

# Conditions of Sale of **exeron**® GmbH of Oberndorf a.N., Germany

(As amended in February 2011)

based on

VDW Conditions of Sale of Machine Tools in the Domestic German Market (VDW-502)

as Recommended by Verein Deutscher Werkzeugmaschinenfabriken e.V. (VDW)

(Association of German Machine Tool Builders' Association)

For use in transactions with:

1. any natural person who is exercising a trade or independent professional activity when concluding the contract (business person);
2. any legal person governed by public law or any special fund under public law.

## I. General Provisions

1. The present Conditions of Sale as well as separate agreements made, if any, shall apply to all deliveries of goods and provision of services. The buyer's own conflicting or deviating terms and conditions of purchase shall not become an integral part of the contract, not even upon acceptance of an order.  
Unless otherwise agreed, a contract shall become binding through the seller's order confirmation in writing.
2. The seller reserves all property rights and copyrights to samples, cost estimates, drawings and other information, both tangible and intangible, also in electronic form; none of the above shall be disclosed to any third party.  
The seller agrees not to disclose information or documents specified by the seller as confidential without the seller's prior consent.

## II. Prices and Payment

1. Unless otherwise agreed, prices are ex works, including loading at the factory, but not including packing and unloading. Prices are subject to value added tax at the statutory rate.
2. Unless otherwise agreed, payment shall be due and payable net to seller's account as follows:  
1/3 of the total as a down payment upon receipt of order confirmation,  
1/3 upon buyer's receipt of information that the main parts are ready to be shipped, and  
the balance within one month of the date the risk has passed.
3. The buyer shall have no right to withhold payment or offset it against a counterclaim unless the buyer's counterclaim is undisputed or is res judicata.

## III. Delivery Time, Delay in Delivery

1. The delivery time is agreed by the parties to the contract. In order for the seller to comply with the agreed delivery time, all commercial and technical issues between the parties must have been resolved and the buyer shall have met all its obligations, e.g., obtaining all necessary certificates or authorisations of government authorities or made down payments as agreed upon. As long as this is not the case, the delivery time shall be extended by a reasonable period. This shall not apply if the seller is liable for the delay.
2. Delivery times are subject to correct and timely receipt of supplies by the seller. The seller shall communicate to the buyer any foreseeable delays as soon as possible.
3. The delivery time shall be deemed met when the item to be delivered has left the seller's premises by the end of the stipulated delivery time or notice of readiness for dispatch has been given. If the item is subject to an acceptance procedure, the delivery date shall be the date of acceptance, or, alternatively, the date of notice of readiness for acceptance unless acceptance is refused for good reason.
4. If a delay in dispatch or acceptance is due to reasons for which the buyer is liable, the costs arising from the delay shall be charged to the buyer starting one month of the date of notice of readiness for dispatch or acceptance.
5. If the time of delivery cannot be met due to an act of God, industrial action or any other event beyond the seller's control, the delivery time shall be extended by a reasonable period. The seller shall notify the buyer without delay of the beginning and the end of any such event.
6. The buyer may rescind the contract without notice if seller's total performance has definitely become impossible before the risk of damage or loss has passed to the buyer. The buyer may also rescind the contract if performance relating to a given order becomes partially impossible and the buyer has a legitimate interest in rejecting partial delivery. If this is not the case, the buyer shall pay the share of the agreed price attributable to the partial delivery. This shall also apply in case of the seller's inability to perform. Otherwise, Section VII (2) shall apply.  
If impossibility or inability to perform on the seller's part occurs while the buyer is in default of acceptance or if the buyer is solely or by far for the most part liable for these circumstances, the buyer shall pay the stipulated consideration.
7. If the seller is in default thus causing damage to the buyer, the buyer shall have a claim to a lump-sum compensation occasioned by the default. For every full week of default, 0.5% of the value of that part of the total delivery, but in sum total not to exceed 5% of the value of that part of the total delivery, which – due to the default - cannot be used in due time or not as stipulated in the contract. If the time of delivery has expired and the buyer sets the seller a reasonable deadline for performance – taking the statutory exceptions into account - but the seller fails to meet this deadline, the buyer may rescind the contract subject to the applicable statutory provisions. At the seller's request, the buyer shall notify the seller within a reasonable period of time whether or not the seller will exercise seller's right to rescind the contract.  
Any additional claim based on delay in delivery shall be governed exclusively by the provisions under Section VII (2) herein below.

