

(Position as per: 15.02.2011)

## **KUNDO xT GmbH's General Terms and Conditions of Delivery**

### **1. Scope of Application**

- 1.1 As of 15 February 2011 all deliveries, services and offers by KUNDO xT GmbH (hereinafter referred to as "Supplier") shall be effected solely on the basis of these General Terms and Conditions of Delivery. Any terms and conditions of the Customer that deviate from or supplement these General Terms and Conditions of Delivery are not acknowledged unless the Supplier has expressly consented to them in writing. These Terms and Conditions of Business shall also apply to all future transactions between the Supplier and the Customer.
- 1.2 These Terms and Conditions of Business apply only in relation to entrepreneurs ("*Unternehmer*"), public-sector legal entities and special bodies or funds under public law within the meaning of Paragraphs 14 and 310(1) German Civil Code (*BGB*)).

### **2. Offer and Conclusion of the Contract**

- 2.1 If the Customer makes an offer to enter into a contract, the Customer shall adhere to said offer for two weeks.
- 2.2 Any verbal agreements reached prior to conclusion of the contract are required to be in writing in order to be effective.
- 2.3 All specifications in manuals, catalogues, prospectuses, type lists, data sheets and other brochures as well as in product specifications are only approximate unless the fitness for the contractually intended purpose requires an exact match. They are not guaranteed quality specifications, rather they are descriptions or designations of the goods or service. The prerequisites and scope of the Customer's rights arising out of any guarantee, which may, as the case may be, have been given, shall be governed solely by the terms of the guarantee agreement.
- 2.4 The Supplier absolutely reserves all rights of ownership and copyrights in documents such as pictures, stated weights and dimensions as well as quotations, which the Supplier sends to the Customer. The Customer shall require the express written consent of the Supplier before passing them on to third parties.

### **3. Prices and Payment Terms**

- 3.1 All prices are net prices ex works or ex warehouse excluding value added tax, which shall be payable in addition at the rate applicable from time to time to the extent that it applies. Any packaging requested by the Customer or which the Supplier considers to be necessary as well as delivery charges shall be charged in addition at the cost price applicable at the time of the delivery. The cost of returning the packaging to the Supplier, as the case may be, shall be borne by the Customer.
- 3.2 If the Customer is granted a cash discount as a matter of principle, said cash discount cannot be claimed if any other payments that are due arising out of the business relationship between the Supplier and the Customer are outstanding.
- 3.3 The Customer shall have the right to withhold payments or to offset them against counterclaims only insofar as the Customer's counterclaims are undisputed or have become final and absolute.

### **4. Supplier's Right of Rescission**

If it becomes apparent after the contract has been concluded that the Supplier's claim to the purchase price is at risk because of a lack of solvency on the part of the Customer, the Supplier shall be entitled to refuse performance in accordance with the statutory provisions and to rescind the contract - as the case may be, after having set a deadline – (Paragraph 321 German Civil Code (*BGB*)). In the case of contracts for the production of non-fungible goods (individual production) the Supplier can declare rescission immediately.

### **5. In Arrears with Payment**

- 5.1 Unless otherwise agreed the invoice sum shall be payable within 14 days of receipt of the invoice.
- 5.2 If payment in instalments has been agreed, the entire balance of the purchase price shall be immediately due for payment if the Customer is in arrears with one instalment, or with the amount of one instalment, for more than 14 days.

The Supplier is also entitled to immediately call in the balance of the purchase price if it becomes apparent after the contract has been entered into that the

Supplier's claim to the consideration is at risk due to a lack of insolvency on the part of the Customer, particularly due to a worsening of the Customer's financial circumstances. However, this shall only apply if the Supplier has previously set the Customer a reasonable deadline to furnish him with security in the amount of the balance of the purchase price and if said deadline has expired to no avail.

## **6. Delivery and Delay**

6.1 Any time limits and dates proposed by the Supplier for deliveries and services shall always only be deemed to be approximate unless a fixed time limit or a fixed date has expressly been promised or agreed.

