

# General Terms and Conditions of Sale and Delivery

of KLANN Packaging GmbH



## § 1 Scope of Application; Writing Requirement

- (1) Our General Terms and Conditions of Sale and Delivery (TSD) apply to all sales and deliveries, to all work and labor contracts<sup>1</sup> and to all contracts for work and materials<sup>2</sup>, as well as to all comparable exchange agreements entered into by KLANN Packaging GmbH.
- (2) All transactions shall exclusively be governed by our TSD. We repudiate any terms and conditions used by the other contracting party which are inconsistent with or which differ from our TSD unless we explicitly assent to their applicability in writing. Our TSD shall even apply if we unconditionally enter into sales or perform deliveries in awareness of terms used by the other contracting party which are inconsistent with or which differ from our TSD.
- (3) Our TSD shall only apply to transactions with entrepreneurs, public legal entities, and public separate estates in terms of BGB<sup>3</sup> section 310.
- (4) As far as continuous business relations are concerned, our TSD shall also apply to future transactions even if they are not explicitly agreed upon again.
- (5) All stipulations, including all ancillary agreements, entered into by us and the other contracting party with regard to the performance of this contract are laid down in writing in this contract. No verbal stipulations are made when this agreement is entered into. Any modification or amendment of any agreement including these terms and conditions shall be made in writing. Any modification of this writing requirement is on its part required to be made in writing.

## § 2 Offer and Documents Relating to the Offer

- (1) Our offers are non-binding unless otherwise shown in the order acknowledgement. The same applies to the documents attached to our offers such as pictures, drawings, samples, drafts, particulars as to measures, weights, or information on any kind of performance unless they have explicitly been referred to by us as binding.
- (2) If orders by other parties contracting with us are to be treated as offers in terms of BGB section 145, then we may accept those orders within two weeks.

## § 3 Prices and Payment Terms

- (1) All prices shall be deemed to be quoted "ex works" and in euros unless otherwise shown in the order acknowledgement. The legal value added tax is not included. The legal amount of that tax applicable on the day on which the invoice is made will be separately shown in the invoice. Delivery dates that are changed on behalf of the customer after conclusion of contract and which lead to unused freight capacity, as well as special deliveries and scheduled deliveries, possible surcharges for auxiliary delivery means (for example a lifting platform) and demurrage for more than 2 hours are invoiced separately.
- (2) We reserve the right to reasonably modify our prices if cost reductions or cost increases occur after the contract has been made, particularly if such cost reductions or cost increases are caused by labor pacts, or changes of the prices of materials, of raw materials or of energy resources. Upon request to do so, we will verify such cost reductions or cost increases to the other contracting party. Particularly, a price alignment only making up for a meanwhile occurred increase of our list prices shall be deemed to be reasonable, provided it is compatible with the provisions of BGB section 315. There shall be no adjustment of prices if fixed prices have explicitly agreed upon.
- (3) Payments shall only be made to one of the accounts mentioned in the respective invoice. Payment shall be made by prepayment net. Other terms of payment are possible only by written agreement – provided appropriate credit. The statutory provisions on default of payment shall apply. We have the right to assign our claims against the other contracting party to third parties. The other contracting party shall bear all fees, cost, and expenses to be incurred in connection with the successful prosecution of any claim against it outside of Germany. The default interest rate is 8 percentage points above the respective basic interest rate. We are not barred from claiming additional default damages, particularly on the basis of the principles on commitment fees charged by banks.
- (4) The other contracting party shall not set off any counterclaims against our claims unless such counterclaims are either undisputed or acknowledged by us as meritorious or declared to be meritorious by an unappealable judicial decision. Other than that, there shall be no offsetting of claims.
- (5) The limitations on exercising any rights of withholding payment shall be the same as those on the right to set off any counterclaims. The foregoing shall be without prejudice to the right of the other contracting party to withhold payment in cases of gross breaches of contract and in cases in which we have already received a part of our payment claim which is equivalent to our possibly defective performance.

## § 4 Deliveries

- (1) The inception of the time of delivery requires the clarification of all technical and other issues and preconditions required for performing the contract. For example, depending on the type and content of the contract, that includes the confirmation of the lithography, the size samples, the completion of the tools, and having possibly required governmental permits at hand. It shall commence no sooner than on the day on which the order acknowledgment is dispatched and it shall be deemed to have been observed if, by the end of the time limit for delivery, the goods have either left our plant/warehouse or, in case their dispatch is impossible, the readiness of the goods for dispatch has been reported.

