

## **I. General**

- (1) The present General Conditions of Sale of IVA Schmetz GmbH (“**Vendor**”) (“**Conditions**”) shall apply only to entrepreneurs in the sense of Art. 14 German Civil Code (“**Buyer**”) with regard to the sale of machinery, integrated software and other products (“**Products**”).
- (2) Offers, order confirmations, deliveries and services provided by the Vendor shall be undertaken solely on the basis of these Conditions.
- (3) The Conditions shall also govern all future business relationships including where this has not been expressly agreed again.
- (4) Counter-confirmations by the Buyer citing his Terms of Business and/or Purchase Conditions shall not be valid, even where the Vendor has not expressly taken exception to them.
- (5) Divergences from the present Conditions shall only be effective where they are confirmed in writing by the Vendor.

## **II. Offer and Conclusion of Contract**

- (1) The Vendor’s offers are subject to change except where they have been expressly specified as binding.
- (2) A contract shall be created only in conjunction with an order confirmation from the Vendor. The order confirmation may be issued in writing or in electronic form (including EDI, remote data transmission or machine-readable data carriers). This shall also apply to additions, amendments or supplementary agreements. The issue of an invoice shall be deemed an order confirmation. Any quotations are given without commitment and no agreement is concluded unless and until we have issued an order confirmation.
- (3) Order or article numbers relate to the given latest issue of the Vendor’s documents such as catalogues or brochures which also contain further technical details. These documents serve only to provide information where they are not specified as binding or unless they exactly correspond to the purpose of use contractually foreseen by the Contracting Parties. No guarantee is given for the precise unit weights as specified from time to time in the catalogue.
- (4) Drawings, sketches, dimensions, weights and other performance data shall only be binding where this has been expressly agreed in writing. All drawings and documents shall be returned automatically to the Vendor where no contract is effected.
- (5) Where it becomes apparent after conclusion of the contract that the Vendor’s claim to consideration is endangered through the Buyer’s inability to perform, in particular because of open, outstanding invoices, the Vendor shall be entitled to refuse performance of the contract until the Buyer has effected the consideration or provided security for same. The Vendor shall be entitled to withdraw from the contract where the Buyer fails to perform having been given an appropriate deadline for effecting the consideration or providing security for same. The Buyer’s countervailing rights shall not be affected.

## **III. Prices and Payment Terms**

- (1) The prices specified by the Vendor in his offers are subject to change except where they have been designated as binding. Unless otherwise stated in the order confirmation, prices shall be ex works/warehouse of the Vendor exclusive of packaging, postal charges, freight, other shipping charges, insurance and excise duty which shall be shown separately in the invoice. Packaging shall be charged at cost price. VAT is not included in the Vendor’s prices. The rate valid at the time shall be shown separately in the invoice.
- (2) All of the Vendor’s invoices shall be payable in Euro at the place specified by the Vendor net 8 days from the date of the invoice.
- (3) The Vendor shall be entitled, irrespective of contrary Buyer terms, to set off payments against the Buyer’s older debts. Where costs and interest charges have already accrued, the Vendor shall be entitled to set off payments firstly against the costs, then against the interest charges and finally against the main payment.
- (4) A payment shall only be considered fulfilled when the corresponding sum has been received by the Vendor.
- (5) Where the Buyer falls into arrears with his payment obligations, the Vendor is entitled, after a reasonable grace period, to declare all payments to be due at once.

- (6) If the Buyer falls into arrears with his payment obligations the Vendor is entitled to demand a bank guarantee as collateral.

## **IV. Setting Off, Right to Retention, Non-Assignability**

- (1) The Buyer shall only be entitled to set off or retention with regard to claims which are undisputed or which have been recognised by declaratory judgment. Deductions because of defects shall be subject to the same restrictions.
- (2) The Buyer declares that his claims and obligations may be set off by the Vendor and his associated companies. Claims and obligations of the Buyer’s associated companies may also be set off in the same way.
- (3) The Buyer’s rights out of the contract and these Conditions are non-transferable.

