

# General Terms and Conditions of Sale 01.2017

## 1. General, Scope

- 1.1. These general terms and conditions of sale shall apply to all agreements entered into by ELAFLEX-Gummi Ehlers GmbH and ELAFLEX HIBY Tanktechnik GmbH & Co. KG (each individually, 'Seller') governing the sale and/or the delivery of movables regardless of whether the Seller itself manufactures the goods or purchases such from suppliers.
- 1.2. These general terms and conditions of sale shall apply exclusively. Any deviating, opposing, or supplemental conditions of the buyer shall not apply. This provision shall also apply whenever the Seller does not object to any terms and conditions of the buyer.

## 2. Agreement Formation

- 2.1. Any offers of the Seller shall be non-binding.
- 2.2. The buyer shall be bound to its order for fourteen (14) days.
- 2.3. An agreement shall come into existence only via a written order confirmation by the Seller.

## 3. Prices and Terms and Conditions of Payment

- 3.1. The Seller shall grant the calculated list price starting from a minimum invoice value of €100.00 net. Any stipulation of a discount shall be possible only starting from a net invoice value of at least €300.00.
- 3.2. In the event of a net invoice value of less than €100.00, the Seller shall, in order to cover the Seller's costs, invoice the buyer a net lump-sum price of at least €100.00.
- 3.3. Provided that no agreements to the contrary are made, the invoice amount shall be payable strictly net 30 (thirty) days of the invoice date. The invoice date shall be deemed the date the invoice is sent; in case the invoice is collected, the day on which the invoice is transferred to the buyer.
- 3.4. Upon the elapsing of the payment period in accordance with clause 3.3, the buyer shall enter into default.
- 3.5. In the event of default, the Seller shall have the right to withdraw from the agreement.

## 4. Delivery

- 4.1. Deadlines and dates for deliveries held out prospectively by the Seller shall always be deemed as approximate, unless a fixed deadline or a fixed date has been assured or stipulated.
- 4.2. Deliveries shall be effected freight collect ex works (Incoterms® 2010).
- 4.3. The Seller shall have the right to make partial deliveries if:
  - the partial delivery is usable for the buyer within the scope of the purpose of the intended contractual purpose,
  - the delivery of the remaining goods ordered is assured, and
  - no considerable additional expenditures or costs arising to the buyer arise therefrom.
- 4.4. The Seller shall not be liable for impossibility of delivery or for delays in delivery, to the extent that these have been caused by force majeure or by other events not foreseeable at the time of entering into the agreement (e.g. strikes, lockouts, unavoidable shortages of raw materials, unforeseeable operational disruptions of all types, or the absent, incorrect, or untimely delivery of supplies by suppliers), for which the Seller is not responsible. To the extent that (i) such events make the delivery materially more difficult or impossible for the Seller and (ii) the hindrance is not only of temporary duration, the Seller shall have the right to withdraw from the agreement. In the case of hindrances of temporary duration, the delivery periods shall be extended or postponed by the time period of the obstruction plus a reasonable start-up period. To the extent that the acceptance of the delivery is not reasonable for the buyer as a result of the delay, it shall be able to withdraw from the agreement by means of a declaration made in writing without undue delay vis-à-vis the Seller. The Seller shall inform the buyer without undue delay in accordance with this section 4.4 of (a) the impossibility of delivery or (b) of delays in delivery.