<sup>1</sup> Comment by the Translator: This translation is used for the German term "Werkvertrag" which stands for a contract under which the contractor not only is liable to perform work but also to bring about a result by the work, such as a complete and flawless house or a safe and operable condition of a vehicle after a repair.

<sup>2</sup> Comment by the Translator: A contract under which the contractor undertakes to make the piece of work contracted for from materials it has to supply itself.

<sup>3</sup> Bürgerliches Gesetzbuch = German Civil Code

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- (2) Observance of the time limit for delivery requires the performance of its contractual obligations by the other contracting party. That includes without limitation the timely reception of agreed upon payments. The defense of non-performance of the contract by the other contracting party is reserved by us.
- (3) All information relating to the time of delivery shall only be approximative unless a specific date for delivery has been explicitly confirmed.
- (4) If we are prevented from performing our delivery obligation by the occurrence of unforeseen circumstances which we are not in a position to avoid although we have exercised our diligence as was reasonable under the circumstances of any respective individual case, then the time allowed for delivery shall be reasonably extended unless such performance has become impossible. Any occurred delay is suspended. The extension shall particularly cover disruptions of business operations, governmental interference, delay of the delivery of important raw materials and supplies, industrial action and its consequences and effects, force majeure, etc. In those cases, the other contracting party is temporarily discharged from its obligation to take delivery of the goods during the period of that extension.
- (5) If the other contracting party delays taking delivery of the goods or if it culpably breaches any other obligations to cooperate, then we shall be entitled to claim compensation of any damages caused thereby including any additional expenditures. Any additional rights are reserved by us.
- (6) We have the right to make delivery installments. Unless other tolerances have been agreed upon, we reserve the right to supply less or more than the respective agreed upon quantity of goods to an extent as is customary in our trade or in our industry if such shortage or excess is caused by either manufacturing-related or shipment-related circumstances. Excess or deficient quantities of plus/minus 10% if the contracted for quantity is up to 10,000 pieces and of plus/minus 5% if the contracted for quantity is 10,000 pieces or more shall be treated as customary in our industry provided that the ordered item is a printed tinplate can.
- (7) We assume no procurement risks or guaranties in terms of BGB section 276 for the timeliness of any delivery. Without prejudice to the provisions hereinafter, we are not liable for financial losses due to any delay caused by an ordinarily negligent breach of contract committed by any of our executive bodies or vicarious agents. We are, however, liable for delays in deliveries according to the statutory provisions, if
  - (a) time is agreed to be of the essence,
  - (b) the interest of the respective other contracting party in continuing the performance of the contract has ceased to exist,
  - (c) the delay in delivery is caused by an intentional or grossly negligent breach of contract we are responsible for,
  - (d) any delay in delivery we are responsible for is to be attributed to such contractual duties the performance of which is characterizing the respective contract and upon the performance of which the other contracting party may rely.But even in that case, the compensation of damages shall be limited to the foreseeable, typically occurring damages; if the delay in delivery is not caused by an intentional breach of contract.
- (8) In any other case of a culpable delay in delivery, the damages recoverable from us shall, without prejudice to the above provisions, be limited to 0.5% of the value of the respective delivery for each week; the total of such recoverable damages is not to exceed 5% of the total value of the respective delivery, however. We reserve the right to raise the defense that the actual damage is less.

## § 5 Packaging Materials

- (1) Any packaging materials made available by us on the basis of a loan for their use or on the basis of a loan-in-kind, including accessories, such as pallets, trays, etc., shall immediately be sent back to our supplier plant shown in the shipping documents in undamaged condition and carriage prepaid. We reserve the right to charge the replacement value of those packaging materials 10 days after the delivery. The same applies if any packaging materials are returned in damaged or defective condition.
- (2) Non-returnable packaging materials, particularly cardboard packaging materials will be charged on the basis of their cost price unless the parties to the respective contract have agreed otherwise.