6.2 The delivery time shall begin with the date of the confirmation of the order. Compliance with binding delivery times is subject to the timely receipt of all of the documents, permits and releases to be provided by the Customer as well as compliance with the agreed payment terms. If said prerequisites are not fulfilled in time the delivery time shall be reasonably extended. This shall not apply if the Supplier is responsible for the delay.

6.3 The delivery time shall automatically be reasonably extended if the Supplier is prevented from complying with the delivery time due to circumstances, for which the Supplier is not answerable (particularly force majeure, industrial dispute, strike, administrative order, the shortage of materials, non-availability or non-deliverability of goods and other circumstances, for which the Supplier is not responsible and which were not foreseeable).

6.4 In the event of any delay in delivery the Customer shall be entitled to rescind the contract in accordance with the statutory provisions if the Customer has, prior thereto, set the Supplier a deadline of 4 weeks for subsequent delivery, which has expired to no avail. The right to demand compensation for any delay in delivery shall remain unaffected. The Supplier's obligation to pay compensation shall be governed by Clause 12.

At the Supplier's request, the Customer must declare within a period of two weeks whether he is rescinding the contract because of a delay in the delivery or insists on the delivery.

6.5 The Supplier shall be entitled to effect part deliveries of goods if the Customer is able to use the goods so delivered for their contractually stipulated purpose and

the Customer does not thereby incur considerable additional work or additional expense.

## **7. The Passing of Risk and Consignment**

7.1 Unless otherwise agreed the place of delivery and performance shall be the Supplier's place of business.

7.2 The risk shall pass to the Customer upon consignment of the goods. This shall also apply if the Supplier has agreed to provide other services, such as delivery and installation, or if the Supplier has agreed to pay the shipping charges.

7.3 If the goods are collected by the Customer – even if through third parties – the loading and transportation shall be at the Customer's own risk.

7.4 If consignment is delayed due to circumstances, for which the Customer is responsible, the risk shall pass to the Customer upon receipt of the notice that the goods are ready for dispatch.

7.5 Upon the request and at the cost of the Customer the Supplier can insure the goods against insurable risks. If the goods are shipped back at the Customer's instigation the Customer must ensure that they are sufficiently insured. The provision in Clause 11.4 shall remain unaffected thereby.

## **8. Orders to be Called-Off**

The Customer must purchase goods ordered for call-off no later than three months following the expiry of the term of the contract. If the Customer fails to make said purchase the Customer shall be in default (*Verzug*). In that case the Supplier can demand damages for any loss as a result of the delay in said purchase. After a reasonable period has expired, the Supplier may furthermore rescind the contract or demand damages in lieu of performance.

## **9. Default in Accepting Delivery**

9.1 If consignment is delayed at the request of the Customer or for reasons for which the Customer is responsible, or if the Customer and the Supplier have agreed that the Customer must accept delivery of the goods and the acceptance of the

delivery is delayed due to circumstances, for which the Customer is responsible, the Supplier can charge the Customer storage charges in the amount of 0.5% of the price of the subject matter of the delivery for each started month beginning with effect from the month following the notice of the readiness for dispatch, however a maximum of 5% in total. Both contracting parties nevertheless retain the right to prove greater or lower storage costs as well as other further-reaching claims arising out of Paragraph 304 German Civil Code (*BGB*).

## **10. Reservation of Title**

- 10.1 The Supplier reserves title to goods delivered until all current and future debts owed to the Supplier under the purchase contract and any ongoing business relationship have been paid in full as well as until the Supplier has been released from any contingent liabilities entered into by the Supplier in the interests of the Customer.
- 10.2 The Customer must treat and keep the goods, which are subject to the reservation of title, with care and must carry out any necessary and customary inspection, servicing and maintenance work at its cost.

So long as the reservation of title exists, any disposal, pledge, transfer by way of security, rental or any other encroachment on the goods, which are subject to the reservation of title, shall be permitted only with the prior written consent of the Supplier. The Customer must immediately notify the Supplier in writing of any attachment of the goods, which are subject to the reservation of title, by third parties, particularly by way of distraint, any exercise of a contractor's right of distraint or seizure and must point out to the third party that the reservation of title exists. If the third party is not in a position to reimburse the Supplier the court and out-of-court costs of any successful third-party action against execution in accordance with Paragraph 771 German Code of Civil Procedure (*ZPO*), the Customer shall be liable towards the Supplier for any damage thereby incurred.

