

General Conditions for the Supply of Products and Services of Messko GmbH



I. General Conditions

1. The written order confirmation of MESSKO GMBH (hereinafter referred to as "MESSKO"), including any written amendments, governs the delivery and performance of MESSKO products and services (hereinafter collectively referred to as "Supplies").
2. MESSKO's deliveries are made and services are performed exclusively on the basis of these General Conditions for the Supply of Products and Services (hereinafter referred to as the "General Conditions Standard Sales Terms and Conditions"), which apply only if the Purchaser is an entrepreneur (§ 14 BGB, i.e. German Civil Code), a public authority or a special fund pursuant to public law. These General Conditions are also applicable to future sale of Supplies even if not explicitly agreed, unless MESSKO bases the sale on other general conditions of sale expressly approved by MESSKO in writing. Without MESSKO's written agreement, Purchaser's terms and conditions are not binding on MESSKO even if they have been included in Purchaser's order and have not been explicitly contradicted by MESSKO, whether or not they are material. MESSKO's performance does not constitute acceptance of Purchaser's terms and conditions. Reference to the applicability of legal regulations is intended only for clarification. Even without such clarification, the legal regulations apply to the extent they are not explicitly changed or excluded in these General Conditions.
3. Any documents relating to a quotation such as cost estimates, illustrations, drawings and weight details (collectively, the "Documents") shall not be binding unless specifically so agreed. MESSKO reserves all rights, right, title and interest (including copyright) to the Documents. The Documents shall not be made available to third parties without the prior written consent of MESSKO and they shall, upon request, be immediately returned to MESSKO if MESSKO is not awarded the contract. Sentences 2 and 3 shall apply reciprocally to Purchaser's Documents, but these may be made available to those third parties to whom MESSKO may transfer Supplies and/or Services.
4. Purchaser shall have the non-exclusive right to use standard software in unchanged form with the stipulated performance characteristics for the agreed Supplies. Purchaser may make two back-up copies without MESSKO's Supplier's express consent.
5. Partial delivery of Supplies shall be permissible to the extent commercially reasonable.

II. Prices and terms of payment

1. Prices are based on delivery ex works excluding packing plus any sales tax payable under applicable law, unless otherwise expressly agreed.
2. Payments shall be due 30 days after date of invoice and delivery, in cash and free of all deductions, made to the address for payment specified by MESSKO, unless other payment conditions have been expressly agreed.
3. If payment is not made when due, MESSKO shall be entitled to interest on amounts in arrears at 9 percentage points p. a. over the base lending rate as published by the German Federal Reserve Bank but not more than the highest rate permitted by law. MESSKO reserves the right to claim further damages in the case of late payment.
4. Purchaser may set off only claims that are undisputed or have been determined in a legally binding manner. In the case of any defects, counterclaims of the Purchaser, including but not limited to claims arising from Article VII No. 2 of these General Conditions, shall remain unaffected.

III. Retention of title

1. MESSKO shall retain title to the Supplies (Secured Goods) which shall remain the property of MESSKO until all contract claims against Purchaser have been satisfied. If the realizable value of MESSKO's collective security rights exceeds the amount of all secured claims by more than 10 %, MESSKO shall, on Purchaser's request, release a corresponding part of the retained rights.
2. For the duration of the retention of title Purchaser may not give any of the Supplies in pledge or as security, and release of Supplies shall be permissible only to resellers in the ordinary course of business and only on condition that the reseller receives payment from its customer or retains title so that the property is transferred to the customer only after fulfillment of the customer's obligation to pay.
3. Purchaser shall immediately inform MESSKO in writing of any seizure, confiscation or other acts or interventions by third parties.
4. If Purchaser materially breaches a contractual obligation, including but not limited to a delay in payment, MESSKO shall be entitled to terminate the contract and/or take back the Supplies. Purchaser shall be obliged to return the purchased Supplies. If MESSKO retakes the Secured Goods or asserts other rights pursuant to the retention of title, the contract shall nevertheless not terminate unless expressly stated by MESSKO.