## IV. Passing of Risk, Acceptance

1. The risk of damage or loss shall pass to the buyer when the delivery item has left the factory; this shall also apply if part deliveries are made or the seller has agreed to render additional performance, e.g., to bear the shipping costs or to carry out delivery and installation. If the buyer's acceptance is required, the date of such acceptance is the relevant date for the risk to pass. Acceptance shall be carried out without delay on the acceptance date, or, alternatively, upon the seller's notice of readiness for acceptance. The buyer shall not be entitled to refuse acceptance on grounds of an immaterial defect.
2. In case of default in shipping or acceptance for reasons beyond the seller's control, the risk of damage or loss shall pass to the buyer as of the date of notice of readiness for shipping or acceptance. The seller shall take out any insurance required by the buyer at the buyer's expense.
3. Part deliveries shall be permitted if not unreasonable for the buyer.

## **V. Retention of Ownership**

1. The seller retains ownership of the delivery item until all payments under the delivery contract have been received, including payments for ancillary performance agreed upon, if any.
2. The seller shall be entitled to insure the delivery item against theft, breakage, fire, water and any other damage at the buyer's expense unless the buyer can prove to have taken out such insurance itself.
3. The buyer shall not sell, pledge or assign the delivery item as collateral. If the item is attached, distrained, seized, or otherwise disposed of by any third party, the buyer shall inform the seller thereof without delay.
4. If the buyer is in breach of contract, including but not limited to a default of payment, the seller may recover and the buyer shall release the delivery item following a request for payment.
5. Due to the retention of ownership, the seller shall have a right to reclaim the delivery item only after rescinding the contract.
6. If an application to institute insolvency proceedings has been filed, this shall entitle the seller to rescind the contract and claim surrender of the delivery item without delay.

## **VI. Warranty Claims**

The seller shall be liable for defects in quality and of title of the delivery item, to the exclusion of any and all claims the buyer may have and except as provided in Section VII herein below, as follows:

### Defects in quality

1. The seller shall repair or replace at the seller's discretion and free of charge all parts proving to be defective due to circumstances arising before the risk of damage or loss has passed to the buyer. The buyer shall notify the seller in writing of any such defect without delay. The seller shall regain ownership of any replaced parts.
2. The buyer shall give the seller sufficient time and opportunity for the seller to make repairs and replacement deliveries upon coordination with the seller; otherwise, the seller shall be released from liability for the consequences thereof. Only in urgent cases where operational safety is compromised and/or to prevent disproportionate damage (in which case the buyer shall notify the seller without delay) shall the buyer have the right to repair a defect itself or have it repaired by a third party and to claim reimbursement of the necessary expenses from the seller.
3. Of the cost directly incurred through the repair of defects or replacement, as the case may be, the seller shall bear the cost of the replacement part, including shipping cost, provided the complaint is justified. In addition, the seller shall bear the cost of disassembly and reassembly and the cost of providing the required mechanics and assistants, including travel expenses, provided this is not an unreasonable burden imposed on the seller.
4. Within the statutory framework and save the exemptions set forth therein, the buyer has a right to rescind the contract if the seller fails to repair or provide replacement for any defect in quality within a reasonable period of time set for this purpose. If a defect in quality is not a material one, the buyer shall only be entitled to reduce the contract price. Otherwise, the right to reduce the purchase price shall be excluded.  
Any further claims shall be governed by the provisions set forth in Section VII (2) herein below.
5. The seller shall not be liable for defects including, but not limited to the following cases:  
unsuitable or improper use, incorrect assembly and/or startup by the buyer or any third party, normal wear and tear, faulty or negligent handling, improper maintenance, unsuitable resources, poor construction work, unsuitable subsoil, chemical, electrochemical or electrical influences unless they come within the Seller's responsibility.
6. In the event of any improper repairs made by the buyer or a third party, the seller shall not be liable for the consequences thereof. This shall also apply if the buyer has made modifications to the delivery item without the Seller's prior consent.

