

W. Pilling Kesselfabrik GmbH & Co. Kommanditgesellschaft

Terms and Conditions of Sale and Delivery

I. In General – Scope

1. These standard conditions ("Terms & Conditions") for supplies and services (hereinafter also referred to as just "delivery") apply exclusively inasmuch as they have not been amended by explicit written agreement between the parties hereto. Any offers, offer acceptance, order confirmation or sale of any products whatsoever shall be subject to these Terms & Conditions. Any customer terms or conditions deviating from these Terms & Conditions are excluded herewith; they shall only come into effect upon written confirmation by us of such amendments. These Terms & Conditions are the basis for each and every individual transaction between the customer and us and they exclude any other agreement whatsoever.
2. We are to be permitted to correct any errors in our sales brochures, pricelists, offer documents or other documentation as a result of a mistake without being held responsible for any damages arising from such errors.
3. The following terms and conditions only apply to companies as defined by Sections 310, 14 BGB1.
4. We would like to point out that we store person-related data of our customers.

II. Offer – Offer Documentation

1. Our offers are non-binding and subject to change without notice. Contracts and agreements, as well as transactions mediated by our representatives or employees, shall only become binding upon written order confirmation by us. Verbal agreements shall have no validity unless confirmed by us in writing. This also applies for any agreement on the aforementioned requirement for written form. Correspondence by telefax, email or data transmission shall be equivalent to the written form.
2. We reserve the right of a deadline of four weeks in compliance with Section 145 BGB for the acceptance of an offer by our customers.
3. The customer shall bear responsibility for the correctness of the order and the customer shall also be responsible for providing us within an appropriate period with any information regarding the ordered goods so that the order can be fulfilled in due contractual form.
4. We reserve all proprietary rights, copyright and other rights to illustrations, drawings models, patterns and other documents and items that we place at the disposal of our customers. Such documents and items may not be placed at the disposal of third parties without our express permission, even if they are not explicitly marked "confidential".

III. Pricing

1. Unless otherwise agreed, our prices are "ex works" (EXW) plus value-added tax (VAT) at the current rate applicable at the time of the respective delivery.
All other ancillary costs, public charges and customs duties charged on the delivery are to be borne by our customer insofar as this is not in contradiction of any mandatory legal requirements.
2. Our prices valid on the day of delivery shall be binding unless otherwise agreed. We reserve the right after notification of the customer in good time and prior to delivery of the merchandise to raise the price of the goods in such manner as necessary due to general price developments outside of our control (such as a rise in the costs for materials or production) or as a result of a change in suppliers.
3. Additional costs as a result of a change in an order by the customer following order placement shall be charged additionally including any possibly arising costs for standstills.

IV. Packaging

1. We will take our packaging back from our customers in compliance with our obligations pursuant to German packaging regulations². Costs for any return delivery thereof shall be borne by our customers.
2. Re-usable packaging such as containers, Euro-pallets and skeleton containers shall be charged to our customers at our own cost prices if they are not exchanged on the spot at the time of delivery for corresponding, undamaged packaging of an equal value or sent back to us within a period of four weeks following delivery. We will provide our customers with a credit note to the extent of the charged packaging costs if re-usable packaging is returned to us in an undamaged state.
3. When being returned, any packaging must be clean, free of foreign bodies and sorted according to type of material. If this is not the case, we are entitled to charge our customers any additional costs incurred as a result thereof.

V. Payment Terms

1. Unless otherwise agreed, our invoices shall be due for payment without any deductions within 30 days of the invoice date irrespective of the receipt of goods.
2. Bills of exchange and cheques will only be accepted on account of performance. The costs for cashing shall be borne by the customer.
3. Payments have not been effected until the invoiced amount is at our disposal.
4. In the event of default of payment, we are entitled, subject to other rights, to charge expenses and default interest at the standard bank interest rate, however, at least 8 percentage points above the respective basic interest rate (Section 247 BGB) p.a. Our entitlement to compensation for any further damages remains unaffected in this respect.
5. All our other outstanding invoices shall be due for immediate payment if the customer fails to pay an invoice at the latest 14 days after becoming due, amounts receivable from the supply of goods exceed the agreed goods credit line, bills of exchange are protested or cheques cannot be cashed. The same shall apply if the customer discontinues payments, is overindebted or subject to insolvency proceedings or if such proceedings are dismissed for lack of assets, or if any other circumstances become known that give reason to doubt the creditworthiness of the customer.

VI. Assignment, Offsetting, Retention

1. The customer shall only have a right of retention and offsetting entitlement inasmuch as the customer's counterclaims are undisputed or legally enforceable or accepted by us.
2. The customer is not authorised to assign claims against us to third parties.

VII. Right of Retention

1. Supplied goods remain our property ("conditional commodity") until fulfilment of all existing and future claims from the business relationship with our customer, irrespective of legal grounds. The right of retention shall also remain in place even if individual claims are integrated into a current account and the balance has been drawn or accepted (current account reservation). In the case of several business transactions, the right of retention shall remain in place even if a delivery has been paid but there is still an outstanding amount from other deliveries (extended right of retention).

2. Insofar as the customer has fulfilled its obligations to us and is not in default it shall be entitled to sell the conditional commodities in the regular course of business and under reservation of ownership on condition that the claims pursuant to text no. 6 below are passed over to us.

3. Handling and processing of the conditional commodities shall be undertaken free-of-charge for us as manufacturer (Section 950 BGB) without any obligation for us as a result thereof. The processed commodities are deemed to be conditional commodities as defined by text no.1 above.

4. In the event of inseparable mixture or commixture of the conditional commodity with other commodities not belonging to the customer (Sections 947 (1), 948 BGB), we acquire co-ownership of the new product in ratio of the invoice value of the conditional commodity (invoice end-value including Value-Added Tax) to the invoice value of the other used commodities. In the event of the customer acquiring sole ownership by combination, mixture or commixture of commodities supplied to us (Sections 947 (2), 948 BGB), the customer conveys to us herewith the co-ownership in ratio of the invoice value of the conditional commodity (invoice end-value including Value-Added Tax) to the invoice value of the other used commodities at the time of the combination, mixture or commixture. Resulting co-ownership rights are deemed to be conditional commodities as defined by text no. 1 above. The customer holds the arising sole or co-ownership for us in safe custody free of charge.

5. In the event of a combination of the purchased commodity with a plot of land resulting in us losing our conditional ownership (Section 946 BGB), the customer assigns to us any claims against third parties which may arise as a result thereof as security for any claims we may have against the customer.

6. Claims by the purchaser from the resale of the conditional commodities are assigned to us herewith to the extent of the value of the delivery (invoiced end-amount including Value-Added Tax). We accept this assignment herewith. If assigned claims are included in a current invoice, the agreed assignment shall also relate to all other claims from the open account relationship (current account reservation). Upon sale of the merchandise in which we have co-ownership pursuant to text no. 4 above, assignment of the claims shall apply to the extent of the value of the co-ownership share.

7. We authorize the customer herewith as part of orderly business practice to collect the claims assigned to us from the resale. The customer agrees to keep in safe custody as trustee any collected payments from resale to third parties and to forward them to us. The entitlement to payout by the respective bank of any income from the resale is assigned to us in advance herewith as security.

8. Extraordinary dispositions such as pledging, assignment as security and any other assignment are not permitted. We are to be notified immediately of any access by third parties to the conditional commodities or assigned claims, in particular, attachments. This also applies for encroachments of any kind. The customer shall be liable for any arising losses insofar as the third party is not in a position to reimburse us for the court costs of action pursuant to Section 771 ZPO.

9. The customer shall no longer have right of disposal over the conditional commodities in the event of the customer being in violation of contract, particularly in cases of default of payment, or if we become aware of circumstances after the respective conclusion of contract that in our opinion are sufficient to diminish the creditworthiness of the customer. Under these circumstances, we are entitled to make any still outstanding deliveries only against prepayment or upon provision of security, to withdraw from the contract and to demand return of the conditional commodities or conveyance of the indirect ownership therein at the customer's expense. The authorization for collection pursuant to text no. 7 above becomes void. The statutory provisions regarding the setting of deadlines and their expediability shall remain unaffected.

10. Security provided to us by the customer will be released at our discretion upon demand by the customer insofar as the realizable value of the existing security exceeds the secured claim by a total of more than 10 per cent.

VIII. Delivery, Default

1. Our delivery commitment is on condition of receipt of correct and timely supplies by us, unless we are to be held responsible for the incorrect or late supply. If we are unable to deliver to our customer because of an incorrect or late supply of goods to us, we will notify our customer of these circumstances without delay, however, no later than five working days after becoming aware of the incorrect or late supply.

2. Adherence to our delivery commitments is on condition of timely and correct fulfilment of commitments by the customer.

