

General Terms and Conditions of Business of KUSTAN GmbH & Co. KG

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I. General/Exclusive Application

1. The following terms and conditions of business are applicable solely with respect to entrepreneurs, juridical persons under public law and public-law special funds.
2. The following terms and conditions are applicable for all contracts concluded between us and the buyer concerning the delivery of goods. They are also applicable for all future business relations, even if not explicitly agreed again. Our terms and conditions of business shall apply as accepted at the latest upon taking receipt of the delivery or service. Deviating terms and conditions of the buyer that we do not explicitly recognise shall be non-binding for us, even if we do not explicitly reject them. The following terms and conditions shall also apply even if we execute the buyer's order unconditionally, despite knowledge of conflicting or deviating terms and conditions of the buyer.
3. All agreements made between us and the buyer concerning execution of the contracts of purchase are set out in writing in the contracts.

II. Conclusion of contract/several customers

1. Our offers are without engagement and non-binding, unless we have explicitly marked them as binding. They are valid for a maximum of thirty days. Contracts shall come about exclusively through our written order confirmation or through execution of the order.
2. An order from the buyer that can be qualified as offer of conclusion of a contract of purchase can be accepted by us within two weeks through the sending of an order confirmation or through sending of the products ordered within the same period.
3. We reserve the right to make technical and design alterations compared to descriptions and information in prospectuses, quotations and written documents, as well as changes to performance, construction and materials resulting from technical progress, without the customer being able to derive any rights as a result. Information concerning our products (technical data, measurements etc.) is rough and approximate only and does not constitute a guaranteed quality, unless the guarantee is provided explicitly and in writing.
4. We reserve ownership rights, copyright and other protected privileges to all samples, drawings, calculations and other documents – including those in electronic form. These must not be made accessible to third parties without our consent and must be returned to us immediately on request.
5. A majority of customers shall be liable as joint and several debtors. We shall perform for each of these with effect for and against all of them. Each customer is entitled to issue and receive legally binding declarations for and against all.

III. Terms and conditions of payment

1. The prices agreed upon conclusion of the contract, in particular in the order confirmation, shall apply. If a price has not been determined explicitly, the normal price applicable at our registered office at the time of conclusion of the contract shall apply. The cost calculated by us (weights, quantities, time etc.) shall be authoritative for the determination of the price, unless the customer objects immediately following its announcement. The prices are subject to statutory value added tax at the applicable rate.
2. In the absence of any special agreement to the contrary, the prices shall apply as ex-works. Not included are necessary packing, transport, travel and freight costs as well as the costs of transport insurance; further, country-specific charges may apply in addition for international deliveries. Likewise not included is assembly of the goods delivered by us. This must be agreed and remunerated separately. The scope of assembly does not include underground and over ground work, the production and assembly of platforms, stairs, railings and consoles, their connection or the laying of pipelines for water and other operating resources, connection of the electricity supply, of the electrical components as well as the provision of tools and lifting gear. The customer must provide auxiliary personnel free of charge and in sufficient numbers for loading and transport work.
3. A low-volume surcharge of 25.00 Euro net will be levied on invoice amounts up to 125.00 ERur net.
4. Our order includes – in so far as necessary – workshop drawings and production documents, plant drawings, procedural diagrams, fundament plans, documentation as well as operating and maintenance instructions. If our services are subject to an approval procedure, official requirements must be advised in writing prior to placing of the order. If required, we shall assist the customer with approval procedures. This must be agreed and remunerated separately.
5. In the event of the applicable prices of our suppliers or other costs related to our products increasing between conclusion of the contract and delivery, we shall be entitled to increase the agreed prices by an appropriate amount. Upon request, we shall provide the customer with evidence of the reasons for the price adjustment.
6. The purchasing price is payable net (without deduction) immediately upon receipt of the invoice by the buyer, unless other payment terms are stated in our order confirmation. The deduction of a cash discount is only permitted given a special written agreement between us and the buyer. Payment shall not apply as having been made until we are able to dispose of the amount. With cheque payments, payment shall not apply as having been made until the cheque has been honoured in the normal course of business.
7. If the customer does not pay invoices due, exceeds an agreed period for payment, if the economic position of the customer deteriorates subsequent to conclusion of the contract or if we receive information on the customer subsequent to conclusion of the contract that calls the ability to pay or the creditworthiness of the customer into question, we shall be entitled to make the entire residual debt due immediately and – by way of amendment to the agreements made – to demand advance payments, the provision of collateral or immediate payment upon delivery for all of our claims. This shall apply in particular if a bill of exchange is protested, a cheque is not honoured or if the customer ceases payments. In the event of withdrawal as a result of default on payment, we shall be entitled to 10% of the gross order amount as damages, unless the customer demonstrates that the actual damage is lower. We reserve the right to demonstrate higher damages.

