

# General Terms and Conditions of Sale and Delivery of BYK-Chemie GmbH

(September 2010)

## 1. GENERAL

- 1.1 These General Terms and Conditions of Sale and Delivery (hereinafter called "General Sales and Delivery Conditions") shall apply only in relation to customers which are enterprises in terms of § 14 of the Civil Code (BGB) of the Federal Republic of Germany (hereinafter called "Customer").
- 1.2 In the event that our General Sales and Delivery Conditions are introduced into a transaction with the Customer, such General Sales and Delivery Conditions shall also apply to all further transactions between the Customer and us unless agreed otherwise in writing.
- 1.3 Our General Sales and Delivery Conditions shall apply exclusively. Any conditions of the Customer which are at variance hereto or which conflict with our General Sales and Delivery Conditions shall only apply if expressly accepted by us in writing.

## 2. OFFERS, ORDERS, CHARACTERISTICS OF GOODS

- 2.1 Our offers are subject to change and are non-binding unless expressly stated otherwise. Our offers are merely an invitation for the Customer to submit a binding order on this basis. A contract will be formed, also in relation to ongoing business transactions, only if the Customer's order is confirmed by us in writing (including per fax or email) or, if the goods are delivered. Our order confirmation shall determine the conditions of the contract. In case of immediate delivery our order confirmation may be replaced by an invoice.
- 2.2 The obligation to deliver an item only the category of which has been defined shall not encompass the assumption of a procurement risk. We shall not be deemed to have granted a guaranty unless we have specified a guaranteed property in writing.
- 2.3 In case of the electronic transmission of an order, the provisions of § 312e section 1, sentence 1, no.s 1 to 3 Civil Code (BGB) (Duties in Electronic Transactions) are hereby excluded. We shall not be obliged to confirm the receipt of any order by electronic means. Any emails received by us on business days between 0:00 and 16:00 h shall be deemed to have been received as of 16:00 h unless earlier receipt can be proven. Emails received by us between 16:01 and 23:59 h shall be deemed to have been received at 16:00 h on the next business day, unless earlier receipt can be proven.

## 3. PAYMENT CONDITIONS, SECURITY

- 3.1 Unless otherwise agreed, invoiced amounts are due for payment to our bank account in Euro without any deductions within 30 days of the date of invoice. Any further expenses shall be borne by the Customer. In case of goods being exported, any costs related from the transfer or payments of moneys shall be borne by the Customer to the extent that such arise in the country of the Customer.
- 3.2 Any acceptance of an order and the performance of delivery may be made subject to requirements of security deposit or prepayment. We are also entitled to demand payment concurrently with the delivery of the goods.
- 3.3 In the event that there is any substantial deterioration in the financial situation of the Customer after concluding the contract, such as by way of filing for insolvency proceedings by the Customer, the commencement of insolvency proceedings, an application for a declaration of insolvency or an arrest warrant or, if there is a cessation of payment or similar, which is not based on any right of retention or other rights, we may, in addition to our rights under Art. 3.2, withdraw from the contract at any time.
- 3.4 Any rights of retention or set-off on the part of the Customer shall only exist in relation to those counterclaims which are undisputed or have been determined by final legal judgement unless the counterclaim relates to a breach of a substantial contractual duty (for definition see section 8.1) on our part. Any rights of retention may be exercised by the Customer, only if its counterclaim arises from the same contractual relationship.

## 4. DELIVERIES, FORCE MAJEURE, DEFAULT, DISPATCH, PACKING

- 4.1 All binding delivery dates and terms shall require an express written agreement in order to be valid. If non-binding or approximate delivery dates or terms have been specified, we will use our best efforts to comply with these specifications. Any unilateral requirements stipulated by the Customer shall not be binding on us unless we expressly agreed to their validity in writing. Transactions for fixed delivery dates must expressly be designated as such and confirmed by us in writing
- 4.2 In the event that we do not receive any deliveries or services from our subcontractors, or do not receive them properly or in time, for reasons beyond our control and despite a reasonable stock being maintained, or in case of any event of force majeure, we shall inform our customers timely in writing or in text form. In such case, we are entitled to delay delivery for the period of the hindrance or to withdraw from the contract in whole or in part in relation to the non-performed part provided that we met our obligation to inform our customers and we have not assumed any risk of procurement. Force majeure includes strikes, lock-outs, actions of authorities, scarcity of energy and raw materials, transport difficulties which are not culpably caused by us, any hindrances to operations which are not culpably caused by us, for example, as a result of fire, water and machine damage, and any other hindrances which in objective terms have not been culpably caused by us. In the event that a delivery date or delivery deadline is agreed in a binding manner and as result of any event under this section 4.2 such agreed delivery date or delivery deadline is not met, the

Customer may, after the expiry of a subsequent further reasonable deadline, withdraw from the contract with respect to the non-performed part of such contract, if it would be objectively unreasonable for the Customer to continue to be bound by such a contract. Any further rights to claim on the part of the Customer are excluded in such case.

- 4.3 Any claims for damages due to delays in delivery shall be limited to a maximum amount of 0.5 % of the net delivery price for the goods delayed per completed week of delay, but totalling no more than a maximum of 5 % of the net delivery price. In case such delay relates to a wilful act or gross negligence or a breach of a substantial contractual duty (for definition see section 8.1), the statutory liability shall apply, however such liability shall be limited to the foreseeable damage in the event of a negligent breach of a substantial contractual duty.
- 4.4 If a Customer sets a reasonable subsequent deadline after a delay in delivery and such deadline expires without performance, the Customer may withdraw from the contract; the Customer shall be entitled to claim damages due to non-performance to the amount of the foreseeable damage only if such non-performance relates to a wilful act or gross negligence or is a breach of a substantial contractual duty (for definition see section 8.1); in all other cases any liability for damages shall be limited to 50 % of the damage incurred.
- 4.5 The limitations of liability in accordance with sections 4.3 and 4.4 shall not apply in so far as a commercial contract where time is of the essence is agreed; the same applies if the Customer may claim that as the result of the delay for which we are responsible, an immediate claim for damages should apply instead of performance (§281, section 2 Civil Code (BGB)).
- 4.6 We shall not be in default delay for as long as the Customer is in default of performance of any obligations it may have towards us, even if resulting from other contracts.
- 4.7 Unless agreed otherwise, any loading and dispatching takes place on an uninsured basis at the risk of the Customer ex works or ex distribution warehouse.
- 4.8 We shall determine the means of transport and the transport route. We shall, however, attempt to take into account the Customer's preferences in regard to means and route of transportation; however, any additional costs resulting therefrom - also in relation to agreed free freight delivery – shall be borne by the Customer.

## **5. PRICES**

- 5.1 Any orders placed with us shall be performed at the list prices valid on the delivery date. These prices are quoted exclusive of the statutory value-added tax, as amended. Unless agreed otherwise, the contract prices shall be quoted per kg/net, domestic delivery free domicile, and foreign delivery free German border, duty unpaid, for delivery in non-returnable drums (barrels and containers); if delivery in non-returnable cans is desired, the price will be increased by the can supplement valid on the day the invoice is issued. If the Customer demands transport by express or air freight, it will be charged any additional costs.
- 5.2 We are entitled to reasonably increase prices unilaterally (§ 315 Civil Code (BGB)) in case of any increase in material procurement or production costs, taxes, wage or salary or social security costs as well as energy costs and costs for environmental protection provided that the time between the concluding of the contract and delivery is greater than two months. Any increase in terms of the above is not possible in so far as the increase of costs of any of the above named factors is set off by a decrease in costs of any of the above factors in relation to the total cost burden for the delivery.

## **6. RETENTION OF TITLE**

- 6.1 We reserve the title of ownership to all goods supplied by us (hereinafter referred to generally as "retention of title goods"), until all our claims arising from the business connection with the Customer, including any future claims from contracts concluded at a later time, have been settled. This shall also apply to any balance in our favour, if any specific individual claim or all claims by us are included in a current invoice (current account) and a balance is drawn.
- 6.2 The Customer shall insure all retention of title goods adequately in particular against fire and theft. Any claims against an insurer arising out of a case of damage affecting retention of title goods shall hereby be deemed to have already been assigned to us to the amount of the value of the retention of title goods.
- 6.3 The Customer is entitled to resell the delivered goods in the normal course of business. Any other form of disposal by the Customer, and in particular any pledging or granting of any security rights shall not be permitted. If the retention of title goods are not paid for by a third party immediately during the course of resale, the Customer shall sell such only subject to retention of title. Any entitlement to resell retention of title goods shall be extinguished automatically, if the Customer ceases to make payment or is in default with any payment in relation to us. The same shall apply correspondingly if the Customer is part of a group of companies and/or if one of the circumstances described in the above sentence occurs in relation to the parent company or a holding company of the Customer.
- 6.4 The Customer hereby assigns in advance all claims, including any securities and supplementary rights, which it is entitled against any final purchasers or third parties as a result of or in connection with the resale of retention of title goods. The Customer shall not enter into any agreement with its customers which exclude or limit our rights in any manner whatsoever or which render void the advanced assignment of claims. In case of the sale of retention of title goods together with other items, the claim against the third party purchaser shall be deemed to have been assigned to us to the amount of the delivery price agreed between us and the Customer, to the extent that the individual amounts attributable to the relevant goods cannot be determined from the invoice.
- 6.5 The Customer shall remain entitled to collect any claims which have been assigned to us until such right is duly revoked by us to which revocation we are entitled at any time. Upon request, the Customer shall provide us with the

information and documentation necessary to collect any assigned claims and, insofar as we do not do so ourselves, the Customer shall inform its customers immediately about the assignment of the claims to us.