## § 6 Retention of Title

- (1) The respective user of these General Terms and Conditions of Sale and Delivery (hereinafter called "user") retains the title to the goods delivered by us until all debts from the business connection between the respective user and the other contracting party have been paid off. The same shall apply when debts are transferred to an open account or after the accounts have been balanced.
- (2) An explicit exception from the above is made for debts owing to other business entities which are economically affiliated with the respective user, even if those business entities are mentioned in this set of provisions.
- (3) The other contracting party shall diligently keep, service, and maintain the goods title to which is retained. It shall buy insurance covering damages to those goods caused by fire, water, and theft on the basis of their original value.
- (4) If the other contracting party is in default or if it has breached any other obligations justifying the rescission of that contract, then we are entitled to demand that the goods title to which has been retained be surrendered to us once we have rescinded the respective contract. The assertion of the claim to be surrendered such goods is presumed to concurrently represent the notice of rescission of the respective contract if there is any uncertainty to that effect. After having repossessed the goods title to which has been retained, we have the right to realize those goods subject to the condition that the proceeds from such a realization shall be credited against the debts of the other contracting party minus reasonable costs of such a realization.
- (5) Any alteration or treatment of the goods title to which has been retained shall be deemed to have been made by the other contracting party on our behalf in our capacity as manufacturer. If the goods title to which has been retained are attached to, confused with or processed together with goods not owned by us, we shall acquire a prorated joint ownership interest. The same shall apply if the goods not owned by us are to be considered the principal item or if the value of the performed treatment of the goods is higher than the value of the goods; in that case, the parties to the respective agreement shall be deemed to have agreed that the other party to the respective agreement is transferring its prorated ownership interest to us.
- (6) The other contracting party is authorized to dispose of the goods title to which has been retained in the ordinary course of its business, regardless if those goods have been processed or not, and to collect the receivables accruing therefrom. It shall not pledge any such goods or re-

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ceivables; moreover, it shall neither sell nor otherwise dispose of any such accruing receivables. If those goods are forwarded on credit, then the other contracting party shall effectively protect our rights.

- (7) As a provision for that case, the other contracting party now and hereby assigns a portion of its rights accruing from passing on the goods title to which has been retained which is equivalent to the full final gross amount of our claims. We accept this assignment. The other contracting party remains authorized to collect such receivables unless we explicitly object to such collection by it. We remain authorized to assert all rights and receivables in our own name at any time and without being required to show cause for doing so. We agree, however, to refrain from collecting such claims while the other contracting party properly pays our claims and does not default on any payment, and while no insolvency proceedings are filed for, and while non-payment due to other reasons does not appear likely. In those cases, the other contracting party shall provide all information and submit all documents required for prosecuting such claims.
- (8) The other contracting party shall inform us in writing about any attempted or completed seizures by third parties of the goods title to which has been retained or of any claims or ancillary rights resulting therefrom, or about any other adverse effects on our collaterals or the exposure of our collaterals to any risk immediately after becoming aware thereof, and to make all documents pertinent thereto or required for taking legal action available to us immediately.
- (9) We agree to release any collateral we are entitled to if and to the extent the achievable sales value of our collaterals exceeds 110% of the value of the claims to be secured thereby.
- (10) To the extent the validity of the retention of title is subject to special conditions or formal requirements in the country of the other contracting party, the other contracting party shall meet or satisfy those conditions or formal requirements at its own expense.

## § 7 Shipment and Passing of Risk

- (1) Absent any provision to the contrary, the commercial domicile of the user shall be the place of any performance and dispatch shall be ex works user's factory. At the request of the other contracting party, we will buy in-transit insurance coverage for the respective shipment at the expense of the other contracting party.
- (2) The delivery of raw materials or half finished products for toll manufacturing or finishing purposes is performed at the expense and risk of the other contracting party, the same applies to the redelivery of the finished goods.

## § 8 Intellectual Property Rights and Tools

- (1) If any third party industrial property rights or copyrights, or labeling regulations or other intangible property rights are violated when the goods are manufactured on the basis of drawings, samples or other information or requests of the other contracting party, then the other contracting party shall indemnify us against all third party claims upon our first demand.
- (2) Drafts, lithographs, printing blocks, printing plates, embossing presses, and tools are only charged on a pro rata basis and do, therefore, remain our property. They may only be made accessible to third parties or used in dealings with third parties with our written authorization. If the other contracting party makes molds available, then it shall ship them to us free of any charges.
- (3) One half of the proportional costs is payable when the order is placed, the other half thereof is payable when the outturn samples are received, and that is without any cash discount deduction. The other contracting party shall also bear the costs of any modifications requested by it.
- (4) We do diligently lay the tools, lithographs, and molds away for subsequent orders and insure them against damages by fire. Our duty to lay the tools, lithographs, and molds away expires if the other contracting party has failed to place any subsequent orders within two years after the last delivery and if we have given notice of the expiry of that duty.