## 5. Retention of Title

- 5.1. Until complete payment of all present and future receivables arising from the agreement and of the ongoing business relationship to the buyer, the Seller shall retain title in the goods sold.
- 5.2. The goods delivered under the retention of title shall not be permitted either to be pledged to third parties or to be transferred as collateral prior to full payment of the secured receivables. The buyer shall inform the Seller in writing without undue delay if a petition to initiate bankruptcy proceedings is lodged or to the extent that access by third parties (e.g. pledges) is effected on the goods delivered under the Seller's retention of title.
- 5.3. The handling and processing of the goods delivered under the retention of title shall be effected on behalf of the Seller such that the Seller is to be regarded as a (co-) manufacturer of the handled or processed goods according to its invoice value, as contemplated under §950 of the Civil Code (the 'BGB') and shall receive joint title in the newly created item in proportion to its invoice value.
- 5.4. In the event of the Seller's withdrawal from the agreement due to non-payment of the payable purchase price, the Seller shall have the right to demand the goods based upon the retention of title and the withdrawal.
- 5.5. The Seller shall have the right to enter the warehouse of the buyer in order to ascertain and to make a written record of whichever goods subject to the retention of title are at hand. Such shall also apply after a petition to initiate bankruptcy proceedings over the assets of the buyer. The written record is to be countersigned by the buyer.
- 5.6. The buyer shall have the right to resell, in the ordinary course of business, the goods subject to the retention of title. The Seller shall be able to revoke its consent (i) if the buyer does not comply with its payment duties vis-à-vis the Seller or (ii) if the Seller's claim for payment is jeopardized by the buyer's inadequate ability to perform.
- 5.7. The buyer hereby assigns to the Seller as collateral any receivables against third parties arising from resale of the goods or products, in their entirety or in the amount of the joint title of the Seller in accordance with the above clause 5.3.. The Seller hereby accepts the assignment.
- 5.8. The buyer, along with the Seller, shall be empowered to make collections. The Seller shall be obligated not to collect the receivable as long as the buyer complies with its payment obligations vis-à-vis the Seller and the payment claim of the Seller is not jeopardized by deficient performance ability of the buyer. If such is the case, then the Seller shall be permitted to demand that the buyer (i) make the assigned receivables and their debtors known to the Seller, (ii) provide the Seller with all information necessary for the collection, (iii) hand out to the Seller the documents belonging thereto and (iv) report the assignment to the creditors.
- 5.9. Upon demand by the buyer, the Seller shall release the collateral to be selected by the Seller if the value of the collateral that can be realized amounts to more than 110 % of the value of the secured receivables, but by no later than whenever the estimated value of the collateral exceeds 150 % of the value of the secured receivables.

## 6. Buyer's Defect Claims

- 6.1. Prerequisite to any claims of defect by the buyer shall be that the buyer has complied with its statutory examination and defect-notice obligation as contemplated under § 377 of the 'Commercial Code'.
- 6.2. In cases of complaint of shortfalls or deficiency in weight, the buyer shall be able to assert rights to complain of defects only if upon receipt of the goods the buyer has carried out a quantity- or weight check.
- 6.3. The goods complained of are to be sent back to the Seller for inspection in the original packaging or in packaging of equal value.

- 6.4. If the buyer demands a defect remediation, then the Seller, at its choice, shall be able to subsequently improve or to deliver a replacement.
- 6.5. The subsequent performance shall include neither the removal of the defective item nor the renewed installation, if the Seller originally was not obligated to make the installation.
- 6.6. If the buyer, following an initial request for defect remediation, has granted the Seller an additional reasonable grace period for the remediation of defects without result, or if two (2) attempts at subsequent improvement or substitute delivery fail, then the buyer, at its choice, shall be able to withdraw from the agreement or to demand a reduction in payment. In the event of a trivial defect, however, there shall be no right of withdrawal.
- 6.7. The Seller – irrespective of the legal reasons for refusal – shall have the right to refuse subsequent performance to the extent that the buyer upon the request of the Seller has not shipped the goods complained of or a sample thereof to the Seller. The buyer shall not be entitled to any right of withdrawal or reduction on account of such a refusal.
- 6.8. The Seller shall not be obligated to subsequent performance if the buyer has performed, or has had third parties perform, any operations on or changes to the goods without the Seller's consent – unless the buyer proves that the defect has not been caused by such operations or changes.
- 6.9. In the event of withdrawal, the buyer shall be liable for any incidence of negligence and intent in case of any deterioration, loss, and uses not availed of.
- 6.10. Any possible damage claims due to deficient performances shall be able to be asserted only within the scope of clause 7 of these general terms and conditions of sale.
- 6.11. With the exception of
  - damage claims, to which clause 7 of these general terms and conditions of sale applies, and
  - defect claims due to the delivery of an item that has been used in accordance with its customary manner of use for construction and that such has caused its defectiveness, and for which the statutory limitation period applies as contemplated under § 438 para. 1 no. 2 BGB, any defect claims by the buyer shall lapse after the expiration of twelve (12) months from the commencement of the statute of limitations period.

## 7. Liability

- 7.1. In accordance with statutory regulations, the Seller shall be liable
  - a) in cases of malice or intent,
  - b) in cases of injury to life, limb or health,
  - c) within the scope of a guarantee possibly expressly assumed, and
  - d) in cases in which the prerequisites of liability under the 'Products Liability Act' (the 'ProdHaftG') are satisfied.
- 7.2. The liability of the Seller in cases of gross negligence shall be limited to foreseeable, typically occurring damages. These limitations of liability shall not apply in cases of injury to life, limb, or health, within the scope of any possibly expressly assumed guarantee, or in cases in which the prerequisites of the Seller's liability under the ProdHaftG are satisfied.
- 7.3. Furthermore, the Seller shall also be liable in cases of simple negligence due to the breach of a contractual duty, the fulfilment of which makes the proper performance of the agreement possible in the first place and upon the compliance of which the buyer may regularly rely (so-called cardinal duty). To this extent, the liability shall be limited to the foreseeable, typically occurring damages. The limitation of liability as contemplated under sent. 2 of this clause 7.3 shall not apply in cases of injury to life, limb or health, within the scope of any possibly expressly assumed guarantee, or in cases in which the prerequisites of the Seller's liability under the ProdHaftG are satisfied.
- 7.4. Any further liability of the Seller shall be precluded.
- 7.5. Any damage claims of the buyer against the Seller arising from or in connection with the agreement shall lapse by no later than twelve (12) months after the commencement of the statute of limitations. Such shall not apply in cases of malice, intent and gross negligence, in cases of injury to life, limb or health, within the scope of any possibly expressly assumed guarantee, or in cases in which the prerequisites of the Seller's liability under the ProdHaftG are satisfied.
- 7.6. The limitations of liability of this clause 7 shall apply in the same scope to the benefit of the governing bodies, the legal representatives, the employees, and other vicarious agents of the Seller.
- 7.7. The limitations of liability of this clause 7 shall also apply if liability vis-à-vis persons other than the buyer is sought to be established.

## 8. Protection of Intellectual Property

- 8.1. All documents made available by the Seller to the buyer, particularly, but not exclusively limited to, drawings, pictures, lists, tables and samples, shall be subject to protection under the law and shall not – without the Seller's approval – be permitted to be either reproduced or made accessible to third persons for their own use. All specifications made therein shall not be binding. They shall serve for illustrative purposes. The right to make any deviations and structural changes shall be reserved.
- 8.2. Moulds, tools or models which are made for the c of an order shall remain property of the Seller even if pro rata costs are calculated and paid.

## 9. Setting off and Retention

The buyer shall be able to offset only with demands which are (i) undisputed or (ii) judicially determined. The buyer shall be able to assert a retention right only to the extent that such right is based upon (i) undisputed or (ii) judicially determined claims arising from the same contractual relationship.

## 10. Place of Performance

The place of performance shall be Hamburg, Germany.

## 11. Applicable Law and Venue

- 11.1. German substantive law shall apply exclusively, precluding the 'United Nations Convention on Contracts for the International Sale of Goods' dated 11 April 1980 (CISG).
- 11.2. Venue shall be at Hamburg, Germany, to the extent that the buyer is a businessperson, a legal person under public law, or a special asset under public law. The Seller, however, shall have the right to initiate legal proceedings against the buyer at the buyer's general venue as well.

## 12. Final Provisions

- 12.1. Any ancillary agreements, amendments to and/or restatements of these general terms and conditions of sale shall require the written-form in order to be valid. Such shall also apply to any amendments to this written-form clause itself.
- 12.2. Insofar as nothing else has been stipulated and no compelling regulatory legal provisions are opposed thereto, for preservation of the written-form requirement the transmission of a signed document via telefax or via e-mail shall suffice, but not however, other telecommunications means of transmission, e.g. e-mail lacking a qualified electronic signature as contemplated under the 'German Digital Signature Act'.
- 12.3. Should any provision of these general terms and conditions of sale be or become ineffective or unenforceable, then such shall be without prejudice to the validity of the remaining provisions of these general terms and conditions of sale. The contracting partners shall be obligated to replace the ineffective or unenforceable provision with a provision that approximates the business spirit and purpose of the omitted provision as closely as possible in accordance with legal requirements.