- 10.3 In the event of conduct by the Customer that is intentionally or negligently in breach of contract - especially in the event of default of payment - the Supplier shall be entitled to take back the goods delivered. The taking back of goods shall not constitute rescission of the contract unless such rescission has been expressly declared by the Supplier in writing.

10.4 The Customer is under a duty to - at his own cost - insure the goods, which are subject to the reservation of title, for their replacement value against risks, against which the goods, which are subject to the reservation of title, are, by their nature, usually insured. If the Customer fails to comply with this obligation, the Supplier shall be entitled to take out such insurance at the Customer's cost.

10.5 The reservation of title is extended and prolonged as follows:

- a) The processing and transformation of the subject matter of delivery by the Customer is always undertaken on behalf of the Supplier. If the goods are processed with other property not belonging to the Supplier, the Supplier shall acquire joint title to the new goods in the proportion which the value of the goods, which are subject to the reservation of title (invoice sum plus value added tax), has to the value of the other processed goods at the time of processing. Moreover, the goods created by virtue of the processing shall serve as security for the Supplier in the same way as the goods, which are subject to the reservation of title.
- b) If the goods, which are delivered subject to the reservation of title, are inseparably mixed or combined with other goods, the Supplier shall acquire joint title to the new goods in the proportion which the value of the goods, which are subject to the reservation of title (invoice sum plus value added tax), have to the value of the other mixed or combined goods at the time of the mixing or combining.

If goods are combined in such a way that the Customer's goods are to be considered as the main goods, the Supplier and the Customer hereby agree in advance that the Customer transfers joint title to the goods to the Supplier to the extent set out in sentence 1.

- c) If the goods delivered are combined with something inserted to construct a building (Paragraph 94(2) German Civil Code (*BGB*)) such that they thereby become an essential part of a plot of land (e.g. due to the installation of meters for reading heating costs and water meters produced by the Supplier) the Customer hereby already assigns his future claims arising out of any maintenance and service agreement that exists between the Customer and his customers relating to the goods delivered by the Supplier (e.g. outdoor temperature sensors) to the Supplier.

- d) The Customer may sell the goods, which are subject to the reservation of title, in the ordinary course of business upon the usual terms and conditions of business. The Supplier can revoke said authorisation if the Customer is in default of payment.

- 10.6 The Customer hereby already assigns his claims arising out of the resale, the further processing and the combining and mixing to the Supplier. The Customer is entitled to collect the assigned claims in his own name. However, he is under a duty to pay over the proceeds collected to the Supplier in the amount in which the Supplier has outstanding debts (Clause 10.1) owed to it by the Customer.

The Supplier shall be entitled to revoke the authorisation to collect debts as soon as the Customer is in default of payment. In that case the Customer is under a duty to disclose the assigned debts and the debtors who owe the debts, to hand over all of the documents required to assert the debt and to provide the information necessary to collect the debt.

- 10.7 If in the case of a delivery which is exported the above provisions on a reservation of title are not valid under the law of the country of destination or require supplementation or a registration in order to be effective, the Customer shall be under a duty to take all of the actions that are necessary under the law of the country of destination in order to validly establish a reservation of title for the Supplier.

If this is not possible under the law of the country of destination the Customer shall be under a duty to obtain another satisfactory means of security for the Supplier.

## **11. Warranty**

- 11.1 It shall be a prerequisite for any warranty claims of the Customer that he has complied with his duties to inspect and to report any complaints in a timely manner in accordance with Paragraph 377 German Commercial Code (*HGB*).

- 11.2 The Supplier shall not be liable for negligible defects. Defects which impair the contractually agreed quality of the goods, or in the event that no such agreement was reached the use intended by the contract, or in the event that no such use was agreed the ordinary use of the goods, only insignificantly and defects, which soon disappear of their own accord or which can be removed by the Customer himself expending only minor effort or expense are negligible defects.