IV. Time for delivery; delay

1. Delivery periods are approximate target times and not binding. Observance of the stipulated time for delivery is conditioned upon the timely receipt of all documents, necessary permits and releases, including plans to be provided by Purchaser, as well as fulfillment of the agreed terms of payment and other obligations by Purchaser. If these conditions are not fulfilled on time, the time for delivery will be extended accordingly except if MESSKO is responsible for the delay. MESSKO will inform Purchaser accordingly without delay.
2. If MESSKO's non-observance of the time for delivery is due to an event of Force Majeure (as defined below), such time shall be extended accordingly. MESSKO will inform the Purchaser accordingly without delay". Force Majeure" means an event beyond the control of MESSKO which prevents MESSKO from complying with any of its obligations, including but not limited to: (a) Act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods); (b) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilization, requisition, or embargo; (c) rebellion, revolution, insurrection, or military or usurped power, or civil war; (d) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; (e) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or (f) acts or threats of terrorism.
3. If MESSKO is responsible for a delay in delivery, Purchaser - provided it can credibly establish that it suffered a loss from such delay - may claim compensation of 0.5 % of the purchase price for every full week of delay but in no event more than a total of 5 % of the net price of the delayed Supplies.
4. Except as otherwise required by applicable law (such as in cases of willful misconduct or bodily injury), Purchaser's claims for damages as a result of delayed delivery and claims for damages instead of performance which exceed the limits specified in No. 3 shall be excluded in all cases of delayed delivery, including after expiry of an extension of time for delivery that MESSKO may have granted. Purchaser may terminate the contract only as provided by law and only if the delay in delivery was MESSKO's responsibility.
5. Upon request by MESSKO, Purchaser shall state within a reasonable length of time if it is terminating the contract as a result of the delay in delivery and/or demanding a claim for damage in lieu of performance or insisting on delivery.
6. If, at Purchaser's request or for reasons for which it is responsible, dispatch or delivery is delayed by more than one month after notice is given that goods are ready for dispatch, MESSKO may charge Purchaser storage costs for each month thereafter in the amount of 0.5 % of the gross price of the Supplies, but in no event shall the aggregate storage charges exceed a total of 5 % of the price. The parties may nevertheless furnish proof of higher or lower storage costs. Legal claims of MESSKO (including but not limited to indemnification for any additional costs and expenses incurred, termination) shall not be affected. Any such storage costs shall, however, be credited towards any further pecuniary claims.

V. Transfer of risk

1. All risk shall pass to Purchaser, including if "carriage paid" delivery has been agreed, when the Supplies (or partial shipment of the Supplies) leaves the factory, regardless of whether further services such as commissioning or start-up remain to be performed following delivery. At the written request and expense of Purchaser, shipments will be insured by MESSKO against usual transport risks.
2. If the dispatch or the delivery is delayed for reasons for which Purchaser is responsible, or if Purchaser has failed for other reasons to accept delivery, the risk shall pass to Purchaser as soon as MESSKO has given notice that the goods are ready to be dispatched.
3. With respect to Supplies which are services, all risk shall pass to Purchaser upon completion of those services.

VI. Taking delivery

Deliveries shall be accepted by the Purchaser, regardless of minor defects.

VII. Limited Warranty for defect of quality

MESSKO hereby warrants the Supplies to be free from defects in workmanship and materials and to conform to any specially agreed specifications for a period of twenty-four months (the "limitation period") from the date of shipment or completion of services.

In the case of breach of warranty, MESSKO shall be liable as follows:

