

General Terms and Conditions of the Company Nowack GmbH & Co. KG/ Nowack GmbH

Section 1 – Scope of application

1. These general terms and conditions apply to all contracts, deliveries and other services performed in the course of the commercial business transactions of the company Gebr. Nowack GmbH & Co. KG as well as Nowack GmbH (hereinafter referred to as 'seller', 'we' or 'us') with entrepreneurs according to Section 14 BGB (German Civil Code) (hereinafter referred to as 'buyer' or 'customer').
2. The general terms and conditions of the seller shall apply to the exclusion of all else; contradictory provisions of the customer, or those which deviate from our terms and conditions, are not recognised by us unless we explicitly agreed to their validity in writing. Our general terms and conditions shall also apply if we perform deliveries to the customer without reservation whilst being aware of alternative terms of the buyer or terms, which deviate from our general terms and conditions.
3. Agreements reached in individual cases between the contractual parties (including ancillary agreements, amendments and changes) shall always take precedence over these terms and conditions.
4. These general terms and conditions shall also apply to all future business relationships, even if they are not stipulated expressly again.

Section 2 – Offer and contract conclusion

1. The offers in the seller's catalogues and documentation as well as offers placed on the internet (unless explicitly referred to as binding) are always non-binding, i.e. only constitute a request to submit an offer.
2. Orders shall be deemed accepted if they are confirmed in writing by the seller or are performed immediately after receiving the order. In such a case, the invoice shall act as order confirmation.
3. Should the seller become aware of circumstances indicating the seller is unable to perform, especially delay in payment for earlier deliveries or endangerment the purchase price payment which, according to the best judgement of a businessman, indicate a major deterioration in the buyer's financial situation, the seller is entitled to demand payment in advance or similar securities and, if the buyer refuses, to withdraw from the contract, whereby any invoice for partial deliveries already performed is immediately due.
4. Should the seller surrender documentation to the buyer as part of order processing, e.g. calculations, photographs, brochures, catalogues, samples and drafts etc., the seller retains title to said items. Copyright or other industrial property rights also remain with the seller. The buyer is not permitted to make this documentation accessible to third parties without the explicit consent of the seller. Should no contract come into force between the seller and buyer, all said documentation, including all copies in physical and electronic form, must be returned without delay upon first request of the seller.

Section 3 – Delivery deadlines and delay

1. Delivery deadlines and dates are non-binding and are solely to be regarded as a predicted delivery schedule unless the parties have explicitly agreed to a specific deadline or delivery date in writing. In the case of goods not produced by the seller, the seller can only perform delivery provided that they themselves have been properly and promptly supplied with the goods.

2. A performance or delivery deadline is to be extended - also during a delivery delay - to a reasonable extent in the event of force majeure and all unforeseen impediments arising after contract conclusion for which the seller is not responsible (in particular: operational disruptions, strikes, lock-outs, outbreak of armed conflict, natural catastrophes, unexpected drop in temperature, unusually heavy rain, infestation of pests, outbreaks of plant disease, and disruptions to traffic routes) in so far it can be proven that such impediments have a considerable impact on the delivery of the purchased good. The same shall apply if said impediments arise with respect to the seller's suppliers and their sub-suppliers. The seller shall promptly inform the seller of the start and end of such impediments.

3. The seller is only liable for their own actions and those of their vicarious agents; the seller is not liable for the actions of their suppliers resulting in delayed or unperformed deliveries. The seller is, however, obliged to assign any possible claims for compensation against suppliers to the buyer. Errors made in selecting suppliers remain unaffected.

Section 4 – Quality

1. The goods shall be supplied in standard commercial quality, unless otherwise agreed. Specifications of dimensions, weight and quantities are to be considered approximate. Deviations of plus or minus 10% are permissible.

2. Samples are only intended to demonstrate average quality. It is not necessary for all parts or goods of the delivery to correspond to the sample. The dimensions indicated shall only be approximate specifications. Samples of goods do not constitute a guarantee of quality. The seller reserves the right to replace decoration items depicted in their offers with comparable goods.

Section 5 – Prices and payment

1. Unless otherwise agreed, prices are offered ex seller's works and do not include costs for delivery, packaging or VAT. Deducting cash discounts is only permitted if the parties agree in writing. In the event of considerable changes in costs for freight, customs and haulage following the issuing of the order, the seller is entitled to assert claims against the buyer for the additional amount.

2. Should no special agreement be in place, payment is due immediately upon receipt of the invoice without any deduction to the seller's payment office. Payments will always be used to settle the oldest payable accounts plus the default interest accrued thereon. Promises of discounts only apply if the buyer is not in arrears with respect to payments for earlier deliveries.

3. We shall accept cheque payments on account of performance according to special agreement, but not in lieu of performance. Expenses will be deducted from credit in the form of cheques at the value on the day at which the buyer will be able to dispose of the equivalent value.

4. In the event of a considerable deterioration in the buyer's financial situation, or in the case of payment delay on the part of the buyer, the seller can revoke the direct debit authorisation of the buyer in the event of goods being sold to which the seller holds title, and to demand payments in advance for pending deliveries. However, the buyer can avoid such legal consequences by making a security payment to the value of the endangered payment claim.

5. Interest on arrears shall be calculated at 9% per year above the base interest rate. Interest may be upwardly adjusted if the seller can show that costs of the arrears justify a higher interest rate or downwardly if the buyer can prove that costs incurred will be lower.

Section 6 – Retention of title

1. All delivered goods remain the property of the seller (reserved goods) until all claims have been settled; this particularly refers to the respective balance claim, which is due to the seller within the framework of the business relationship. The same shall apply if payments have been made in respect of specially designated claims. This shall furthermore apply to all future deliveries even if not explicitly asserted by the seller.

2. The buyer is obliged to care for the products until ownership has been transferred in terms of the perishability of the goods and to protect them against harmful effects of the weather. Until ownership is transferred, the buyer is obliged to notify the seller in writing without delay should the item delivered be seized or subject to other interventions by third parties. Should the third party affected not be able to compensate the seller for the court and out-of-court costs of a lawsuit pursuant to Section 771 ZPO (German Code of Civil Procedure), the buyer shall be liable for the amount outstanding.

3. If the seller is not in payment arrears, they may sell the reserved goods in the course of normal business transactions in line with their regular terms and conditions in so far as the claims from re-selling according to Clauses 4 and 5 below are transferred to us.

4. All claims against the buyer or third parties arising from the re-selling of the reserved goods are as of now transferred by the buyer to us in line with the agreed final invoice price (including VAT) plus a security surcharge of 10%. This transfer shall be performed irrespective of whether the purchased item has been sold with or without processing or commingling with other items. The buyer shall remain entitled to collect this claim even after the transfer. Our entitlement to collect the claim ourselves remains unaffected. However, we will not collect the claim provided the buyer fulfils their payment obligations arising from the proceeds received and for as long as the buyer is not in payment arrears and, in particular, no application has been submitted to initiate insolvency proceedings and payment has not ceased. In such a case, the buyer is in no way authorised to assign the claim to third parties.

5. Should the buyer fail to meet their payment obligations to the seller, fall into payment arrears, cease payment or submit an application to initiate insolvency proceedings, the buyer must notify the seller without delay. The seller is entitled to demand the buyer provide notification of assigned claims and their respective debtors, as well as all information required to collect our claims and associated documents, and to notify the debtors (third parties) of the assignment. Should the buyer be in arrears towards the seller with respect to payment obligations, all existing claims become immediately due.

6. The seller is obliged to release at their choice all securities to which they are entitled at the request of the buyer in so far as the realisable value of their securities exceeds the claims to be secured by more than 20%.

Section 7 – Transfer of risk and transportation

1. Unless otherwise agreed, the dispatch route and means of dispatch are left to the choice of the seller. The same shall apply to packaging in terms of technical transportation matters and environmental concerns.

2. The statutory regulations (section 447 BGB) shall apply to the transfer of risk and irrespective of whether the dispatch is performed from the place of performance and irrespective of who is to bear the freight costs. Once the goods have been handed over to the railway company, haulage firm or freight carrier, or one week after commencement of storage, however no later than the departure of the goods from the warehouse, all risks are transferred to the buyer; this shall also apply if the seller has assumed responsibility for performing the delivery. The good(s) can be insured at the request of the buyer for which the buyer shall bear all costs. The seller assumes no liability for damage caused by frost, heat, incorrect choice of transportation method or transport delays.

3. Should the buyer use the seller's transport containers (e.g. Euro pallets, CC trolleys, Euro CC trolleys, mesh containers or similar), these must be promptly returned to the seller following delivery.

Section 8 – Warranty and notification of defects

1. Unless otherwise agreed, the buyer's rights in terms of material defects or defects of title shall be subject to the statutory regulations.

2. The contractually agreed characteristics of the goods shall be the primary basis for warranty claims. Should no special agreement have been reached with respect to characteristics, the statutory regulations shall apply to determining the presence of a defect. The seller assumes no liability for statements made by third parties, such as manufacturers.

3. In order to assert claims for defects, the buyer must fulfil their statutory inspection and complaint obligations pursuant to Sections 377, 381 HGB (German Commercial Code). Should a defect of the goods be detected during inspection or at a later point, the buyer must promptly provide written notification.

Notwithstanding this duty to inspect and provide notification (this includes faulty or incomplete delivery), obvious defects are to be reported to the seller in writing within 12 hours of delivery. The timely submission of notification is sufficient to ensure compliance with the deadline.

Warranty claims for defects shall be excluded should the buyer fail to perform their obligations to inspect and report defects.

4. Should a defect be present, the seller is entitled to determine the method of subsequent improvement; either rectification of the defect (improvement) or by delivery of a non-defective item (substitute delivery).

5. The expenses required by subsequent improvement, especially transport and road costs, are not to be borne by the seller in so far as these are a result of the purchased good being taken to a place other than the location of the professional activity or commercial branch establishment of the recipient after delivery, unless such relocation corresponds to the proper use of the item. Claims to recourse pursuant to Sections 478, 479 BGB remain unaffected.

6. Claims to recourse pursuant to Sections 478, 479 BGB shall only exist to the extent that the claim by the consumer was justified and only to the statutory extent, but not for goodwill regulations which have not been agreed with the seller. In all other respects, the individual entitled to recourse must fulfil their own obligations; this particularly applies to observance of notification obligations.

7. Claims by the buyer for damages or reimbursement of expenses incurred in vain in the favour of the buyer shall only exist to the extent of Section 9 of these terms and conditions. They are excluded in all other cases.

8. Notwithstanding the statutory regulations, the general limitation period for claims arising from material defects and defects of title shall be one year following delivery. If acceptance has been agreed, the limitation period begins upon acceptance.

9. The preceding agreement concerning the limitation period governing the sale of goods shall also apply to contractual and non-contractual claims of the buyer relating to a defect of the goods unless the application of the ordinary statutory limitation would result in a shorter period of limitation in an individual case. The limitation periods of the German Product Liability Act shall remain unaffected hereby.

Section 9 – Liability and damages

1. The seller shall only be liable for intentional or grossly negligent acts by the seller or their vicarious agents which result in damage. In the event of simple negligence, the seller shall only assume liability if a significant contractual obligation (an obligation whose violation endangers the achievement of the purpose of the contract) or cardinal obligation (an obligation whose fulfilment is a prerequisite for executing the contract and upon which the customer may rely) is violated. Liability for violations of such a significant contractual obligation or cardinal obligation is limited with respect to extent to the damage foreseeable on contract conclusion.

2. Claims based on a warranty, injury to life, body and health; as well as pursuant to the German Product Liability Act and any other obligatory liability regulations shall remain unaffected.

Section 10 – Offsetting, right of retention

The buyer's right to offset claims shall only arise if their counter claims are legally established and undisputed. Should the buyer wish to assert a right of retention, they are only authorised to do so in so far as their counter claim is based on the same contractual relationship or the counter claim is legally established or undisputed.

Section 11 – Data protection

The buyer is hereby informed that the seller shall solely use personally-identifiable data collected during the business relationship in accordance with the provisions of the General Data Protection Regulation and the German Federal Data Protection Act.

§ 12 Exemption from liability for items, storage

1. Should the buyer provide drawings, drafts, samples, brands, documentation or other written material, the buyer is obliged to ensure these are kept free of third-party rights with particular respect to the violation of third-party industrial property rights. Otherwise, the buyer releases the seller from any third-party claims.

2. Should the buyer transfer goods to the seller for order processing and storage, this shall be performed by the seller with due diligence. Liability on the part of the seller for damages to the stored goods resulting from natural deterioration, or despite observance of due diligence, is excluded. Liability in accordance with Section 9 remains unaffected.

Section 13 – Place of fulfilment, place of jurisdiction, applicable law

1. The place of performance for all obligations arising from this contract shall be Borken (Germany) irrespective of the location and time at which risk is transferred and irrespective of which contractual partner is to bear transport and insurance costs.

2. The exclusive place of jurisdiction for all disputes is Borken (Germany) unless another exclusive place of jurisdiction is agreed upon. The seller is also entitled to bring charges against the buyer at their general place of jurisdiction.

3. Business relationships are solely governed by the law of the Federal Republic of Germany to the exclusion of the UN sales convention.

Section 14 – Severability clause

Should individual provisions of these terms and conditions be ineffective, or prove to be so, or should they contain a gap in regulations, the remaining provisions shall remain unaffected. To rectify any such gaps, regulations shall be put into place which the contractual parties would have agreed to in light of the commercial purpose of the contract and the purpose of these terms and conditions had they been aware of the gap in regulations.

Gebr. Nowack GmbH & Co. KG/
Nowack GmbH