

**General Terms and Conditions of Sale and Assembly of Thom Metall- und Maschinenbau GmbH**

**I.**

**General, Scope of the Conditions**

(1) The present General Terms and Conditions of Sale (GTCS) apply to all our business relationships with our customers (hereinafter called „Customer“ and/or „Purchaser“). The GTCS apply only then if the Customer/Purchaser is a company (§ 14 BGB (German Civil Code)), a legal entity under public law or special assets under public law.

(2) The GTCS apply in particular for contracts for the sale and/or delivery of moveable goods (in the following also: „goods“), irrespective of whether we manufacture the goods ourselves or purchase from suppliers (§§ 433, 651 BGB). Should the assembly of the goods have been agreed upon within the framework of the sale or separately, these GTCS also always apply to the assembly, if no special provisions are included on them in the individual contract. The GTCS apply in their respective version as a framework contract also for future contracts for the sale and/or the delivery and assembly of moveable goods with the same Customer/Purchaser, without us having to refer to them again for each individual case; we will inform the Customer/Purchaser immediately about changes to our GTCS in this case.

(3) Our GTCS apply exclusively. Deviating, conflicting or supplementary General terms and Conditions of Business from the Customer/Purchaser shall only then and insofar become part of the contract when we expressly consent to them in writing. This requirement for consent applies in every case, for example also if we unconditionally make a delivery to the Customer/Purchaser in the knowledge of his General Terms and Conditions of Business.

(4) In any case, individual contracts made with the Customer/Purchaser (including side contracts, supplements and changes) have in each case priority over these GTCS. A written contract or our written confirmation is determinative for the content of such arrangements.

(5) Legally relevant declarations and notifications which are to be given us by the Customer/Purchaser after the contract is concluded (e.g. setting deadlines, notification of defects, declaration of withdrawal or reduction) must be made in writing to be valid.

(6) Any references to the application of statutory provisions are made for the purposes of clarification only. Statutory provisions are valid even without such clarification, if they are not changed or expressly ruled out directly in these GTCS.

**II.**

**§ 1 Conclusion of Contract**

(1) Our offers are subject to change and non-binding. This also applies when we have provided the Customer/Purchaser with catalogues/technical documentation (e.g. drawings, plans, computations, calculations, references to DIN standards), other product descriptions or documentation – also in electronic form – to which we reserve proprietary rights and copyrights.

(2) Ordering of the goods by the Customer/Purchaser constitutes a binding offer of contract. If not otherwise indicated in the order, we are entitled to accept this offer of contract within 7 working days after we receive it.

(3) Acceptance can be made either in writing (e.g. with order confirmation) or by delivery of the goods to the Customer/Purchaser.

**§ 2 Delivery and Assembly Deadline, Delay**

(1) The delivery deadline and the assembly deadline will be arranged individually or specified by us when the order is accepted.

The assembly deadline is deemed to be complied with when a trial assembly can effectively be carried out by the expiry of the deadline. This assembly, to be carried out before the trial, does not include any additional fine adjustments to be made to the equipment, whose details become known after the equipment has actually been put into operation.

(2) Should we not be able to comply with binding provision and assembly deadlines for reasons for which we are not responsible, (e.g. non-availability of the performance, industrial disputes), we will inform the Customer/Purchaser about this immediately and at the same time inform them of the estimated new deadline. In the event that the performance may also be unavailable within the new deadline, we are entitled to withdraw from the contract, in whole or in part; any counter-performance already rendered by the Customer/Purchaser will be reimbursed by us immediately. The unavailability of the performance in this sense applies in particular to the late delivery by our suppliers. If we have concluded a congruent covering transaction, neither our suppliers nor we are at fault or if in individual cases, we are not obliged for procurement.

(3) The event of our delay is determined by statutory provisions. In each case, however, a reminder is required from the Customer/Purchaser. At the expiration of one week (time of restraint), the Customer/Purchaser shall be entitled to claim a flat-rate compensation, should the delay occur on our part and cause damage to the Customer/Purchaser. This compensation flat-rate for each full calendar week of delay of more than one week amounts to 0.3%, however no more than a total of 3% referred to the part/component of total goods delivered too late that cannot be used in time or as contractually agreed due

to the delay in delivery. The obligation to pay the said compensation shall be effected only if the undue delay in delivery would cause a delay in the production of the Customer/Purchaser.

We reserve the right to prove that the Customer/Purchaser has not suffered any damage or only a much lower amount of damage as the above-mentioned flat rate.