8. The buyer is only entitled to offset – including in the event of assertion of defect claims or counter claims – if the counter claims have been established as legally valid, recognised by us or are undisputed. The customer is only authorized to exercise a right of withholding if his counterclaim is based on the same contractual relation.

IV. Delivery / passing of risk

1. Delivery dates or periods, not explicitly agreed as binding, constitute exclusively non-binding information. The delivery time stated by us shall not begin until following clarification of commercial and technical matters. The buyer must likewise fulfil all obligations incumbent on him, such as provision of necessary official approvals or down payments, correctly and on time.
2. Our delivery time shall apply as adhered to if our product is made available for collection ex-works or warehouse by expiry of this period and the customer informed accordingly. If acceptance is required, the acceptance date shall be authoritative; this shall not apply in cases of justified refusal of acceptance.
3. If we are unable to perform punctually, we shall inform the customer immediately. We shall not be in default until following expiry of an appropriate period of grace set by the customer.
4. If we are not responsible for the delay as a result of force majeure or other unforeseeable, extraordinary circumstances, such as operational disturbances caused by fire, water and similar situations, failure of production facilities and machines, delays by our suppliers, interruption of operations as a result of shortages of raw materials, energy or labour, strike, lock-out, problems in procuring transport, traffic disruptions or official intervention, the delivery period shall be extended appropriately in so far as these circumstances prevent us from fulfilling our performance obligations on time without fault on our part. If we are still unable to perform following an appropriate extension, both we and the customer shall be entitled to withdraw from the contract in terms of the part affected by the disruption to delivery (or, in the event of loss of interest, completely). Claims of the customer for damages are excluded.
5. If the underlying contract of purchase is a fixed transaction as defined in the BGB (German Civil Code) or the HGB (German Commercial Code), we shall be liable in accordance with the statutory provisions. The same shall apply if, as a result of a delivery delay for which we are responsible, the customer is entitled to assert the loss of his interest in continued fulfilment of the contract. In this case, our liability shall be limited to the foreseeable, typical damage if the delivery delay is not based on intentional violation of the contract for which we are responsible; in this respect, we must take responsibility for culpability of our representatives or vicarious agents. In particular, we shall not be liable for loss of profit by the customer and for unforeseeable, indirect consequential damage.
6. In the event of default on delivery, we shall likewise be liable to the buyer in accordance with the statutory provisions if the delivery delay is based on intentional or grossly negligent violation of the contract for which we are responsible; in this respect, we must take responsibility for culpability of our representatives or vicarious agents. Our liability shall be limited to the foreseeable, typical damage if the delivery delay is not based on intentional violation of the contract for which we are responsible. In particular, we shall not be liable for loss of profit by the customer and for unforeseeable, indirect consequential damage.
7. If a delivery delay for which we are responsible is the result of culpable violation of a fundamental contractual obligation – in this respect, we must also take responsibility for culpability of our representatives or vicarious agents - we shall be liable in accordance with the statutory provisions, subject to the proviso that, in this case, liability for damages shall be limited to the foreseeable, typical damage. In particular, we shall not be liable for loss of profit by the customer and for unforeseeable, indirect consequential damage. Our liability is limited to 500,000.00 euros per damage event, except in cases of intentional or grossly negligent conduct.
8. If we are responsible for the delay, the customer can withdraw from the contract in accordance with the statutory regulations. If the customer suffers damages as a result of the delay, he shall be entitled to demand lump-sum compensation. This shall be 0.5 percent for each full week of the delay, subject, however, to a maximum of 5% of the value of that part of the performance that cannot be used on time or cannot be used in the contractual form as a result of the delay.
9. Farther-reaching liability for late delivery for which we are responsible is excluded. The further statutory claims and rights of the customer, to which he is entitled in addition to the claim for damages in the event of late delivery for which we are responsible, shall remain unaffected.
10. We are entitled to make partial deliveries and partial performance at any time, provided this is reasonable for the customer.
11. If the buyer defaults on acceptance, we shall be entitled to demand compensation for the resulting damage and any additional expense. The same shall apply if the buyer culpably violates obligations to cooperate. Upon occurrence of default on acceptance or debtor's delay, the risk of accidental deterioration and accidental loss shall pass to the buyer.
12. In the absence of any agreement to the contrary, loading and dispatch shall be uninsured at the risk of the buyer. Upon request, we shall arrange transport insurance for the delivery at the expense of the buyer. We shall endeavour to take account of wishes and interests of the buyer in terms of the form of dispatch and transport route; resulting additional expense shall be for the account of the buyer, even if freight-free delivery has been agreed.
13. Loaned containers and packing must be returned by the customer freight-free within 60 days. Loss or damage shall be for the account of the customer if he is responsible for such and as long as the loaned containers and packing are not returned to us. Loaned containers and packing must not be used for other purposes or for other products. They are intended exclusively for transport of our goods as delivered. Inscriptions must not be removed. The customer is also obliged to ensure disposal of the packing at his own expense.
14. If dispatch is delayed at the request of or through fault of the buyer, we shall store the goods at the expense and risk of the buyer. In such cases, notification of availability for dispatch shall be equivalent to dispatch.
15. The risk of accidental deterioration and of accidental loss of the goods shall pass to the customer upon making available for collection and corresponding notification to the customer. This shall also apply if we assume additional services such as, in particular, dispatch costs or delivery, unless delivery is by our own vehicles or means of transport. If acceptance is required, the risk shall pass upon acceptance.