## § 9 Warranty and Other Liabilities

- (1) The other contracting party shall examine the goods for possible defects no later than within one week following the receipt of the goods and it shall complain of detected defects in writing. Hidden defects shall be complained of within three workdays after their identification. Otherwise, the goods shall be considered approved, except in cases of intentional misrepresentation. This obligation to complain of defects shall also apply to chain transactions.
- (2) The quality of any respective sample or galley proof shall be deemed agreed upon when the submitted samples or galley proofs are certified as released or when the other contracting party waives the submission of those samples or galley proofs. With regard to printed and varnished packaging materials, we make efforts to exactly match the agreed upon hues. Due to technical reasons, minor technically unavoidable differences in print, color, etc., are excepted, however, and shall not provide a basis for any warranty claim under this provision. Any such difference shall especially be treated as minor and technically unavoidable if, depending on the basic color, the actually agreed upon coloration does not differ from the Pantone coloration by more than one point and if a printing mismatch of plus/minus 0.3 millimeters occurs. The same shall apply in cases of minimal scratches, stress marks, and color specks the total of which affects less than 0.01 % of the can surface. Such differences shall not be counted as defects.
- (3) Rejected goods shall be kept available for us until we either take them back or give written permission to destroy them.
- (4) If any item is defective, then we have the choice to either cure the defect ourselves at our expense or to supply a replacement. We may refuse to remedy our performance, however, if and to the extent that remedying our performance is unreasonable for us, particularly if the expenditure required for remedying our performance is disproportionate to the price of the item. The item to be replaced shall either be returned to us in exchange for the remedied performance or be destroyed at our expense after receiving written instruction by us to do so.
- (5) Subject to the statutory requirements and to the provisions of these TSD, the other contracting party may at its choice either rescind the respective sales contract or claim damages if we fail to remedy our performance or if a time fixed for remedying our performance expires before the performance is remedied. The other contracting party shall have no right to reduce the price if we neither are responsible for the defect be-

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cause of intentional conduct nor have given any warranty with respect to that defect. Unsubstantial defects shall not entitle the other contracting party to rescission or damages. If fewer goods than agreed are delivered, then the other contracting party shall not be entitled to rescission or damages unless it proves that its interest in the respective contract has objectively been frustrated. The period of limitation for defects shall be 12 months as of the passing of risk unless longer limitation periods are mandatorily provided by statutory law. This reduction of the statutory period of limitation shall not apply in any event of damages resulting from injury to life, body, or health, or in any event of damages caused by intentional or grossly negligent breach of any duty.

- (6) We shall be liable according to the provisions of statutory law if the other contracting party claims damages caused by intentional or grossly negligent misconduct of our executive bodies, legal representatives or vicarious agents. If we cannot be accused of intentional misconduct, then the compensation of damages shall be limited to that which is foreseeable and typical. If we have made a written warranty, then we shall be liable in accordance with the provisions of statutory law.
- (7) We shall just as well be liable for the breach of such contractual duties the performance of which is characterizing the respective contract and upon the performance of which the other contracting party may rely. But even in that case, the compensation of damages shall be limited to that which is foreseeable and typical.
- (8) The liability for any culpable injury to life, body, or health shall remain unaffected. The same shall apply to the mandatory liability under the German Product Liability Code.
- (9) Any liability is disclaimed unless provisions to the contrary have been made above. The above provisions shall only apply to cases of recourse against the supplier pursuant to BGB sections 478 et seq. if we grant the other contracting party equivalent compensation by way of extensions of payment terms, discounts or the like.

## § 10 No Assignment of Claims

The other contracting party shall not assign any contractual rights to any third party without our explicit written approval.

## § 11 Place of Performance; Place of Litigation; Choice of Law

- (1) Unless otherwise agreed upon in writing, the place of any performance shall be at the domicile of the respective user.
- (2) The user's domicile shall be the exclusive place of jurisdiction with respect to all claims connected with the business relationship regardless of their nature and their basis. The user may, however, bring an action against the other contracting party at the venue of the other contracting party. The requirements and effects of the retention of title provided under § 6 hereof shall be governed by the law applicable at the location where the respective item is stored if the choice of German law as applicable law is unlawful or invalid under that law.
- (3) The laws of the Federal Republic of Germany shall apply; the provisions of the United Nations Convention on Contracts for the International Sale of Goods shall be inapplicable.

## § 12 Nullity

Should any of the above provisions be fully or partially void, then the validity of the other provisions shall remain unaffected thereby.

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