Any further claims, in particular those for consequential damage, shall be excluded.

(4) The rights of the Customer/Purchaser in accordance with. § 8 of these GTCS and our statutory rights remain unaffected, especially for the exclusion of the obligation to perform (e.g. due to performance and/or subsequent performance becoming impossible or unreasonable).

### **§ 3 Cooperation and Assistance from the Customer/Purchaser**

The Customer/Purchaser shall perform his obligations of cooperation in time, so that provision (in case of sale by despatch delivery) and/or assembly of the equipment by the agreed date can be ensured by us.

In particular, the Customer shall provide necessary materials. These shall include test materials and especially those primary products that will be processed and handled by the equipment to be manufactured by us. The test materials are to be delivered to us free and to be disposed of by the Customer/Purchaser at his own cost when we no longer require them.

The Customer/Purchaser shall continue to provide drawings, data sheets and risk reports.

In the event that we have a contractual obligation to carry out assembly, the Customer/Purchaser shall ensure that access is guaranteed at all times to those premises in which the equipment should be set up. The Customer/Purchaser shall in addition guarantee electricity supplies as well as further necessary ambient conditions such as the required room temperature.

Furthermore, the Customer/Purchaser will provide the suitable personnel for monitoring the trial runs of the equipment.

### **§ 4 Delivery, Passing of Risk, Acceptance, Default of Acceptance**

(1) Delivery takes place from our works in Verden (EXW Justus-von-Liebig-Str. 2, 27283 Verden, Germany, Incoterms® 2010), which is also the place of performance. At the request and cost of the Customer/Purchaser the goods will be despatched to another destination (sale by despatch). Unless otherwise agreed, we are entitled to determine the type of despatch (especially transport forwarder, despatch route, packaging).

(2) The risk of accidental loss and accidental deterioration of the goods passes to the Customer/Purchaser when they are handed over from our works in Verden in accordance with Clause EXW of the Incoterms® 2010. In the event of a sale by despatch, the risk of accidental loss and accidental deterioration of the goods as well as the risk of delay are passed on to the transport forwarder or freight company or other person or organisation instructed to perform shipment from our works in 27283 Verden. If acceptance is arranged, this is understood in the sense of the „Factory Acceptance Test“ (FAT) from our works in 27283 Verden and this is determinative for the passing of risks. Otherwise, the statutory provisions of the law on contracts also apply accordingly for arranged acceptance. Provision of the goods or acceptance shall be deemed effected if the Customer/Purchaser delays acceptance.

(3) If the Customer/Purchaser delays acceptance or fails to act in cooperation or if our provision of the goods is delayed (in cases of sale by despatch delivery) for reasons for which the Customer/Purchaser is responsible, we are entitled to demand compensation for any loss thereby incurred including additional expenditure (e.g. storage costs). For this we shall charge a flat rate in the amount of 0.14 % of the order value per calendar day, beginning with notification of provision of the goods.

The proof of a higher amount of damages and our statutory claims (especially compensation for additional expenditure, appropriate reimbursement, termination) remain unaffected, the flat rate will, however, be offset against further monetary claims. The Customer/Purchaser is reserved the right to prove that we have not suffered any or a much lower amount of damage as the above-mentioned flat rate.

(4) If the assembly of the goods is contractually arranged for, the Purchaser shall accept the assembly as soon as the conclusion of the assembly is notified and a trial has been carried out. Should the assembly not comply with the contract, the assembly firm is obliged to subsequent improvement, unless the defect is negligible for the Purchaser or is the fault of the Purchaser.

If the Purchaser delays acceptance, the goods are deemed to be accepted after the expiry of 2 weeks after the request for acceptance.

If acceptance of the assembly is not arranged, the goods are deemed to be accepted at the time at which goods ready for sale can be produced with them, at the latest.

Claims relating to identifiable defects are excluded after acceptance has been made, if a reservation has not been agreed upon.

### **§ 5 Prices and Conditions of Payment**

(1) Unless otherwise agreed in individual cases, our current prices valid at the time of concluding the contracts, plus statutory VAT are applicable.

Purchase prices are understood exclusive of assembly costs. Assembly costs are indicated separately and calculated in accordance with our service conditions and the applicable charge rates and surcharge rates set down in them. The service conditions are a part of our offer and will be delivered to the Customer/Purchaser with the offer.

(2) For sale by despatch (§ 4 paragraph 1) the Customer/Purchaser bears the transport costs ex works and the cost of any transport insurance requested by the Customer/Purchaser. Any customs payments, fees, taxes and other public levies will be borne by the Customer/Purchaser. We will not take back transport packaging - and all other types of packaging in accordance with packaging regulations; they become the property of the Customer/Purchaser, palettes excepted.

(3) The purchase price is due and to be paid within 10 days from invoice date net without deductions. For contracts with a sales value of more than 10,000.00 EURO, we are however entitled to demand an advance payment in the amount of 50 % of the purchase price. The advance payment is due and to be paid within 10 days from the invoice date.

(4) The Customer/Purchaser enters into default upon the expiry of the above-mentioned payment deadline. Interest will be paid on the purchase price during the period of default at the respective applicable statutory default interest rate. We reserve the right to claim any further damages from default. Our claim for commercial default interest against business persons remains unaffected (§ 353 HGB).

(5) The Customer/Purchaser is only entitled to set-off rights and rights of retention to the extent that its claim is undisputed or has been finally adjudicated upon by the courts. For defects in the delivery in cases of an agreed sale by despatch, the opposing rights of the Customer/Purchaser remain unaffected especially in accordance with § 7 paragraph 6, clause 2 of these GTCS.

(6) If, following the conclusion of the contract, it becomes apparent that our claim to the purchase price should be at risk due to the lack of the Customer/Purchaser's ability to perform (e.g. application for the opening of insolvency proceedings), we are entitled, according to the statutory provisions, to refuse performance and – if necessary after setting a deadline – to withdraw from the contract (§ 321 BGB). For contracts on the manufacture of non-fungible items (one-off products), we can declare our withdrawal immediately; the statutory regulations on the expendability of setting a deadline remain unaffected.

(7) The assembly costs are to be paid within 10 working days after acceptance, in case of non-acceptance after the notional acceptance. The purchaser will receive a separate invoice for the assembly costs if no other arrangement has been made.

For an assembly value of more than 10,000.00 €, we are entitled to demand an advance payment in the amount of 50 % of the assembly value. The advance payment is due within 10 days from invoice date.

## § 6 Retention of Title

(1) Until complete payment is made of all our current and future claims from the purchase contract as well as the assembly contract and a current business relationship (secured claims), we reserve the right to ownership of the goods sold.

(2) Before complete payment of the secured claims, the goods subject to retention of title may neither be pledged to third parties, nor assigned as collateral. The Customer/Purchaser must inform us immediately in writing if and when third parties exercise rights over the goods belonging to us.

(3) If the Customer/Purchaser acts in a way contrary to the terms of the contract, especially for non-payment of the purchase price due, we are entitled to withdraw from the contract in accordance with statutory provisions or/and to demand that the goods be returned on the basis of retention of title. Any demand for the return of goods shall not be deemed to include a simultaneous declaration of withdrawal; rather, we are entitled to demand that the goods be returned and to reserve the right of withdrawal. Should the Customer/Purchaser not pay the purchase price due, we may only assert these rights if we have previously set the Customer a reasonable period for payment unsuccessfully or if according to statutory provisions the setting of such a period is dispensable.

(4) The Customer/Purchaser is entitled to sell and/or process the goods under retention of title in the ordinary course of business. In this case, the following stipulations apply additionally.

(a) The retention of title extends to the full value of any products arising from the processing, mixing or combining of our products, whereby we are regarded as the manufacturer. In case of processing, mixing or combining our goods with products of a third party, the title of which is retained, we shall acquire co-ownership in the processed, mixed or combined goods in proportion to the invoice value. Furthermore, the same applies for the resulting product as for the goods delivered under retention of title.

(b) The Customer/Purchaser's claims against third parties arising from the resale of the goods or the products are assigned to us as security as now in total or in the amount of our approximate share of joint ownership in accordance with the above-mentioned clause. We accept the assignment. The obligations of the Customer/Purchaser named in paragraph 2 apply also in view of the assigned claims.

(c) The Customer/Purchaser remains authorised to collect the claim in addition to us. We obligate ourselves not to collect the claim as long as the Customer/Purchaser fulfils his payment obligations towards us, does not default on payment, if no application for the opening of insolvency proceedings has been made and there is no other fault in his performance capability. Should this be the case, however, we can demand that the Customer/Purchaser informs us about the claims assigned and their collectors, gives us all the information required for collection,

hands over the corresponding documentation and informs the debtors (third parties) about the assignment.

(d) Should the realisable value of the securities exceed our claims by more than 10%, we will, upon the request of the Customer/Purchaser, release securities at our discretion.

## **§ 7 Claims for Defects from the Customer/Purchaser**

(1) The statutory provisions apply for the rights of the Customer/Purchaser for defects in quality and defects in title (including wrong and short delivery as well as improper installation or faulty instructions for operation), if not otherwise determined below. Special statutory provisions for the final delivery to a user remain unaffected in any case (supplier recourse in accordance with §§ 478, 479 BGB).

(2) The basis of our liability for defects is above all the agreement entered into about the quality of the goods. Our product description applies as the agreement for the quality of the goods, which is an object of the individual contract.

(3) If the quality was not agreed upon, the statutory provisions must be applied to assess whether there is a defect or not (§ 434 paragraph 1, sentences 2 and 3 BGB). We shall not be held liable, however, for public statements made by the manufacturer or other third parties (e.g. advertising messages).

(4) The claims for defects from the Customer/Purchaser presuppose that he fulfilled his obligation of inspection and notification of defects (§§ 377, 381 HGB). Should a defect become apparent during inspection or later, we must be notified of it immediately in writing. The notification is deemed immediate if it is made within two weeks, whereby the timely despatch shall be sufficient to keep to the deadline. Irrespective of this obligation of inspection and notification of defects, the Customer/Purchaser must notify obvious defects in writing (including wrong and short delivery) within two weeks of delivery, whereby here too the timely despatch shall be sufficient to keep to the deadline. Should the Customer/Purchaser fail to make the proper inspection and/or notification of defect, our liability for the defect that is not notified is excluded.

(5) If the item delivered is defective, we can initially choose if we perform subsequent performance by removing the defects (subsequent improvement) or with the delivery of an item free of defects (substitution delivery). Our right to refuse subsequent performance under the statutory conditions remains unaffected.

(6) We are entitled to make the subsequent performance due dependent on the fact that the Customer/Purchaser pays the due purchase price. The Customer/Purchaser is however entitled to retain a part of the purchase price that is reasonable in the ratio to the defect.

(7) The Customer/Purchaser shall give us the time and opportunity needed for the supplementary performance, especially to hand over the goods queried for inspection. In case a substitution delivery is made, the Customer/Purchaser shall give back the defective item in accordance with statutory provisions. Subsequent performance does not include either the dismantling of the defective item or the new assembly if we were not originally obliged to install.

(8) We will bear the costs for expenditure necessary for the purposes of inspection and subsequent performance, especially costs for transport, travel, work and material (not: dismantling and assembly costs), if there is actually a defect. In the event that a request to remedy defects from the Customer/Purchaser proves to be unjustified, we can demand compensation from the Customer/Purchaser for the expenses from this.

(9) In urgent cases e.g. endangering of operational safety or averting disproportionate damages, the Customer/Purchaser has the right to remove the defect himself and to demand compensation from us for the expense objectively needed for this. We will be advised immediately about self-remedying of defects, if possible in advance. The right of self-remedy does not exist if we would be entitled to refuse a corresponding subsequent performance in accordance with statutory provisions.

(10) If the subsequent performance has failed or if a reasonable deadline for the subsequent performance to be set by the Customer/Purchaser has expired unsuccessfully or can be dispensed with under the statutory provisions, the Customer/Purchaser can withdraw from the contract or reduce the purchase price. There is no right of withdrawal for negligible defects.

(11) Claims from the Customer/Purchaser for compensation or compensation for wasted expenditure exist only in accordance with § 8 and are otherwise excluded.

## **§ 8 Other Liabilities**

(1) Unless otherwise provided for in these GTCS including the following provisions, we shall be liable according to the relevant statutory provisions in case of a breach of contractual and non-contractual obligations.

(2) We assume liability for compensation – irrespective of legal grounds – for wilfulness and gross negligence.

In cases of minor negligence, we are only liable

a) for damages arising from injury to life, body and health,

b) for damages from a breach of an essential contractual obligation (obligation whose fulfilment makes possible the proper execution of the contract in the first place and upon the observance of which the contractual partner regularly relies and may rely); in this case, however our liability is limited to reimbursement of foreseeable, typically occurring damages.

The above-mentioned principles of liability do not apply for damages that did not arise on the assembly object itself during the contractually agreed assembly. For such damages, we are liable only

- a) in case of intent
- b) in case of gross negligence by the management / agents or managerial staff
- c) in the case of negligent injury to life, body or health

(3) The limitations of liability defined in para 2 do not apply if we have fraudulently concealed a defect or have taken over a guarantee for the quality of the goods. The same applies for claims from the Customer/Purchaser in accordance with the product liability law.

(4) In the event of a breach of duty that is not attributable to a defect, the Customer/Purchaser can only withdraw or terminate if we are responsible for the breach of duty. The free right of termination on the part of the Customer/Purchaser (especially in accordance with §§ 651, 649 BGB) is excluded. Furthermore, the statutory conditions and legal consequences apply.

(5) We assume liability for persons employed by us in performing obligations only if they have violated essential contractual obligations through gross negligence, limited to contract-typical, reasonably foreseeable damages.

(6) Further claims shall be excluded, in particular, we are not liable for indirect damages, e.g. property damage, pecuniary damage, damage to objects/property other than the delivery item, loss of earnings and other type of consequential damage/loss, irrespective of any legal ground. Our total liability referred to an order shall amount to max. 5% of the purchase price without tax, customs duties, levy, transport and insurance costs.

## § 9 Period of Limitation

(1) Deviating from § 438 paragraph 1, no. 3 BGB the general period of limitation for claims for defects in quality and defects in title is one year from handover according to clause EXW of the Incoterms® 2010. If takeover has been arranged (FAT), the period of limitation begins with takeover FAT.

(2) If the goods are a building or an object that was used in accordance with its usual purpose for a building and which caused its defects (building material), the period of limitation, in accordance with statutory regulation is 5 years from handover (§ 438 paragraph 1, no. 2 BGB). Special statutory regulations for third party claims also remain unaffected (§ 438 paragraph 1 no. 1 BGB), for wilful deceit of the Customer/Purchaser (§ 438 paragraph 3 BGB) and for claims of recourse against the supplier for final deliveries to a customer (§ 479 BGB).

(3) The above-mentioned periods of limitation for sales law apply also for contractual and non-contractual claims for damages from the Customer/Purchaser based on a product defect, unless the application of the

regular statutory period of limitation (§§ 195, 199 BGB) would lead to a shorter limitation period in each individual case. The periods of limitation of the product liability law remain unaffected in any case. Otherwise, the statutory periods of limitation in accordance with § 8 apply for claims for compensation from the Customer/Purchaser.

## § 10 Property Rights and Use of Software

(1) Software delivered by us or incorporated in our delivered items, or software used for the performance of our services shall remain our property. Any other rights to the software and its documentation, including copies of it shall remain with us respectively with the software supplier. The grant of licenses or sub-licenses shall not be allowed.

(2) We reserve the property/copyrights concerning designs, illustrations, diagrams, cost estimates and similar documentation (even in electronic form). Access to third parties shall be allowed only by our written consent.

(3) Intellectual property rights in items/objects delivered, as well as know-how shall remain our property. As far as objects/items or processes provided by us are completely or in part protected by industrial property rights, the Customer/Purchaser shall be granted a non-exclusive right of use. This right of use shall be granted only for the use of the item/object delivered in compliance with the intended purpose and scope of the agreement/contract. As far as software is included in the scope of delivery, and if agreed by us in writing prior to the grant, the Customer/Purchaser shall be granted a non-exclusive right to use the software including its documentation. It is handed over exclusively for use in connection with the pertaining object/item delivered. The use of the software on more than one system and/or a different system shall not be allowed. The transfer of or interventions in this software shall be allowed only by our prior written consent. Unauthorized intervention of any kind in this software will result in an immediate loss of all claims for warranty, remedial actions and services, including the CE-conformity of the item/object delivered. In this case, the Customer/Purchaser will be obligated to remove the CE-Manufacturer's Declaration immediately. The Customer/Purchaser shall undertake neither to remove manufacture's information, particularly those about copyright references, nor to change/modify it without our prior express written consent.

## § 11 Applicable Law and Jurisdiction

(1) These GTCS and all legal relationships between us and the Customer/Purchaser are regulated by the law of the Federal Republic of Germany. The prerequisites for and the effects of the retention of title in accordance with § 6 are subject to the law of the respective location of the item, if, under that law, the choice of German law would be inadmissible or invalid.

(2) In as far as the Customer/Purchaser is a businessman in the sense of the German Commercial

Code or a legal entity under public law or special assets under public law, the place of jurisdiction for all disputes arising directly or indirectly from the contractual relationship is exclusively – also internationally – our place of business in 27283 Verden. We are however also entitled to bring actions at the general place of jurisdiction of the Customer/Purchaser.

The language of the contract is German, which is why these conditions will be applied exclusively in their German version.

Status: 01/2016