1. MESSKO shall, at its option and expense, repair, replace or provide parts or services for those that prove to be defective within the limitation period - irrespective of operating time - provided that the cause of the defect occurred prior to the time at which the risk passed to the Purchaser.
2. For services, MESSKO's liability for defect of quality shall be limited to exchanged parts and work performed.
3. Claims for defects of quality expire after the limitation period, i.e. within twenty-four months unless otherwise provided by law. The special provisions of law regarding time limits (in particular §§ 438(1) no. 1 and no.2, §§ 444 and 445b of the German Civil Code) shall remain in effect.
4. A condition to the Purchaser's claim for defects is that the Purchaser has fulfilled its legal obligations to inspect for and give notice of such defects. Any inspection of parts or components that are integrated into other products must be carried out prior to installation. If defects are apparent either in the inspection or thereafter, the Purchaser is to give MESSKO prompt written notice. Notice will be deemed to have been given promptly if given within two weeks, whereby for purposes of meeting this deadline, sending the notice within that period is sufficient. In addition to this duty of inspection and notice, the Purchaser shall give written notice of any readily apparent defect (including delivery of the wrong product or quantity) within two weeks of delivery, whereby also in this case sending the notice within the period is sufficient.
5. The Purchaser shall immediately notify MESSKO in writing of any breach of warranty.
6. Purchaser may withhold payment based on claims of breach of warranty only in an amount that is commensurate with the actual defect(s). Purchaser may withhold payment only if a claim of breach of warranty is made and MESSKO does not dispute it.
7. Purchaser shall give MESSKO a reasonable period to rectify a defect. In the case of replacement, Purchaser shall return the defective part or component to MESSKO pursuant to relevant provisions of law. Rectification of defects shall include neither removal of the defective part or component nor reinstallation if MESSKO was not originally responsible for installation. MESSKO shall bear, or reimburse the Purchaser for, costs incurred in connection with corrective work, including for materials, labor, shipment and travel. If costs are increased because the products or devices on which services were performed have been transferred to some place other than the agreed upon place of delivery, Purchaser shall bear such additional costs. Purchaser shall also pay the costs of sending the defective item to MESSKO. MESSKO reserves the right to require indemnification for costs incurred in connection with an unwarranted request for rectification of a defect unless the absence of a defect could not have been ascertained by the Purchaser.
8. If MESSKO's attempted remedy of any warranty breach fails, Purchaser - irrespective of any claims for damage with respect to Article X - may terminate the contract or decrease the remuneration by a commercially reasonable amount.
9. Claims for breach of warranty shall not include minor deviations from the quality or condition agreed upon, minor impairment of usability, or natural wear and tear or damage arising - after the transfer of risk - from faulty or negligent handling, excessive strain, unsuitable equipment, defective workmanship, inappropriate foundation soil, chemical, electrochemical, electrical or other external influences not assumed under the contract, or from non-reproducible software errors. Claims for defects of quality do not cover modifications or repairs (and the consequences that result) carried out improperly by Purchaser or by third parties.
10. Purchaser's claims for legal recourse against MESSKO are valid only to the extent that the Purchaser has not made any agreement with its customer beyond those imposed by law. Moreover, the provisions of No. 8 apply to and restrict Purchaser's claims under this No. 10.
11. Article X also applies to damage claims ("Other damage claims"). Furthermore, MESSKO hereby excludes Purchaser's claims against MESSKO and its agents concerning warranties for quality defects except as permitted by this Article VII.

VIII. Industrial property rights and copyrights; defects of title

1. Unless otherwise agreed, MESSKO shall furnish the Supplies free of third party industrial property rights and copyrights (hereinafter referred to as "Property Rights") only in the country of delivery. If a third party, because of an alleged infringement of Property Rights, asserts legitimate claims against Purchaser for products furnished by MESSKO and used in conformity with the contract, MESSKO shall be liable to the Purchaser within the limitation period as follows:
 - a) At its own option and expense, MESSKO shall either obtain a right to use the relevant products, modify them so as not to infringe upon the Property Rights, or replace them. If this is not possible on terms acceptable to MESSKO, Purchaser may terminate the agreement or reduce the purchase price by a commercially reasonable amount.
 - b) Any obligation of MESSKO to honor a claim for damage is limited by Article X below.
 - c) The obligations of MESSKO described above are applicable only if Purchaser immediately notifies MESSKO in writing as to the claims lodged by a third party, an infringement is not acknowledged, and all counter-measures and settlement negotiations are reserved by MESSKO. If Purchaser ceases to use any of the Supplies in order to reduce damage or for other material reasons, it shall advise the third party that the cessation of use is not an acknowledgement of an infringement of Property Rights.
2. Claims of Purchaser against MESSKO shall be excluded if the Purchaser is responsible for the infringement of Property Rights.
3. Claims of Purchaser shall also be excluded if the infringement of Property Rights was caused by specific demands of the Purchaser, by a use of the product not foreseeable by MESSKO or by the product being altered by Purchaser or being used together with products not provided by MESSKO.
4. In the case of Property Right infringements, the provisions as defined in Article VII, Nos. 6, 7 and 11 apply to those claims by Purchaser cited in No. 1a).
5. For other defects of title, the provisions as defined in Article VII apply.
6. Further claims or any claims made by Purchaser against MESSKO and its agents other than those dealt with in this, Article VIII, concerning a defect of title are excluded.