16. If dispatch or acceptance is delayed or not carried out as a result of circumstances for which the customer is responsible, the risk shall pass to the customer as soon as we notify him of availability for dispatch or acceptance.

v. Warranty

1. Defect claims of the buyer shall only apply if the buyer has correctly fulfilled his obligations to examine and report as per section 377 HGB. The customer must examine the product immediately upon receipt. If necessary, he must carry out random checks to ascertain whether the delivery/service is free from defects and is suitable for the envisaged use. Recognisable defects must be reported to us in writing within one week of receipt of the product or – if a defect does not manifest itself until later – within one week of detection. Exclusively our order department is responsible for receipt of defect notifications. If this is not done, the product shall apply as approved and the customer shall forfeit his defect rights, unless we have maliciously concealed the defect. The same shall apply if we are not given the opportunity to check defects reported or if the customer carries out changes to the deliveries or services without our consent, unless the defects reported are not based on the changes.
2. In the event of justified complaints concerning defects we shall, subject to exclusion of the rights of the buyer to withdraw from the contract or to reduce the purchasing price, be obliged to provide subsequent fulfilment, unless we are entitled to refuse subsequent fulfilment on the basis of the statutory rulings. The buyer must grant us an appropriate period for subsequent fulfilment; otherwise, we shall be released from liability for the resulting consequences. At our discretion, subsequent fulfilment can be through removal of the defect (repair) or delivery of new goods. The customer shall only have the right to remove defects himself or to have these removed by third parties and to demand compensation of the necessary expense from us in urgent cases, for example in order to maintain operational safety or to avoid disproportionately high damage. In all cases, parts replaced must be returned to us by the customer. In the event of removal of defects, we shall bear the necessary costs in so far as these are not increased by virtue of the fact that the contractual item is at a location other than the place of performance.
3. If subsequent fulfilment has failed, the customer shall be entitled to reduce the counter performance or – in the case of major defects – to withdraw from the contract. This right of withdrawal shall not apply for building services. Subsequent fulfilment shall apply as failed upon the second futile attempt, unless further attempts at repair are appropriate and reasonable for the customer based on the subject matter of the contract. The buyer cannot assert claims for damages subject to the following conditions until subsequent fulfilment has failed. The right of the buyer to assert farther-reaching claims for damages subject to the following conditions shall be unaffected.
4. The buyer's warranty claims shall become statute barred one year following delivery of the goods to the customer or acceptance, unless we have maliciously concealed the defect; in this case, the statutory rulings shall apply. Our obligations under nos. 5 and 7 of this section shall remain unaffected. Excepted from this ruling are building works, including the corresponding planning and supervision services, as well as building materials in so far as they are built in; these services shall be subject to the statutory period of limitation unless the General Terms and Conditions of Contract for the Performance of Building Services DIN 1961 – October 2006 issue (VOB/B) are included as a whole.
5. Under the statutory regulations, we are obliged to take back the new goods or to reduce the purchasing price even without the setting of a deadline normally required, if the customer's customer – as consumer of the new movable item sold (purchase of consumer goods) – could demand taking back of the goods by the buyer or a reduction of the purchasing price as a result of the defect to the goods, or if a corresponding, resulting right of recourse is expressed against the buyer. We are also obliged to reimburse expenses of the buyer, in particular transport, travelling, work and material costs, that are to be borne by the latter in relation to the final consumer within the scope of the subsequent fulfilment as a result of a defect to the goods present at the time of the passing of risk from us to the buyer.
6. The obligations under no. 5 are excluded in so far as the defect is based on advertising statements or other contractual agreements that do not originate from us or if the buyer has assumed a particular guarantee or warranty with respect to the final consumer which goes beyond the statutory scope. The obligation is likewise excluded if the buyer has not fulfilled his obligations to examine and report as per Section 377 HGB correctly, and if he was not himself obliged to exercise the warranty rights with respect to the final consumer as a result of the statutory regulations or has not made this complaint with respect to a demand placed on him.
7. Farther-reaching defect claims of the customer are excluded. Consequently, we shall not be liable for damages not occurring to the product itself and not for other economic loss of the customer.

vi. Liability

1. Our liability covers the freedom of our products from defects in accordance with state of the art technology. Our liability is excluded:
 - a. if our products are not stored, built in, commissioned or used correctly by the customer or third parties
 - b. in cases of natural wear and tear
 - c. in the event of incorrect maintenance
 - d. in the event of use of unsuitable operating resources
 - e. in the event of damage caused by repairs or other work by third parties that have not been explicitly approved by us
 - f. in cases of products sold by us second hand.
2. Irrespective of the limitations of liability in this section, we shall be liable in accordance with the statutory provisions for damages to life, limb and health based on negligent or intentional violation of obligations by us, our legal representatives or our vicarious agents, as well as for damage covered by liability under the Product Liability Act. In cases of damage not covered by sentence 1, we shall only be liable in accordance with the statutory provisions for intentional conduct and gross negligence on the part of ourselves, our legal representatives or our vicarious agents. In this case, however, liability for damages shall be limited to foreseeable, typical damage, unless we, our legal representatives or our vicarious agents have acted intentionally. In particular, we shall not be liable for loss of profit by the customer and for unforeseeable, indirect consequential damage.

3. Our liability within the scope of any guarantee shall be equivalent to the scope in which we have issued a quality and/or durability guarantee concerning the goods or part thereof. Nevertheless, we shall only be liable for damages based on the absence of the guaranteed quality or durability but not occurring directly on the goods, if the risk of such damage is clearly covered by the quality and durability guarantee.
4. We shall also be liable for damages which we cause through simple negligent violation of contractual obligations whose fulfilment makes correct execution of the contract possible in the first place and in adherence to which the buyer can and does normally trust. Nevertheless, we shall only be liable in so far as the damage is typically related to the contract and is foreseeable. In particular, we shall not be liable for loss of profit by the customer and for unforeseeable, indirect consequential damage.
5. Farther-reaching liability is excluded without consideration for the legal nature of the claim asserted; this shall also apply in particular for tortious claims or claims for compensation for futile expenditure instead of performance; our liability as per Section IV no. 5 to no. 9 of the present contract shall remain unaffected. If our liability is excluded or limited, this shall also apply for the personal liability of our employees, representatives and vicarious agents.
6. Claims of the buyer for damages based on a defect shall become statute barred one year following delivery of the goods to the buyer or acceptance. This shall not apply in cases of injuries to life, limb or health caused by us, our legal representatives or our vicarious agents, or if we or our legal representatives have acted with gross negligence, or if our vicarious agents have acted intentionally.

VII. Retention of title

1. We shall retain title to the goods delivered (conditional commodity) until such time as all claims, including all balance claims from current accounts, to which we are entitled against the buyer either now or in future, have been settled. In the event of contract-violating conduct by the buyer, e.g. default on payment of more than 10% of the invoice amount, we shall be entitled to take back the conditional commodity following the prior setting of an appropriate deadline. If we take back the conditional commodity, this shall not constitute withdrawal from the contract, unless we declare this in writing. If we seize the conditional commodity, this shall constitute withdrawal from the contract. We are entitled to exploit the conditional commodity following taking back. Following deduction of an appropriate amount for the costs of exploitation, the proceeds from exploitation must be offset against the amounts owed to us by the buyer.
2. The buyer must treat the conditional commodity with care and insure it sufficiently, at replacement value and at his own expense against theft, breakage, fire, water and other damage. The customer hereby assigns henceforth all claims against the insurance to us. We hereby accept this assignment. The buyer must carry out any necessary maintenance and inspection work in good time at his own expense.
3. The buyer is entitled to sell and/or use the conditional commodity in the ordinary course of business, provided he is not in default on payment. Pledging or transfer by way of security is not permitted. The buyer hereby assigns henceforth to us the claims concerning the conditional commodity, resulting from the onward sale or any other legal grounds (insurance, tortious act), (including all balance claims from current accounts), in their full amount by way of security and we hereby accept this assignment. We hereby authorise the buyer revocably to collect the claims assigned to us in his own name and for his own account. The authorisation to collect can be revoked at any time if the buyer fails to comply correctly with his payment obligations. The buyer is not authorised to assign this claim for the purpose of collecting the claim through factoring, unless a simultaneous obligation of the factor is created to forward us the counter value of the claims for as long as we have claims against the buyer.
4. Processing or conversion of the conditional commodity by the buyer will be carried out for us in all cases. If the conditional commodity is processed with other items not belonging to us, we shall acquire joint ownership of the new item in the ratio of the value of the conditional commodity (final invoice amount including value added tax) to the other processed items at the time of processing. The same shall apply for the new item resulting from processing as for the conditional commodity. In the event of inseparable mixing of the conditional commodity with other items not belonging to us, we shall acquire joint ownership of the new item in the ratio of the value of the conditional commodity (final invoice amount including value added tax) to the other items mixed at the time of mixing. If, following mixing, the buyer's item is to be regarded as the main item, the buyer and us agree that the buyer shall transfer pro-rata joint ownership of this item to us; we hereby accept the transfer. The buyer shall keep our sole or joint ownership of an item, thus acquired, for us. The buyer shall also assign to us the claims, created with respect to third parties through the joining of our goods with real estate, including any ancillary rights such as mortgages, up to the value of our goods as collateral for our claims and with priority above the remaining part of his claims.
5. In the event of access by third parties to the conditional commodity, in particular attachment, the buyer shall draw attention to our ownership and inform us immediately so that we can assert our ownership rights. If the third party is unable to reimburse us for the court or out-of-court costs resulting in this context, the buyer shall be liable for these.
6. We are obliged to release the collateral to which we are entitled in so far as the realisable value of our collateral exceeds the claims to be secured by more than 20%. The choice of which collateral to release shall be our responsibility. Assigned claims must be valued at nominal value, goods subject to retention of title at the selling price and items whose ownership has been transferred at the market price.
7. All claims as well as rights to retention of title under the present terms and conditions shall remain applicable until complete release from contingent liabilities (such as cheque-bill of exchange procedures) that we have entered into in the interests of the customer.
8. All necessary costs for the assertion of collateral rights against debtors, jointly entitled parties and third parties shall be for the account of the customer.

VIII. Place of performance / place of jurisdiction / choice of law / data protection

1. Place of performance and place of jurisdiction for deliveries and payments (including legal action concerning cheques and bills of exchange) as well as for all disputes arising between us and the buyer in connection with the contracts of purchase concluded between us and him is our company headquarters. Nevertheless, we are also entitled to take legal action against the buyer at his place of residence and/or his registered business office.

2. The relations between the contract parties shall be governed exclusively by the law applicable in the Federal Republic of Germany. Application of the United Nations Convention on Contracts for the International Sale of Goods is excluded.
3. We shall store data on our customers within the scope of our mutual business relations in accordance with the German Federal Data Protection Act.

IX. Severability

Should individual provisions of these terms and conditions of business be or become invalid, null and void or contestable, the other terms and conditions shall remain unaffected. In this case, the other rulings must be interpreted or supplemented such that the intended contractual purpose is achieved as precisely as possible in a legally admissible manner.