3. We reserve the right on all deliveries of supplying an excess or short shipment by up to 10 percent, as well as minor deviations in design and dimension of individual parts as well as the delivery of part-amounts in reasonably acceptable quantities. In the event of part-shipments, each part-shipment shall be regarded as a separate delivery. Complaints from part-shipments do not release the customer from its obligation to accept the remaining amount of the ordered goods.

4. The delivery deadline commences on the day of our order confirmation, however, not before complete clarification of all technical and commercial details of execution; delivery periods are deemed to be approximate for the lack of any separate agreement. In the event of any amendment to a confirmed order, the delivery period shall commence again upon confirmation of the amendment. The delivery period shall be interrupted for the duration of any inspection of plans, drawings, production samples etc. by the customer, namely from the date of shipment to the customer to the date of receipt by us of the inspection documents with the binding approval declaration.

5. Unforeseeable works disruptions, events of force majeure or similar events that have a detrimental effect on production or dispatch and for which we are not to be held responsible, e.g. labour disputes, lockouts, machine failure, transport restrictions, official measures, entitle us to extend the delivery period for the duration of the prevention of delivery and an appropriate startup time, however, for a maximum of no more than 90 days and, insofar as the prevention of delivery exists for a period of longer than 90 days, to withdraw from the contract in part or whole or demand in all good faith an appropriate amendment to the contract without any liability for damages being incurred by us as a result thereof.

6. In the event of us being in default of a delivery or performance, we will compensate our customer subject to the conditions of section XI, and no. 1 above for damages incurred, insofar as the customer is able to substantiate that damages were incurred in the course of customary events, to an amount of 0.5 % for each completed week of default, however, no more than a maximum of 5 % of the price for that part of the delivery which could not be put into purposeful operation as a result of the default. The limitation does not apply if a commercial firm deal has been agreed, if the default is the result of premeditation or gross negligence or if any other significant contractual duty has been violated.

7. If we are in default, the customer is obliged to state upon our request and within an appropriate period whether it intends to withdraw from the contract because of the delay in delivery or insists on fulfilment of the performance.

8. The customer must call any goods which have been notified as ready for dispatch. If no call is made or there is no possibility for dispatch, we are entitled to store the goods at our own discretion at the expense and risk of the customer and to deliver and charge as ex works. In the case of orders with ongoing delivery, we are to be notified of calls and type classifications. If calls or scheduling are not made in good time and after having set a subsequent deadline for performance without success we are entitled to undertake scheduling ourselves and deliver the goods or withdraw from the still outstanding part of the call agreement.

IX. Passage of Risk, Dispatch

1. Risk is transferred to the customer upon handover of the goods to the hauliers or freight company, however, no later than upon leaving the works or the warehouse. This also applies even if we take over dispatch costs or delivery. We are not obliged to insure the goods against transport damage. Additional freight costs for special or express delivery shall be borne by the customer, even if we have paid transport costs in individual cases instead.

¹ Bürgerliches Gesetzbuch – German Civil Code

² Verpackungsverordnung

2. Risk is transferred to the customer at the latest at the time of readiness for dispatch in the event of a delay in dispatch at the customer's request or as a result of circumstances for which we are not to be held responsible.
3. Supplied goods are to be accepted by the customer, without prejudice to its rights, even if the goods are faulty.
4. If no written freight orders are issued by the customer, dispatch and/or transport shall be at our discretion and under exclusion of any liability. This applies in particular for the choice of travel and transport means.

X. Customer Complaints, Warranty and Warranty Period

1. The customer shall examine the goods immediately upon delivery and, if there are any faults, notify us thereof immediately in writing. Our performance is deemed to be in conformance with the agreement if the customer fails to do so. Faults which could not be found directly upon delivery of the goods even by careful examination are to be reported immediately upon discovery with immediate cessation of any handling, processing or delivery, however, no later than two months after receipt of the goods. If the goods are going abroad or direct to third parties, examination and acceptance shall take place at our works, otherwise the goods are deemed to have been delivered according to contract and under exclusion of any complaints. (Probably invalid) If the customer complains about a fault, it shall provide samples of the fault material. If the complaint is unwarranted, we are entitled to demand compensation from the customer for incurred expenditure.
2. Rights to complain do not exist in the event of only slight deviations from the agreed properties, only insignificant restrictions to usefulness, natural wear and tear or in the case of damages that occur after the passage of risk as a result of incorrect or negligent handling, excess loads or the use of unsuitable operating means. Incorrect alterations or repair work carried out by the customer or third parties shall not result in any right to complain.
3. We accept no responsibility for the goods being suitable for a specific purpose unless we have explicitly agreed to this liability.
4. If our performance is faulty at the time of passage of risk, we will make amends, namely at our discretion by rectification of the fault or delivery of a fault-free item in exchange for the delivered fault item. If we are unable or not willing to either rectify the fault or make a replacement delivery, the customer is entitled at own discretion to either withdraw from the contract or reduce the purchase price.
5. The warranty does not cover any product faults that are the result of incorrect installation or use, misuse, negligence or other grounds on the part of the customer.
6. Claims by our customer for compensation for expenses incurred for the purpose of supplementary performance, in particular transport, travel, labour and material costs, are excluded inasmuch as the expenses have increased because the delivered item was subsequently moved to another location than the location of the customer's branch, unless the relocation represents the designated use of the item.
7. Rights of recourse against us by the customer pursuant to Section 478 BGB (Recourse of the Entrepreneur) are excluded insofar as the customer has concluded further-reaching agreements with its customers about statutory claims for defects. Furthermore, text no. 6 above also applies accordingly for the extent of the customer's right of recourse against us pursuant to Section 478 (II) BGB.
8. Liability for defects lapses under the statutes of limitation after 12 months. This does not apply inasmuch as legislation prescribes mandatory longer periods. Parts that are subject to a natural shorter period of wear and tear are excluded from this.
9. Complaints about transport damage are to be made to the carriers in writing. The facts are to be established by the assessment of damage. The customer shall introduce all necessary measures.

XI. Claims for Damages and Compensation of Expenses

1. Claims for damages and compensation of expenses (hereinafter referred to as claims for damages), irrespective of their legal grounds, in particular due to violation of contractual duties and unlawful acts,

are excluded. This shall not apply insofar as we are legally bound to liability, e.g. pursuant to product liability law, in cases of premeditation or gross negligence, injuries to life and limb, dangers to health, infringement of essential contractual duties (cardinal obligations). In the event of culpable infringement of essential contractual duties and in cases of premeditation and gross negligence, our obligation to pay damages shall be restricted in volume, however, to compensation for the typical contractual foreseeable damage. A change in the burden of proof to the detriment of the customer is not linked with the aforementioned provisions.

2. Inasmuch as the customer is entitled to compensation for damages and/or expenses and legislation does not specify mandatory longer periods of limitation, these claims shall lapse at the latest at the end of the period of limitation for liability for defects pursuant to section X no. 8.
3. Any exclusion or limitation of our liability shall also apply for the personal liability of our employees, representatives and vicarious agents.

XII. Industrial Property Rights

If we use plans, drawings, models, samples, provided parts or other items placed at our disposal by the customer in order to fulfill our contractual obligations, the customer shall be responsible for ensuring that this does not infringe upon the industrial property rights of third parties. In the event of any claims against us by third parties due to the infringement of industrial property rights for which we are not to be held responsible, the customer agrees to assist us and participate in the settlement of such disputes. If we are responsible to third parties for compensation or other performances due to an infringement of industrial property rights, the customer shall indemnify us from these obligations and compensate us for the incurred damages including our costs and other expenses. If the customer and/or we are forbidden from the production of a consignment by a third party with reference to an industrial property right, we are also entitled to cease work without any further examination of the legal situation.

XIII. Confidentiality

Both contractual parties agree to keep in confidence all information and data from the mutual business relationship. In the event of any contravention thereof, we reserve the right to charge in full any damages suffered by us as a result thereof and instigate due criminal proceedings.

XIV. Place of Fulfilment, Venue, Applicable Legislation

1. Place of fulfilment for our deliveries shall be the delivering works.
2. The exclusive venue for any disputes arising from this agreement shall be the court having jurisdiction over the headquarters of our company. We retain the right, however, to sue at the court having jurisdiction over our customer.
3. German law shall apply. The regulations of the United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not apply. The same applies for censures of German law in other legal systems.

XV. Severability Clause

In the event of any individual provisions of these terms and conditions or other contractual agreements being or becoming void or unenforceable in part or whole, the remaining provisions hereto shall not be affected in any way whatsoever. Under these circumstances, the contractual parties shall be obliged to replace the void or unenforceable provision with a valid and enforceable provision which shall be as close as possible to the sense and spirit of the void or unenforceable provisions. This shall not apply inasmuch as adherence to the contract would represent unacceptable hardship for us or our customer.

XVI. Definitive Version

The German version of these Terms and Conditions of Sale and Delivery shall be decisive in the event of any disputes.