IX. Impossibility of performance, contract adaptation

1. If a delivery is not possible, Purchaser may claim damages, unless MESSKO is not responsible for the impossibility. The Purchaser's claim for damages shall be limited to 10 % of the value of that part of the Supplies which, owing to the impossibility, cannot be put to the intended use. This limitation shall not apply (a) in cases of intent or gross negligence or (b) if there is a legally binding liability on the part of MESSKO due to injury to life, body or health. Purchaser's right to terminate the contract remains unaffected.
2. To the extent unforeseeable events such as are described in Article IV, No. 2. materially change the economic importance of the Supplies or materially affect MESSKO's business, the contract shall be adapted accordingly with due regard to the principle of good faith. If this is not economically reasonable, MESSKO may terminate the contract. MESSKO shall not be entitled to withdraw from the contract in an event which is attributable to MESSKO.

If MESSKO wishes to make use of this right of termination, it shall notify Purchaser in writing immediately after becoming aware of the significance of the event. This right of MESSKO to terminate shall apply regardless of whether MESSKO and Purchaser have agreed to an extension of the delivery time. MESSKO shall without delay refund any consideration already received from Purchaser.

X. Other claims for damages

1. As to Purchaser's claims for damages and expenses (hereinafter referred to as "Claims for Damages"), including those concerning violation of contractual obligations and tort, regardless of their legal basis, MESSKO is liable to Purchaser only in case of intent, fraud or gross negligence. The limitation of liability set forth in the first sentence of this Article X No. 1 applies also in cases of breach of duty by or to the benefit of its agents, legal representatives, employees and other entities providing fulfillment or installation services for whose fault MESSKO is responsible by reason of applicable law. This limitation of liability does not apply to Purchaser's claims based on breach of a material contractual obligation (which means a duty, whose due fulfillment is necessary for the proper carrying out of the contract and on whose observance the contract partner regularly relies on and may rely on) or guarantees provided by MESSKO. In cases of Article X, No. 1, Sentence 3, however, MESSKO's liability is limited to damages which are typical for this kind of contract and foreseeable by MESSKO at the time of entering into the contract except to the extent MESSKO is liable by reason of intention, fraud or gross negligence. In particular, without limitation, indirect and consequential damages which are the consequence of defects in the product delivered are subject to recovery only to the extent such damages are the consequences of defects which are normally expected in case of use of the delivered product in accordance with MESSKO's directions.
2. The limitations of liability set forth in Article X, No. 1 above shall not apply to Purchaser's claims for loss of life, bodily injury or damage to health or if excluded by product liability laws.
3. If the Purchaser is entitled to claims for damage under this Article X, the duration of liability of these claims corresponds to the time as set forth in the applicable limitation period regarding claims for defects of quality pursuant to Article VII, No. 3. The statute of limitations applies to claims for damages

based on loss of life, personal injury or injury to health or based on applicable product liability laws. The statute of limitations also applies to claims for damages in case of gross negligence or intent.

XI. Governing law

The laws of the Federal Republic of Germany to the exclusion of its conflict of law provisions of German International Private Law and the United Nations Convention on Contracts for the International Sale of Goods (CISG) shall be applicable.

XII. Settlement of Disputes concerning national Supplies

The following arbitration clause shall apply to contracts by and between MESSKO and Purchaser whose business address is in the Federal Republic of Germany:

All disputes arising in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS) (German Institution for Arbitration) without recourse to the ordinary courts of law. The place of arbitration is Munich. The number of arbitrators is three. The arbitral proceedings shall be conducted in English. The laws of the Federal Republic of Germany shall be exclusively applicable to this arbitral proceeding, except for its rules regarding the conflict of laws and the United Nations Convention on Contracts for the International Sale of Goods (CISG), both of which are hereby excluded.

XIII. Settlement of Disputes concerning international Supplies

The following arbitration clause shall apply to contracts by and between MESSKO and Purchaser whose business address is in the Federal Republic of Germany:

All disputes arising out of or in connection with this contract including questions regarding the legal validity of this contract and this arbitration clause be finally settled out of court and shall be referred to arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Zurich, Switzerland. The language of the arbitral proceedings shall be English. The laws of the Federal Republic of Germany shall be exclusively applicable to this arbitral proceeding, except for its rules regarding the conflict of laws and the United Nations Convention on Contracts for the International Sale of Goods (CISG), both of which are hereby excluded.

XIV. Validity of the contract

In case of the legal invalidity of individual terms, the remaining parts of the contract shall remain binding. The parties shall undertake to replace the invalid provision by a new one which as far as possible shall meet the economic purpose intended by the invalid provision save where adherence to the contract would mean an undue hardship on one of the parties.