- 11.3 If the goods supplied are defective at the time when the risk passes the Supplier shall – in derogation from Paragraph 439(1) German Civil Code (*BGB*) – be entitled to, at its option, re-deliver (replacement delivery) or to remove the defect (removal of defects).
- 11.4 The Supplier shall be under a duty to bear the costs required for such supplementary performance ("*Nacherfüllung*"), in particular the transport costs, infrastructure costs, labour costs and cost of materials, to the extent that said costs are not increased as a result of the purchased goods having been shipped to somewhere other than the place of performance.
- If the Customer's notice of defects was unjust, the Supplier shall be entitled to demand that the Customer compensates it for the expenses incurred in connection with checking the notice of defects.
- 11.5 If the removal of the defect or the replacement delivery fails, the Customer may, at his option, demand a price reduction or rescind the contract. The Supplier need only pay damages in accordance with Clause 12.
- 11.6 Warranty claims shall, as a matter of principle, be time-barred one year after delivery of the goods. Claims for damages in accordance with Clause 12 shall be time-barred within the statutory periods. If the goods sold have been used for a building or structure in accordance with their usual manner of use and have caused said building or structure to be defective, the warranty claims relating thereto shall likewise be time-barred in the statutory period.
- 11.7 In the event of any defects in components of other manufacturers the Supplier shall be entitled to assign its warranty claims against the manufacturers to the Customer. In the event of such defects warranty claims against the Supplier shall exist subject to the other prerequisites and in accordance with these General Terms and Conditions of Delivery only if the judicial enforcement of the above-mentioned claims against the manufacturer was unsuccessful or futile due to, for example, insolvency. The limitation period of the Customer's respective warranty claims against the Supplier shall be suspended for the duration of the litigation.
- 11.8 If the end customer is a consumer and he asserts defects, Clauses 11.1 to 11.7 shall not apply to any claims of the Customer to supplementary performance, reimbursement of expenses under Paragraph 478(2) German Civil Code (*BGB*),



rescission or price reduction that exist in connection with the recourse against the Supplier pursuant to Paragraph 478 German Civil Code (*BGB*).

## **12. Liability and Damages**

The following limitations of liability apply to every case of liability of the Supplier for damages irrespective of its cause in law:

- 12.1 The Supplier shall be liable in accordance with the statutory provisions if it has intentionally or negligently breached a material contractual obligation, i.e. a contractual obligation which characterises the typical purpose of the contract, the performance of which makes the proper implementation of the contract possible in the first place, and compliance with which the other contracting party may rely on. If the Supplier has acted negligently it shall, however, be liable only for the reasonably foreseeable damage that typically occurs.
- 12.2 For any other breaches of obligation the Supplier shall only be liable if damage has been caused intentionally or grossly negligently by one of its statutory representatives ("*gesetzliche Vertreter*") or by one of its senior vicarious agents ("*leitende Erfüllungsgehilfe*"); in that case it shall only be liable for the foreseeable damage that typically occurs if the damage was not caused intentionally.
- 12.3 Liability under the German Product Liability Act (*Produkthaftungsgesetz*) shall remain unaffected; this also applies to the liability for any injury to life, body or health caused intentionally or negligently. If it has given a guarantee the Supplier shall be liable in accordance with the statutory provisions. Unless otherwise provided above, claims against the Supplier for damages arising out of a breach of duty shall be excluded.

## **13. Final Provisions**

- 13.1 If the Customer is a merchant (*Kaufmann*) within the meaning of the German Commercial Code (*Handelsgesetzbuch*), a legal entity under public law or a special body or fund under public law the exclusive place of jurisdiction for all disputes arising directly or indirectly out of the contractual relationship shall be the Supplier's registered office (seat). The Supplier shall, however, also be entitled to sue the Customer at any other place of jurisdiction provided by statute.

- 13.2 This relationship between the contracting parties shall be governed by the law of the Federal Republic of Germany; the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded.