

# General Terms and Conditions of EM Devices Europe GmbH

## **§ 1 Scope**

- 1.1 These terms and conditions shall apply exclusively to all deliveries, services and quotations from EM Devices Europe GmbH – hereafter referred to as EM DEVICES. Any counter-confirmations of the Customer with reference to his own terms and conditions and/or conditions of purchase are hereby expressly excluded. Nor shall the latter apply if EM DEVICES executes contracts unconditionally with knowledge of conflicting terms and conditions of the Customer.
- 1.2 There are no subsidiary agreements to this contract. All changes to these terms and conditions require written confirmation from EM DEVICES. This also applies to the removal of the above clause.

## **§ 2 Quotation and Conclusion of a Contract**

- 2.1 Quotations from EM DEVICES are always subject to change and never binding. Unless agreed otherwise, prices are net prices ex works, although inclusive of standard EM DEVICES packaging. These prices, plus the statutory amount of VAT, delivery costs, customs duties and any additional import charges, shall be paid by the Customer in full.
- 2.2 Drawings, illustrations, dimensions, weights or other performance figures contained in catalogues, price lists or other EM DEVICES advertising material only represent a guaranteed condition if this is expressly stated.

## **§ 3 Execution of Deliveries and Services/Acceptance**

- 3.1 Unless expressly agreed otherwise, dates and delivery periods are not binding.
- 3.2 In the event of circumstances at EM DEVICES or at a supplier of EM DEVICES, which prevent EM DEVICES from supplying a delivery at that time or permanently or under reasonable economic conditions through no fault of EM DEVICES and through no fault of the supplier attributable to EM DEVICES (e.g. material procurement difficulties, breakdowns, strikes, lockouts, transport shortages, official orders and all acts of God), EM DEVICES is released from the obligation to supply for the duration of the circumstances and their consequences. EM DEVICES shall inform the Customer immediately if such circumstances occur. If the circumstances last longer than three months, the Customer is entitled to rescind the part of the contract that has not yet been fulfilled at that time following a reasonable period of grace. EM DEVICES can rescind the contract if the circumstances have produced an unreasonably large order surplus, or if the economic conditions have changed considerably in another way.
- 3.3 If, in the event of circumstances described above, EM DEVICES does not have sufficient quantities of goods to satisfy all Customers, EM DEVICES is entitled to reduce all commitments to supply at its own discretion, exercising all due care and diligence, and is released from obligations to supply.
- 3.4 EM DEVICES is entitled to deliver and provide services in instalments at all times. EM DEVICES is entitled to deviate from the agreed delivery or service provided that this is deemed reasonable and appropriate for the Customer.

- 3.5 The Customer must cooperate in the acceptance of goods and services and inform EM DEVICES of difficult delivery conditions in good time.
- 3.6 If the dispatch or delivery of goods is delayed due to reasons for which the Customer is responsible, EM DEVICES is entitled to charge the Customer the costs arising from the storage of such goods, at least 1% of the imputed invoice amount for storage of goods in EM DEVICES warehouses, starting from one month after notification that the goods are ready to dispatch/deliver and for each month of storage or any part thereof, unless the Customer can prove that no damage has resulted or damage has not resulted to this extent.
- 3.7 Even after delivery to the Customer, the packaging remains the property of EM DEVICES. The Customer is therefore obligated to treat the packaging with care and to comply with instructions from EM DEVICES in this respect.

#### **§ 4 Passage of Risk**

- 4.1 The risk of accidental damage passes to the Customer as soon as the delivery has been handed to the carrier or has left EM DEVICES storage for the purpose of dispatch or if EM DEVICES has informed the Customer that goods are ready to dispatch.
- 4.2 If EM DEVICES follows shipment instructions issued by the Customer, it does so at the risk of the Customer. EM DEVICES only accepts liability under the conditions of § 5 of these terms and conditions.
- 4.3 Any agreements regarding transport and insurance costs relate purely to expenses and do not affect the passage of risk.
- 4.4 At the request and expense of the Customer, EM DEVICES shall insure the delivery against damage caused in transit, breakage, fire damage and accidental damage.
- 4.5 If Incoterms are agreed, the current version of each of these terms is valid.

#### **§ 5 Claims Arising from Faults/Liability**

- 5.1 EM DEVICES accepts the liability that the goods to be supplied are free of material defects or defects in title that render them unsuitable or considerably reduce their suitability. This does not include defects caused by improper use, incorrect assembly, provided the assembly instructions are correct, unauthorised modification or similar circumstances occurring within the sphere of the Customer.
- 5.2 The limitation period for claims arising from defects is one year from delivery of the goods. This period also applies to claims arising from tort that are based on a defect in the goods. In the event of liability for the breach of obligations relating to a subsidiary or preliminary contractual duty, or due to tort that is not based on a defect in the goods, the claims of the Customer lapse two years after delivery.
- 5.3 If the Customer is a trader, his claims arising from a defect require the Customer to have fulfilled his obligation to examine the goods and lodge a complaint immediately and appropriately, particularly in the event of incomplete deliveries, as a necessary prior condition. The Customer shall enable EM DEVICES to examine the goods in a reasonable and appropriate way.
- 5.4 Provided that the goods are faulty, EM DEVICES is entitled to choose between rectifying the fault and supplying replacement goods. If EM DEVICES is not prepared or not in a position to rectify the fault or supply replacement goods, or if EM DEVICES refuses to do so or fails

to do so within a reasonable time period due to reasons for which EM DEVICES is responsible, or fails in any other way to rectify the fault or supply replacement goods, the Customer is entitled to choose between rescinding the contract or demanding an appropriate reduction in the purchase price.

- 5.5 If the Customer is entitled to return the goods, they must be returned in accordance with the instructions provided by EM DEVICES following consultation with EM DEVICES.
- 5.6 The Customer is not entitled to rescind the contract as a result of faulty goods in cases in which the Customer is unable to return the goods received and this is not due to the fact that it is impossible to return it due to the nature of the goods received, it must be returned due to reasons for which EM DEVICES is responsible or a fault did not become apparent until the goods were processed or altered. If faulty goods or incomplete deliveries are supplied, the Customer is only entitled to rescind the entire contract and to damages instead of the entire fulfilment if an objective measure is applied in order to confirm that he has no interest in the fulfilment rendered.
- 5.7 Unless specified otherwise in points 5.8 to 5.11 below, the Customer may not make any claims that go beyond those covered in points 5.1 to 5.6 – irrespective of the legal justification. This particularly applies to liability for advice, comments and information. Therefore, EM DEVICES does not accept liability for damages not caused to the goods themselves and in particular, EM DEVICES does not accept liability for lost profits or other economic losses of the Customer.
- 5.8 The above liability disclaimer does not apply if the cause of the damage is based on intent or gross negligence on the part of EM DEVICES, its management or persons involved in the fulfilling of the owed obligations in accordance with § 278 German Civil Code. Nor does it apply if the Customer puts forward claims for damages instead of the entire fulfilment due to the absence of a condition of the goods guaranteed by EM DEVICES, due to a defect maliciously kept quiet by EM DEVICES or due to loss of life, personal injury or damage to health.
- 5.9 If EM DEVICES has culpably breached an important contractual obligation or a “cardinal obligation” and in cases of initial impossibility of which EM DEVICES was aware or should have been aware on entering into the contract, the above liability disclaimer does not apply. In this case, the liability of EM DEVICES is limited to the damage typical of the contract; otherwise, EM DEVICES is not liable in accordance with point 5.7.
- 5.10 The above liability disclaimer also does not apply to claims arising from the product liability law. If the clause limiting liability in point 5.9 does not apply, the liability of EM DEVICES in respect of claims arising from product liability in accordance with § 823 of the BGB (*German Civil Code*) is limited to the indemnification of the insurance. If the insurance does not cover or does not fully cover, EM DEVICES is obligated to accept liability up to the amount insured.
- 5.11 If the above exceptions to the limitation of liability (points 5.8 to 5.10) apply, unlike point 5.2, the statutory period of limitation applies.
- 5.12 Claims arising from a defect may only be made against EM DEVICES by the Customer and are not transferable.

5.13 If EM DEVICES is not liable or has limited liability, this also applies to the personal liability of its employees, co-workers, representatives and persons involved in fulfilling an obligation.

## **§ 6 Product Liability**

6.1 If the Customer sells the supplied goods or products that were manufactured using the goods, the sales should be documented so that his customers can be traced. The Customer is obligated to place his customers under a corresponding obligation provided that the latter are able to keep documentation and it is reasonable and appropriate to do so.

6.2 The Customer shall support EM DEVICES in every way in the defence of claims relating to product liability if this is deemed reasonable and appropriate. In particular, on request, he shall provide EM DEVICES with the required information about the type and nature of processing to which EM DEVICES goods have been subjected and the proportion of goods supplied by EM DEVICES in the product manufactured by the Customer.

6.3 The Customer shall inform EM DEVICES immediately about any claims or other abnormalities in connection with the goods supplied by EM DEVICES.

## **§ 7 Copyright and Industrial Property Rights**

7.1 Should a claim relating to goods supplied by EM DEVICES be made against the Customer due to infringement of industrial and intellectual property rights, he shall inform EM DEVICES immediately and regularly about all matters concerning such a claim and, in particular, provide EM DEVICES with the necessary information and documentation. He shall appoint a solicitor or patent lawyer retained by EM DEVICES to manage any disputes. The Customer remains free to appoint an additional lawyer.

7.2 EM DEVICES is not obligated to check specifications presented by the Customer for the infringement of industrial property rights.

7.3 EM DEVICES is entitled to destroy customer-specific masks designed for the Customer one year after the last delivery to the Customer without informing the Customer first.

7.4 Unless agreed otherwise, the Customer has a non-exclusive, non-transferable right to use customer-specific masks.

## **§ 8 Retention of title**

8.1 The goods remain the title of EM DEVICES until all claims of EM DEVICES against the Customer arising from the business relationship, irrespective of the legal justification, including any claims arising in the future, have been settled (goods subject to reservation of ownership). This also applies if individual or all claims of EM DEVICES have been incorporated into a current account and the account balance has been settled and acknowledged.

8.2 Goods subject to reservation of ownership may only be mixed, processed or altered, even with items that are not the property of EM DEVICES, by order of EM DEVICES with the result that EM DEVICES acquires ownership of the new item corresponding to the percentage of goods subject to reservation of ownership in terms of value (invoice value) in the end product at the time of processing. The Customer is not entitled to make any claims against EM DEVICES arising from the mixing and storage of goods subject to reservation of ownership for EM DEVICES.

- 8.3 The Customer may only sell the property of EM DEVICES or use it for another purpose or obligate himself to do so in the usual course of business under conventional conditions but also only if he is not in arrears and there are no circumstances as a result of which the sale would jeopardize the entitlements of EM DEVICES. However, the Customer hereby transfers all claims against his customer or the third party arising from the resale, including all subsidiary rights, to EM DEVICES, irrespective of whether the goods subject to reservation of ownership are processed prior to resale. If the Customer sells goods subject to reservation of ownership after they have been mixed, processed or altered with additional materials that are not the property of EM DEVICES, part of the claim, corresponding to the percentage value of the goods subject to reservation of ownership in the end product, is transferred. The Customer also has the authority to collect these claims after the transfer has taken place; the authority of EM DEVICES to collect the claims itself remains unaffected. However, EM DEVICES obligates itself not to collect the claims provided the Customer meets his payment obligations appropriately, is not in arrears and in particular, has not had a petition for insolvency proceedings filed against him or had payments stopped. EM DEVICES can demand that the Customer disclose transferred claims and the debtors, provide all details required for collection, hand over the relevant documents and inform the debtors of the transfer. If the Customer has transferred such rights to a third party, he is not entitled to use the goods subject to reservation of ownership until the third party has effectively released the rights in favour of EM DEVICES.
- 8.4 If the value of the collateral furnished for EM DEVICES exceeds the claims of EM DEVICES by more than 20% taking into account the usual downward valuation adjustment by the bank, EM DEVICES is obligated to release collateral of its choice in this respect at the request of the Customer. This should be based on the purchase prices for goods and the nominal value for claims.
- 8.5 The Customer is obligated to treat the goods with care. In particular, he is obligated to insure them against damage caused by fire and water and against theft on a new-for-old basis at his own expense. Should the goods subject to reservation of ownership be seized or the rights of EM DEVICES be jeopardized in any other way, the Customer must inform EM DEVICES immediately and, in coordination with EM DEVICES, do everything necessary to avert the risk. If necessary, at the request of EM DEVICES, the Customer must transfer claims to EM DEVICES if this is a sensible course of action with regard to the protection of the goods subject to reservation of ownership.
- 8.6 If the Customer is in arrears with any payment obligation or an obligation arising from point 8, if insolvency proceedings are commenced over his assets or if his financial circumstances deteriorate significantly, EM DEVICES is entitled to rescind the contract and take back the goods subject to reservation of ownership. The Customer shall bear the cost of this.
- 8.7 If the reservation of ownership is not legally enforceable or not legally enforceable within its intended scope in the foreign country of destination, on request, the Customer must cooperate in furnishing the collateral the effect of which comes closest to this reservation of ownership.

## **§ 9 Prices and Payment**

- 9.1 The agreed prices may be increased if the agreed delivery period is more than four months and if and provided that the total production costs (e.g. increase in material costs and labour,

increase in import duties and taxes) have increased. If the price increases by more than 5%, the Customer can rescind the contract in writing within one week of receipt of the notification of the price increase.

- 9.2 All EM DEVICES invoices are payable in full within 30 days of the invoice date. Unless agreed otherwise, this or any other agreed payment period does not apply if a delivery would cause the size of the debt owed to EM DEVICES – payable and not yet payable – to exceed a credit limit of which the Customer was notified prior to formation of the corresponding contract. In this case, the amount by which the credit limit has been exceeded is payable immediately. The rights of EM DEVICES in point 9.5 of these terms and conditions remain unaffected by the above terms.
- 9.3 Even if the Customer operates under conflicting terms, EM DEVICES is entitled to offset payments against older debts first. If costs have already been incurred and interest has already accrued, EM DEVICES is entitled to offset the payment against costs in the first instance, then against interest and finally against the principal obligation. In the event of payment by cheque or bill, payment is not deemed to have been made until the paper currency has been cashed. The Customer shall bear all costs incurred as a result of discounting cheques and bills. EM DEVICES does not accept liability for punctual and appropriate presentation, objection and notification.
- 9.4 If the Customer falls behind with payments, EM DEVICES is entitled to charge interest at a rate of 8% above the base rate from the relevant date. EM DEVICES reserves the right to assert a further claim arising from delayed payment.
- 9.5 If the Customer fails to meet his payment obligations after entering into the contract, in particular if he fails to honour a cheque or stops payments or if EM DEVICES becomes aware of any other circumstances that seriously call into question the creditworthiness of the Customer after entering into the contract, EM DEVICES is entitled to demand payment of all remaining debt. This also applies if cheques were accepted. Objections from the Customer, other than those stating that a payment period had been granted, remain unaffected. In the cases described above, EM DEVICES is also entitled to demand prepayment or security before supplying goods. This entitlement also exists if a delivery would cause the size of the debt owed to EM DEVICES – payable or not yet payable – to exceed a credit limit of which the Customer was notified prior to formation of the corresponding contract unless EM DEVICES should have recognised this before entering into the contract or the Customer reduces the balance of the debt to such an extent that the credit limit is not reached as a result of the delivery in question.
- 9.6 The Customer is not entitled to offset or withhold payment unless the counterclaim has been deemed indisputable or legally enforceable.

## **§ 10 Cancellation**

Cancellations of orders that have been placed require the approval of EM DEVICES, which is only given in exceptional cases.

## **§ 11 Applicable Law, Court of Jurisdiction, Export Restrictions, Customs Clearance**

- 11.1 The law of the Federal Republic of Germany applies to the legal relationships between EM DEVICES and the Customer without the possibility of recourse to the Conflicts Law or the

law of 5th July 1989 relating to the UN Convention on Contracts for the International Sale of Goods (the Vienna CISG agreement).

- 11.2 Should individual clauses in these terms and conditions be or become invalid according to the applicable German law or a national law in the Customer's country of residence, which cannot be ceded effectively by the above choice of law, the validity of the remaining clauses remains unaffected. The invalid clause shall be replaced by a clause that comes closest in terms of economic sense to the clause that EM DEVICES and the Customer would have wanted.
- 11.3 For traders, Neuss is the court of jurisdiction for all legal disputes arising directly or indirectly from this contract. EM DEVICES is also entitled to make a claim against the Customer at his general court of jurisdiction.
- 11.4 If the supplied goods are subject to German, European and/or North American export controls, the Customer shall comply with the relevant export control regulations in the event that the goods are exported and/or re-exported. If deliveries are exported without payment of duty at the request of the Customer, the Customer accepts liability for any subsequent customs administration claims with respect to EM DEVICES.