of charge if we subsequently agree with the Customer on a respective contract as regards the delivery of goods or performance of services.
- (4) Any ancillary agreements and amendments shall require our confirmation in writing, by fax or by e-mail in order to be legally valid. Any oral assurances made by us shall not be considered to be legally binding.
- (5) We retain all rights of ownership and copyrights to all documents, samples, drawings, specifications, etc. which we make available to the Customer or a potential customer – regardless of whether this is made in connection with an offer, a delivery or in any other context; the afore-said documents, samples, drawings, specifications etc. may not be copied. The Customer has to refrain from making them available to third parties without our express written consent, either in the original or copy form or in terms of content. Upon request, they must be returned to us without undue delay free of charge.

§ 3 Delivery and delivery date

- (1) Deliveries shall be made ex works (EXW, Incoterms 2000) unless expressly agreed otherwise.
- (2) The order confirmation shall stipulate the delivery dates insofar as a fixed date or a fixed deadline has been expressly promised or agreed in writing therein. Any dates and deadlines otherwise foreseen or announced by us are to be considered as estimations which merely apply approximately.

- (3) Deadlines for deliveries and services shall not begin to run before the day after receipt of all documents and data required for the rendering of the contractual performance which have to be submitted by the Customer for the purpose of the proper execution of the order; for example, this includes the approved drawings, permits, clearances or allocations of quota. If a binding delivery date has been expressly agreed, said date shall be suspended for the duration of the delay if we have not received the afore-mentioned data from the Customer by the agreed date. The afore-said applies irrespective of any fault of the Customer or any responsibility of the Customer for the delay occurred.

Furthermore, the delivery deadline shall not begin to run before the receipt of any agreed advance payments. The delivery deadline shall be considered to have been met if by that date the goods have handed over at the loading site specified in the order confirmation to the person authorised by the Customer to transport them.

- (4) If we are in default of delivery or it becomes impossible for us to make a delivery, the Customer shall be entitled to rescind the contract in accordance with the statutory provisions. In the event of our default or impossibility of performance, we shall be liable for damages only according to the provisions specified in § 9 of these General Terms and Conditions of Delivery.
- (5) Deliveries are subject to the prerequisite that our own suppliers make timely and proper delivery to us. Furthermore, delivery shall be subject to the reservation that any required exporting permit has been granted and no other hindrances resulting from exporting or supplier directives which must be adhered to by us or one of our suppliers impede the delivery.
- (6) Any delays of delivery and rendering of services which are a result of force majeure and any other events which were not foreseeable upon the conclusion of the contract or were not foreseeable in their actual scope that make the timely delivery or rendering of services substantially more difficult or impossible for us – this includes, for example, strikes, lockouts, political unrest, governmental directives, subsequent material procurement difficulties that occur without our fault, unforeseeable operational disruptions, damage from fire and frost, etc., even if they affect our suppliers or their own suppliers – shall entitle us to suspend the delivery or rendering of the services for the duration of the hindrance plus an appropriate start-up period even if delivery dates and deadlines have been agreed with binding effect. In case the hindrance is not only of a temporary nature, we shall be entitled to rescind the contract. We shall notify the Customer with regard to the occurrence of the aforementioned circumstances within an appropriate time period. Insofar as it is not reasonable for the Customer to accept (partial) delivery or (partial) service as the result of the delay, the Customer may rescind the unfulfilled portion of the contract in accordance with the statutory regulations. Any further claims of the Customer are excluded.
- (7) In no case shall we be responsible for delays of deliveries and services which are a result of requests for changes by the Customer. If the shipment is delayed upon the Customer's request, then we reserve the right to invoice any additional costs incurred thereby.
- (8) Should the Customer be in default of acceptance, we shall be entitled to demand compensation for any damages we incur, in particular, storage costs customary in the respective location.
- (9) Appropriate partial deliveries are permitted in a reasonable scope if they are usable for the Customer within the contractual purpose, the delivery of the remaining goods is ensured and the Customer incurs no additional costs or substantial additional expenditures.

§ 4 Prices

- (1) The prices shall be valid for the scope of services and deliveries specified on the order confirmation. All prices are understood to be in addition to the respective VAT in effect for the respective product or service and – insofar as not otherwise agreed - EXW (Incoterms 2000), however, without packaging; such shall be invoiced additionally at cost and will not be taken back. Any additional deliveries and services shall be separately invoiced as well as any customs duties, taxes, fees or similar charges that we are required to pay in advance.
- (2) Insofar as we, in deviation of para. 1 hereof, have expressly agreed to bear the costs for freight, loading, insurance, customs duties or other fees and charges, any increases in these costs occurring between conclusion of the contract and delivery shall be charged to the Customer. Upon request, we shall document the cost increases to the Customer. Contrary to sentence 1 of this § 4 para. 2, we shall bear the cost increase if such occurs due to a delayed provision of the goods for which we are responsible.
- (3) Orders for which fixed prices have not been expressly agreed shall be invoiced on the basis of our list prices valid on the date of delivery. Entering of the list price applicable in an order form or an order confirmation does not constitute an agreement upon such a fixed price.

- (4) If, during the time between the rendering of the offer or order confirmation with a fixed price and the date of delivery, the relevant cost factors – such as costs for energy, raw materials, wages, insurance and transport – change substantially (i.e. by at least 10 %), we shall be entitled to appropriately increase our prices. The Customer's interests shall be duly taken into account in this process, particularly with regard to possible commitments of the Customer to subsequently make delivery of the goods at a fixed price.

§ 5 Payments

- (1) If not expressly agreed otherwise, payments within the Federal Republic of Germany must be made without deduction net cash no later than ten days after the delivery of the goods and receipt of the invoice. Payments by the Customer having its registered office abroad shall be made against a letter of credit.
- (2) Should the Customer fail to make payment when due, interest shall be charged upon outstanding amounts at 5% p.a. commencing as of the payment due date.
- (3) Should the Customer be in default of payment, we are entitled to default interest in the amount of eight percentage points above the base interest rate. Any additional claims provided by statutory law remain unaffected.
- (4) Authoritative for the timeliness of the payment shall be the date of our receipt of the payment. Payments made by check shall be accepted only on account of performance; they shall only be considered to have been effected after the check is finally credited to our bank account.
- (5) Should we become aware of circumstances which, according to our dutiful discretion, are likely to substantially reduce the creditworthiness of the Customer and which place the payment of our outstanding receivables by the Customer from the respective contract relationship including those from other individual orders at risk, in particular, if a check issued by the Customer is not honoured or the Customer discontinues its payments, we shall be entitled to make all outstanding receivables from the business relationship with the Customer immediately become payable and due. Furthermore, in this case, we shall be entitled to render any still-outstanding deliveries/services only against advance payment or the provision of security. The right to assert further claims provided by statutory law shall remain unaffected.
- (6) Even if notifications of defects are made or counterclaims are asserted, the Customer shall only then be entitled to set-off if the counterclaim is undisputed, recognised by us or determined with final, *res judicata* effect. The Customer shall only be entitled to exercise a right of retention if its counterclaim is based on the same contractual relationship.
- (7) If not otherwise agreed with the Customer, all payments must be made in € (euro) and exclusively to us.

§ 6 Packaging, shipping, transfer of risk and acceptance of the goods by the Customer

- (1) If not otherwise agreed, we are free to select the type of packaging at our discretion.
- (2) Risk shall be transferred to the Customer at the latest as soon as the goods have been handed over at the loading site specified on the order confirmation to the transport person designated by the Customer. Furthermore, the Customer shall be in default of acceptance if we have notified the Customer of our readiness to ship but the Customer refuses to accept the goods at the designated date or fails to pick up the goods or fails to have them picked up by a transport person on the designated date. The provisions of this paragraph shall also apply for any permissible partial deliveries by us.
- (3) Should the Customer be in default of acceptance or breach other duties to cooperate, we shall be entitled to demand compensation from the Customer for any damages we incur therefrom including any additional expenditures. After a last respite set by us has expired to no avail, we shall also be entitled to otherwise dispose of the goods and to deliver to the Customer within an appropriately extended time period.
- (4) The goods shall be insured against theft, burglary, damage from transport, fire and water or other insurable risks only upon the Customer's express request to do so and at its cost.

§ 7 Claims for material defects

- (1) Claims for defects by the Customer shall require that it has properly fulfilled its obligations to inspect and complain in accordance with section 377 of the German Commercial Code (*Handelsgesetzbuch, HGB*). Any notice of defect has to be made in writing and with a precise statement of the type and scope of the alleged defect so that it is possible for us to examine whether the notice of defect is justified.

Furthermore, the Customer has to examine the goods for damages incurred during transport immediately after receipt and record any damage it determines in writing upon the bill of lading, have this objection of defects being countersigned by the transport person and notify us hereof in writing.

- (2) Insofar as a defect of the goods exists, we shall be entitled to choose either to remedy the defect or to make replacement delivery. In this regard, we shall bear the expenditures that are required for the purpose of subsequent performance in accordance with section 439, para. 2 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). If the Customer, in this context, justifiably asserts claims for costs against us which it has incurred owing to the deployment of its own employees or use of its own assets, then the reimbursement claims of the Customer shall insofar be limited to the costs actually incurred by the Customer.
- (3) Should we not be willing or not be able to remedy the defect or make a replacement delivery, should we refuse to do so or exceed an appropriate time period for reasons for which we are responsible, or if the remedy of defects is unsuccessful at least twice for any other reason, the Customer shall be entitled to choose either to rescind the contract or to demand a corresponding reduction of the purchase price.
- (4) The Customer has no right to rescind due to defects of the goods in cases in which the Customer is unable to return the contractual performance received and this is not based upon the fact that the nature of the performance received makes this impossible, the impossibility is within our responsibility or a defect did not become apparent until the processing or reworking of the goods. In the event that defective goods are supplied or partial deliveries are made, the Customer shall only be entitled to rescind the entire contract or to demand damage compensation instead of the entire performance in accordance with the following provisions if it has no interest in the performance rendered, judged by objective criteria.
- (5) For essential third-party products, our liability shall be limited to the assignment of the claims to which we are entitled against the supplier of the third-party product. Should the assertion of claims against the supplier of the third-party product be unsuccessful due to reasons for which the Customer is not responsible (e.g. owing to the bankruptcy of the supplier), the Customer shall be entitled to assert claims for defects against us in accordance with the provisions of this § 7.
- (6) The Customer shall be entitled to assert claims for damages solely in accordance with § 9 of these General Terms and Conditions of Delivery.
- (7) Any claims for defects of the delivery are excluded if the Customer unilaterally reworks the goods or has them reworked by third parties, without our approval and, by so doing, has made the remedy of the defects impossible or unreasonably difficult. In all cases, the Customer must assume the additional costs for the remedy of the defects which have been incurred through such processing or reworking. Furthermore, no liability is assumed for damages which are incurred owing to the following reasons:
 - unsuitable or improper use,
 - improper assembly or commissioning by the Customer or third parties insofar as none of our assembly instructions are faulty,
 - modifications of the goods by the Customer or third parties,
 - natural wear and tear,
 - improper or negligent handling or storage,
 - unsuitable operational resources, alternative materials, chemical, electro-chemical or electrical influences insofar as they are not attributable to our fault.

- (8) The statute of limitations for claims for defects is one year after transfer of risk. This shall also apply to the statute of limitations for claims under section 823 of the German Civil Code (*BGB*) which are based upon a defect.

In deviation of the afore-said, in the event of the loss of life, physical injury or damage to health, for damages under the German Product Liability Act (*Produkthaftungsgesetz*) as well as for such damages which have been caused through fraudulent conduct, wrongful intent or gross negligence by our legal representatives, our management personnel or vicarious agents, the statutory period of limitation shall apply. The statutory period of limitation shall also apply in the event that we are liable to the Customer for defects of a building structure or for goods which have been used for a building structure in accordance with their customary manner of use and have caused its defectiveness.

§ 8 Claims for legal defects, industrial property rights

- (1) Should the domestic use of the goods lead to an infringement of industrial property rights or copyrights or, insofar as we have been notified before the conclusion of the contract of the fact that the goods will be used abroad, in the designated country of destination, we shall have the choice of – insofar as this is reasonable to the Customer – either procuring the right to continued use or to ensure that the infringement no longer exists by modifying the goods or supplying modified goods which nonetheless still fulfil the contractually agreed functions.
- (2) Should this not be possible or not be possible at financially reasonable conditions or within an appropriate time period, the Customer shall be entitled to rescind the contract or to demand an appropriate reduction of the purchase price. Any claims for damages of the Customer are solely subject to § 9 of these General Terms and Conditions of Delivery. Any further claims shall be excluded.
- (3) The obligations specified in paras. 1–3 hereof exist for us only if
1. the legal defect is not based upon the instructions or drafts issued by the Customer or upon the fact that the Customer altered the goods upon its own accord or has used them in a non-contractual manner or the infringement has been caused only by combining or using the goods with other products,
 2. the Customer promptly notifies us if claims arising from the infringement of copyrights or other industrial property rights are asserted against it,
 3. the Customer supports us in an appropriate scope in the warding-off of the claims that have been asserted and otherwise allows us to undertake all measures to ward off the claims, including our endeavouring to reach an out-of-court settlement,
 4. the Customer makes it possible to exchange or modify the goods.
- (4) In the event of infringements which are caused by products from other manufacturers which we have supplied, we shall be entitled to choose either to enforce our claims against the manufacturers and our own suppliers for the account of the Customer or to assign them to the Customer. In these cases, claims against us under this § 8 shall only arise if the enforcement of the afore-mentioned claims in court against the manufacturers and our own suppliers was unsuccessful owing to reasons for which the Customer was not responsible or appears to have no chances for success, for example owing to a bankruptcy.
- (5) With regards to the statute of limitations for claims for legal defects, § 7 para. 8 of these General Terms and Conditions of Delivery shall apply accordingly.

§ 9 Liability

- (1) We shall be liable for damages or make reimbursement of expenditures in accordance with the statutory regulations for loss of life, physical injury or damage to health and for damages in accordance with the German Product Liability Act. Otherwise, insofar as we have not guaranteed certain quality features of the goods, we shall be liable for damages or reimburse expenditures exclusively in accordance with the following provisions.
- (2) We shall be liable in accordance with the statutory regulations for damages which have been caused by fraudulent conduct as well as for damages which have been caused by wrongful intent or gross negligence on the part of our legal representatives or management personnel.

- (3) Limited to the amount of damages foreseeable and typical for the respective contract, we shall be liable for damages which are caused by the slightly negligent violation of essential contractual obligations (first alternative) and for damages which have been caused by the gross negligence or wrongful intent of our simple vicarious agents without the violation of essential contractual obligations (second alternative). For the purpose of this provision, essential contractual obligations shall be understood as those obligations whose fulfilment is crucial for the proper performance of the contract and which the contractual partners may typically expect to be met.
- (4) In case we are liable in accordance with the afore-mentioned provision of § 9 para. 3 for damages which are caused by the slightly negligent violation of contractual obligations as well as for damages which have been caused by gross negligence or wrongful intent of simple vicarious agents without the violation of essential contractual obligations, this liability shall be limited to the amount of damages foreseeable and typical for that contract.
- (5) Indirect damages and consequential damages (i.e. damages which do not directly affect the contract goods such as, for example, lost profits) are furthermore only compensable insofar as such damages can be typically expected from the normal use of the contract goods.
- (6) Any other liability is excluded.
- (7) The provisions regarding the exclusion of claims for defects and the statute of limitations in respect of such claims, contained in § 7 paras. 1, 7 and 8 of these General Terms and Conditions of Delivery, shall apply accordingly.