### Defects of title

7. If the use of the delivery item results in an infringement of domestic industrial property rights or copyrights, the seller shall at its cost generally arrange for the buyer to have a right to continue using the delivery item or modify the delivery item in a way that is acceptable to the buyer and eliminates any infringement of such industrial property rights. If this is not possible on economically reasonable conditions or within a reasonable period of time, the buyer shall be entitled to rescind the contract. Under the above conditions, the seller, too, shall be entitled to rescind the contract. Furthermore, the seller shall indemnify the buyer against any undisputed or legally enforceable claims of the respective holders of the intellectual property rights.
8. Notwithstanding Section VII (2) herein below, the seller's obligations in case of an infringement of industrial property rights or copyrights are exclusively determined in Section VI (7) herein before. These obligations shall apply only provided that
  - the buyer has notified the seller without delay of any claims put forward on grounds of infringements of industrial property rights or copyrights,
  - the buyer reasonably supports the seller in seller's defence against the claims put forward and/or enables the seller to carry out the modification of the delivery item in accordance with Section VI herein before,
  - the seller retains the right to take any and all defensive action against such claims, including out-of-court settlements,
  - the defect of title is not due to an instruction given by the buyer, and
  - the infringement was not caused by the buyer modifying the delivery item arbitrarily or using it in a way not in conformity with the contract.

## **VII. Seller's Liability, Disclaimer of Liability**

1. If the buyer cannot use the delivery item in the way intended under the contract due to the seller's fault who failed to carry out suggestions or results of consultations made or achieved before or after the contract was signed, or who carried out such suggestions or results of consultations incorrectly, or who failed to meet any other collateral obligation under the contract, including, but not limited to giving instructions for operating and maintaining the delivery item, the provisions set forth in Sections VI and VII (2) shall apply mutatis mutandis to the exclusion of any further claims the buyer may have.
2. The seller shall be liable for damage other than to the delivery item proper only – on whatever legal grounds
  - a. if caused intentionally,
  - b. if caused by gross negligence on the part of the seller's owner / corporate bodies or its senior executives,
  - c. if culpably causing personal injury,
  - d. for fraudulent non-disclosure of a defect or non-disclosure of defects warranted against,
  - e. if covered by warranty,
  - f. for defects of the delivery item to the extent that the German Product Liability Act provides liability for personal injury or damage to personal property.

In cases of culpable breach of fundamental contractual obligations, the seller shall also be liable for gross negligence of non-executive employees and for slight negligence; in the latter case, the seller's liability shall be limited to the reasonably foreseeable damage or loss as is typical of the contract concerned. Any further claims shall be excluded.

### **VIII. Limitation of Action**

Any and all claims of the buyer based on whatever legal grounds shall be subject to a limitation period of 12 months. The statutory limitation periods shall apply to any claim for damages pursuant to Section VII (2 a - f). The statutory limitation periods shall also apply to claims relating to buildings or delivery items designed and properly used for buildings and causing defects of the buildings.

### **IX. Use of Software**

If the scope of delivery includes software, the buyer shall be granted a non-exclusive right of use of the software delivered, including the accompanying documentation. The software shall be licensed to the buyer for use on the designated delivery item. The buyer shall not be permitted to use the software on more than one system.

The buyer shall only be permitted to copy, revise or compile the software or convert it from object code into source code to the extent permitted by law (Sec. 69 a et seq., German Copyright Law (UrhG). The buyer agrees not to remove the manufacturer's marks, including, but not limited to copyright notes, or modify same without the seller's express prior consent.

All other rights to the software and the documentation, including copies thereof, shall remain with the seller and/or the software supplier. Sublicensing shall not be permitted.

### **X. Jurisdiction, Venue**

1. All legal relationships between the seller and the buyer shall be governed exclusively by the law of the Federal Republic of Germany as it applies to the legal relations between or among domestic parties to the exclusion of the conflicts of law rules of Private International Law and the provisions of UN commercial law (CSIG).
2. The court having venue for the seller's registered office shall have jurisdiction over all disputes that may arise. However, the seller shall be entitled to take legal action also in a court having venue for the buyer's headquarters.