## **V. Delivery and Performance Time**

- (1) The dates and deadlines specified by the Vendor are subject to change unless expressly agreed otherwise in writing. Individual delivery time agreements shall be required for on demand and blanket orders.
- (2) Delivery deadlines shall commence on the day on which the Buyer’s order is received by the Vendor. The date of the order confirmation is decisive for the commencement of a term, if another delivery deadline is not mentioned in the order confirmation. The Vendor’s observance of his delivery obligation presumes that the Buyer shall meet his obligations properly and in full; in particular the Vendor must be in possession of all documents, parts, details and licences required from the Buyer and any agreed part-payments must have been made.
- (3) The day of delivery shall be the day on which the Buyer is notified that the goods are ready for collection. Where delivery is due, the day of delivery shall be the day on which the goods are handed over to the party effecting the transport.
- (4) Acceptable part deliveries and part-performances are permissible to a reasonable degree. Moreover unavoidable divergences in quantity of up to +/- 5-10% shall not be deemed as insufficient quantity.
- (5) The Vendor shall not be responsible for delivery and performance delays caused by force majeure. In the event of force majeure and labour disputes the Vendor shall be released from his obligation to perform for the duration of such interruption and to the extent of its effect. The Vendor is obliged to provide all necessary information and to adjust his obligations to the altered circumstances in good faith within the bounds of what may reasonably be expected.  
The Buyer shall only be entitled to withdraw from the contract where the agreed delivery time exceeds the duration of a force majeure event plus an appropriate extra deadline period. Prior to this, the right to withdraw shall only apply where the Vendor has informed the Buyer in writing that the delivery cannot be made by him or can no longer be made. The foregoing restriction shall not apply to transactions where time is of the essence.
- (6) Where the Vendor’s delivery is delayed, and where a delivery date has been agreed in writing, the Buyer may withdraw from the contract once he has given the Vendor a suitable deadline for supplementary performance of at least 30 days save where, exceptionally, no such deadline is required.

## **VI. Transfer of Risk**

- (1) The risk shall transfer to the Buyer as soon as the goods have left the Vendor’s works, an outside warehouse or, in the event of direct delivery of goods not manufactured by the Vendor himself, the warehouse of the subcontractor. Where the dispatch or collection of the goods is delayed or impossible on grounds for which the Vendor is not responsible, the risk shall transfer to the Buyer once the Vendor has notified his readiness to dispatch.
- (2) Goods delivered, even where they display minor defects, shall be accepted by the Buyer, irrespective of his rights as specified at section VIII. below.

## **VII. Right of Retention to Title**

- (1) The delivered goods shall remain the property of the Vendor until the Buyer has met all obligations arising out of the business relationship.
- (2) Processing or mixture of goods subject to retention shall always be undertaken with the Vendor in the role of manufacturer yet shall not be binding upon him. Where the Vendor’s part ownership lapses through confusion of goods it is herewith agreed that the Buyer’s part ownership in the goods shall be

transferred pro rata to the value of the invoice amount. The Buyer shall hold goods owned or part-owned by the Vendor at his own expense.

- (3) The Buyer undertakes to protect the goods owned or part-owned by the Vendor with the due care of a proper businessman against spoilage, deterioration or loss, also in regard to his buyers.
- (4) The Buyer is entitled to process and sell goods subject to retention in the normal course of business. Such goods may not be mortgaged or assigned as security. The Buyer herewith declares that he assigns any claims arising out of the resale of the goods subject to retention or on any other legal grounds, together with all ancillary rights, to the Vendor.
- (5) Where third parties wish to seize the goods subject to retention, the Buyer shall advise them of the Vendor's ownership and shall inform the Vendor without delay. Costs and damages shall be borne by the Buyer.
- (6) Where the Buyer is in arrears with payment, the Vendor shall be entitled to withdraw from the contract and shall recover the goods subject to retention at the Buyer's expense or, where appropriate, shall demand that the Buyer assign any rights of recovery which the Buyer may have against third parties to the Vendor. The Vendor's right to claim damages shall remain unaffected. The same shall apply in the event of any other breach of contract by the Buyer.
- (7) The Vendor undertakes to release securities owed to him at the Buyer's request insofar as the realisable value of such securities does exceed the value of his claims by more than 20%. The securities thus released shall be determined at the Vendor's discretion.

### **VIII. Defect related Claims**

- (1) The Vendor shall be liable for ensuring that his products are free of manufacturing and material defects and that they are otherwise of the specification determined in the order confirmation. Except as provided in these terms and conditions or pursuant to the German Commercial Code, the Vendor disclaims all other guarantees, express and implied, including merchantability and fitness for a particular purpose. The Vendor shall only give guarantees where these are provided expressly in writing and designated as guarantees. The Buyer shall only have the right to claim for defects where he has properly fulfilled his inspection and notification obligations pursuant to Art. 377 German Commercial Code.
- (2) For products with integrated software a separate sales contract shall be concluded with regard to the software. A defect in such software does not represent a defect in the product as a whole unless the remaining product does not meet the standard agreed by Vendor and Buyer because of the software defect. Where such a quality has not been agreed, a software defect shall only represent a defect in the product as a whole where the product, owing to such software defect, is not suitable for the contractually agreed or usual use.
- (3) Industry-standard divergences shall only be deemed defects where this has been expressly agreed in writing by the Contracting Parties. The Vendor's declarations in his catalogues, brochures and price lists with regard to the items available and their performance serve only as descriptions, designations and guidelines, provided that this has not been otherwise agreed by the Contracting Parties in the order confirmation or in terms of the contractually agreed purpose. Minor, insignificant divergences compared with the catalogues or compared with previously delivered goods shall not be deemed defects.
- (4) The Buyer himself shall check whether the Products ordered are suitable for his intended purpose. Products that are not suitable shall only be deemed defective where the Vendor has confirmed their suitability to the Buyer in writing.
- (5) Particular qualities or characteristics of the Products are warranted only if such warranty has been confirmed by the Vendor in writing.
- (6) Wear and tear of expendable parts during the course of normal use does not represent a defect.
- (7) Where the Vendor's instructions with regard to installation, fitting, operation or servicing are not observed, where alterations to the products are made, where parts are exchanged or consumables used which do not correspond with the original specifications, the right to claim for defects shall apply only where the Buyer can provide proof that the defect was not caused by such action but was already present at the time the risk was transferred.
- (8) Where the goods have not yet been delivered to the end consumer, the Vendor shall be obliged in the event of justified and properly notified defects to either remedy the defects or to replace the goods or parts thereof at his

discretion. Where replacement deliveries or repairs fail, the Buyer may, at his discretion, only demand a discount or withdraw from the contract. The Buy-

er's right to withdraw and right to claim damages in place of full performance shall only apply where the defect is material. The Buyer's right to claim damages shall apply pursuant to section X. below.

- (9) Where the goods have already been delivered to an end consumer, the Buyer shall on principle only be entitled to make such defect claims against the Vendor as have been notified to him by his own buyer.
- (10) Defect claims cannot be made against the Vendor where the goods have been returned on the basis of goodwill arrangements not agreed with the Vendor. Furthermore the Buyer shall not be entitled to withdraw from the contract where he has been required to take back the goods because he has not properly fulfilled his obligation of supplementary performance and, in particular, where he has failed to fulfil his obligation of supplementary performance within a specified deadline.  
The Buyer shall inform the Vendor in advance in writing of his own buyer's claim for supplementary performance and shall advise the Vendor of his proposed method of supplementary performance and the approximate associated costs. In the interests of the Vendor, the Buyer is obliged to keep expenditure as low as possible pursuant to Art. 439, para. 2 German Civil Code and to follow the Vendor's suggestions for a cheaper means of providing supplementary performance.
- (11) Where the Vendor is in breach of non performance-related obligations pursuant to Art. 241, para. 2 German Civil Code, the Buyer shall have the right to withdraw and the right to claim damages instead of performance where he may no longer be reasonably be expected to honour the contract.
- (12) Where a defect is to be remedied, the Vendor is obliged to bear all expenses, and in particular all transport, travel, labour and material costs which are necessarily incurred for the purpose of remedying the defect provided that such costs do not arise from the transportation of the given item to some place other than the place of performance.
- (13) Defect claims shall lapse 12 months from delivery of the goods to the Buyer. In the event of intent or negligence, section X. below shall apply.

### **IX. Software**

The Vendor's software is not intended for private use. It may only be installed and/or used by qualified personnel who are familiar with the Vendor's installation and warning information.

Any incorrect installation, usage and/or servicing of the software by the Buyer may cause the software to malfunction and/or may cause damage to plant and/or machinery or people.

Where software defects are caused by the Buyer's failure to observe the Vendor's installation and warning instructions and/or the Buyer's improper use and/or servicing of the software, these shall not be covered by the Vendor's warranty obligation. Equally the Vendor accepts no liability for consequential losses resulting therefrom. This shall apply in particular with regard to any damage suffered by the software and/or consequential damage caused to machinery, plant, other products or people by the defective software.

### **X. Disclaimer**

- (1) The Vendor's liability shall be unlimited in the event of intent or gross negligence, in relation to culpable injury to life, limb or health, for defects which he has deliberately concealed or in the event that he has provided a guarantee of quality or durability. The Vendor's liability shall also be unlimited within the scope of product liability and other liability legislation.
- (2) In the event of culpable violation of material contractual obligations, the Vendor shall also be liable for minor negligence although this shall be limited to contract-typical damages which may reasonably be foreseen at the time the contract is concluded. Material contractual obligations are those the violation of which endangers the object of the contract because those rights of the Buyer are thus taken or restricted which the Vendor is meant to be granting him under the terms of the contract.
- (3) Further damage claims, particularly claims relating to pecuniary loss, are excluded.
- (4) The above liability restrictions specified here at section X. also apply to employees, representatives, agents and assistants of the Vendor.

### **XI. Rights of Usage and Processing, Property Rights**

- (1) Insofar as the Vendor manufactures goods based on an order from the Buyer and in keeping with his instructions and guidelines and delivers these to the Buyer, the Buyer shall be liable to the Vendor with regard to ensuring that the deliveries and services ordered do not violate the property rights of any third party. He shall indemnify the Vendor against any such claims and shall compensate him for any losses thus incurred.

(2) Where the Vendor makes tools, drafts, installation suggestions or other drawings and documentation available to the Buyer together with the goods, the former shall retain title and all property and usage rights to such items. The Buyer shall only be entitled to usage within the scope of the sale contract; he shall in particular not be entitled to reproduce such items or make them available to third parties.

(3) Where the products in question are integrated software, the Buyer is entitled to use them to the extent defined in the contract. The intellectual property rights to the software and any manuals delivered with it shall remain unaffected. The Buyer may only reproduce the software and/or manuals or make them available to third parties where this is imperative under legislation. Art. 69 a et sqq. of the Copyright Act (UrhG) shall remain unaffected. The Vendor gives no guarantee and accepts no liability for the software where and insofar as it has been altered or improperly used by the Buyer.

## **XII. Non-Disclosure Clause**

(1) Unless otherwise expressly agreed in writing, all information to which the Buyer is made privy within the scope of the contractual relationship shall be treated as confidential.

(2) Confidentiality shall not apply to such information

- of which the party who received the information ("**receiving party**") can verifiably demonstrate that it was already aware prior to disclosure provided that the receiving party informs the party which disclosed the information ("**disclosing party**") within one month of receipt of such information;
- which at the time of its disclosure to the receiving party was already in the public domain or accessible, or entered the public domain or became accessible after disclosure without any violation of this agreement on the part of the receiving party;
- that the receiving party shall receive from third parties provided that this information does not form part of a non-disclosure agreement with the disclosing party;
- the disclosure of which to third parties has been approved in advance in writing by the disclosing party; or
- the disclosure of which the disclosing party is obliged either under legislation or by court order or by official directive.

(3) The obligation to observe confidentiality shall also apply after the contractual relationship has ended.

## **XIII. Data Protection**

The Vendor shall store and process all data relating to the Buyer obtained in connection with the contract for his own purposes observing the provisions of the German Federal Data Protection Act. If necessary for the performance under the contract, the Vendor may pass data to third parties. These third parties are obliged to use these data exclusively for the purpose of the contract and with due regard to the regulations of the rules of data protection.

## **XIV. Severance Clause**

Where one of the provisions of these Conditions or any other provision in any other agreement is or should become invalid or where any loophole is contained this shall not affect the validity of the remaining provisions or the contracts as a whole. Loopholes shall be filled with such valid provisions as would have been agreed by the Contracting Parties in keeping with the economic purpose of the contract and these General Conditions of Sale had they recognised the loophole in the first instance.

## **XV. Place of Jurisdiction, Place of Performance**

As far as another exclusive place of jurisdiction does not exist, the sole and exclusive place of jurisdiction for any disputes arising out of or in connection with these Conditions (including any relating to tort claims) between the Contracting Parties shall be Arnsberg. The Vendor is however entitled to take action against the Buyer at his registered office.

Unless otherwise specified in the contract, the place of performance shall be the registered office or branch office of the Vendor carrying out the respective delivery.

## **XVI. Applicable Law**

The laws of the Federal Republic of Germany shall govern the terms of business and all legal relationships between the Buyer and the Vendor. The United Nation Convention on Contracts for the International Sale of Goods ("CISG") is excluded.

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