§ 10 Retention of title

- (1) The goods remain our property until full satisfaction of all our claims against the Customer or its affiliated companies existing now or in the future (including all receivables from a current account insofar as the accounts are balanced and recognised) and resulting from the business relationship, which includes contracts concluded simultaneously or subsequently. Upon the Customer's request, we shall release securities if and insofar as the realisable value derived from such security, subject to the consideration of any customary bank assessment reductions, exceeds the receivables secured by more than 20 %. In this regard, goods are rated at purchase prices and payment claims at their nominal values.
- (2) The processing or reworking of the goods shall always be made by the Customer for us as the manufacturer. The Customer's expectancy right to the goods shall continue in the reworked goods. If the goods are processed or inseparably combined with other goods not owned by us, we shall acquire co-ownership of the new goods at a share corresponding with the objective value of the goods delivered by us as against the value of the other processed goods on the date of the processing or combining. If items are combined in a manner that the item of the Customer is considered to be the principal item, then it shall be considered to have been agreed that the Customer assigns to us proportional co-ownership. The Customer shall store for us our solely owned or co-owned property free of charge. Otherwise, the goods created through processing or combining shall be subject to the same provisions as delivery items to which title is retained.
- (3) The Customer shall be entitled to resell the goods in the normal course of business. However, it already now assigns to us all claims with all ancillary rights to which it is entitled from the resale against the end customer or third parties and regardless of whether the goods are resold with or without processing. The Customer shall be authorised to collect these claims even after such an assignment has been made. Our authority to collect claims ourselves shall remain unaffected hereby. However, we shall be obliged not to collect the claims as long as the Customer properly fulfils its payment obligations, is not in default of payment, no petition has been filed for the opening of bankruptcy proceedings with regards to the Customer's assets and the Customer has not discontinued its payments. We can demand that the Customer discloses the assigned claims and their debtors, provide all information that is required for collection of the claims, submits the related documents and notifies the debtors of such an assignment.
- (4) Should attachments or other claims or seizures by third parties be made with regard to the goods for which title has been retained, the Customer must notify the third party of our ownership, notify us in writing hereof without undue delay and give all necessary information. The Customer may not pledge the goods or assign them as security. In the event of a violation hereof by the Customer, it shall be responsible for any costs and damages that have been incurred.

- (5) In case the customer is in breach of the contract – particularly default of payment – we shall be entitled, after rescinding the contract, to take back the goods for which title has been retained or, if applicable, to demand the assignment of the claims for return of the goods held by the Customer against third parties. The Customer shall bear all costs for recovery of the goods.
- (6) The Customer shall be obliged to handle the reserved goods with due care and, in particular, to adequately insure them at replacement value at its own expense against damage caused by fire, water and theft or generally against loss and damage.
- (7) As security for our claims against it, the Customer assigns to us all claims against a third party resulting from the joining of the goods with a building structure or real property.

§ 11 Confidentiality

Unless expressly otherwise agreed in writing, the information provided to us by the Customer in connection with the orders shall not be considered to be confidential.

§ 12 Applicable law, jurisdiction and partial invalidity

- (1) The law of the Federal Republic of Germany shall apply to these General Terms and Conditions of Delivery and to the entire legal relationships between us and the Customer; the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded.
- (2) Place of performance for all contractual obligations shall be Cologne.
- (3) In case the buyer is an entrepreneur in the meaning of the German Commercial Code (*HGB*), a legal person under public law or a special foundation under public law, the courts in Cologne shall have exclusive jurisdiction for all disputes arising directly or indirectly from the contractual relationship. However, we shall also be entitled to take legal action against the Customer in another jurisdiction.
- (4) In the event that a provision of these General Terms and Conditions of Delivery or a provision in any other contract should be or become invalid or unenforceable, the validity of all remaining provisions or arrangements shall not be affected. In this event, the parties shall be obliged to replace the invalid or unenforceable provision with a valid provision which most closely corresponds to the commercial intent of the invalid provision. This provision shall also apply to any gaps or omissions in these General Terms and Conditions of Delivery.