- 6.6 If the Customer includes any claims from resale of retention of title goods in a current account relationship with its customers, it hereby assigns to us in advance any recognised final balance in its favour which corresponds with the total amount of the claim from the resale of our retention of title goods.
- 6.7 If the Customer has already assigned any claims from the resale of goods delivered or to be delivered by us to a third party, in particular on the basis of non-recourse factoring or recourse factoring or any other agreements, on the basis of which our current or future rights of security in accordance with this section could be limited, it shall notify us of such without undue delay. In case of recourse factoring we are entitled to withdraw from the contract and to demand restitution of any goods already delivered. The same shall apply in case of non-recourse factoring, if the Customer is unable to freely dispose of the purchase price of the claim under the contract with the factor.
- 6.8 In case of any contractual breach, in particularly in case of default in payment, we are – without us having to withdraw from the contract beforehand – entitled to recover all retention of title goods; the Customer is in such case automatically obliged to release such goods to the extent that not only a breach of a minor duty has occurred. In order to be able to determine the stock of goods delivered by us we may at any time during the normal hours of business enter the business premises of the Customer. Recovering retention of title goods shall qualify as withdrawal from the contract only if we declare such expressly in writing or if such is required by the mandatory provisions of law. The Customer shall notify us without undue delay in writing of any access of third parties to the retention of title goods or claims assigned to us.
- 6.9 If the value of the securities available to us under the above provisions exceeds the secured claims in total by more than 10 %, we shall, if requested by the Customer, release any security at our choice to such extent.
- 6.10 Any processing of retention of title goods shall take place for us as the manufacturer in terms of § 950 Civil Code (BGB) without imposing any obligations on our part. If the retention of title goods are processed with any other items not belonging to us or are irreversibly connected with such, we shall acquire co-ownership in proportion to the invoice value of our goods in relation to the invoice value of the other processed or connected items. If our goods are connected with other movable items to form one item, which may be regarded as the main item, the Customer hereby transfers to us in advance co-ownership of such in the same proportion. The Customer shall store for us any goods owned or co-owned by us at no charge. The resulting rights of co-ownership shall apply as retention of title goods. Upon our request the Customer shall at any time provide us with the necessary information for us to claim our ownership or co-ownership rights.
- 6.11 From the time of cessation of payment by the Customer or in case of the issuing of an application for insolvency of the Customer, the Customer shall no longer be entitled to sell, process, connect or mix any retention of title goods. The Customer shall in such case undertake separate storage and labelling of retention of title goods without undue delay and shall further keep for us on a fiduciary basis any moneys received from assigned claims arising from the delivery of goods.
- 6.12 If the above agreed retention of title is not recognised or is only recognised under certain preconditions under the law of the country into which the goods are delivered, the Customer shall notify us of such at the latest upon the concluding of the contract. If the laws of such country do not allow for retention of title or an extended retention of title, but would allow us other rights in similar manner to a retention of title for security purposes, we hereby declare, that we shall use such rights in relation to the delivered goods. The Customer shall assist in undertaking all necessary measures (in particular compliance with formalities).

## **7. WARRANTY, NOTIFICATION OF DEFECT, PROPRIETARY RIGHTS**

- 7.1 The Customer shall immediately inspect the goods delivered upon delivery, where appropriate, for any defects regarding their quantity and quality, by a trial process, and shall notify Seller of any defects without delay, but not later than within 14 days of performance of service; otherwise, the goods will be deemed to have been approved. We shall be notified of any defects not detectable by such an inspection immediately upon their discovery. Any complaints shall be filed in writing specifying the order data and the invoice and shipping numbers.

A complaint not filed in time shall bar the Customer from asserting any claims of non-compliance on grounds of inferior performance.

Any hidden defects shall be notified by the Customer immediately after they have become detectable, but not later than within the period of limitation indicated in Article 8.6. Complaints for defects shall always be accompanied by a reasonably detailed description of the defect.

- 7.2 Any notice of defect under section 7.1 must be in writing. Any notice of defect not complying with the formalities, shall also exclude any right of the Customer to make a claim based on defects.
- 7.3 Upon the commencement of the processing, connecting or mixing with other goods, the delivered goods shall be deemed to have been duly accepted by the Customer in case of any recognisable defects. The same shall apply in case of the goods being further transported on from the original place of destination.
- 7.4 In case of any recognisable defect, the respective goods must be left in the transport container, so that we are able to check the correctness of any complaint, unless we expressly waive the right to such by way of written declaration and the Customer ensures the separate storage of the respective goods.
- 7.5 If justified defects have been notified in time, we shall at our choice rectify the defect or deliver defect-free goods free of charge (subsequent performance). In case of any delivery recourse (§§ 478, 479 Civil Code (BGB)), the Customer

shall have the right of choice. Before sending back any goods, our permission is to be obtained. Any replaced goods shall become our property. If we do not rectify any defect or we do not provide a replacement delivery for the defective goods within a subsequent reasonable deadline set, or if any subsequent performance is not successful (whereby we are permitted to make two attempts), or if we refuse to provide subsequent performance or if such is not reasonable for us, the Customer may in accordance with the provisions of law withdraw from the contract, reduce the price, claim compensation for expenses as well as damages within the terms set out in section 8. Any right to withdraw from the contract or right for a price reduction shall only apply in case of defects which are not insignificant.

7.6 Our liability in accordance with section 8 shall not be affected hereby.

## **8. LIABILITY, EXCLUSION AND LIMITATION OF LIABILITY**

8.1 We shall be generally liable only for any wilful act or gross negligence by us or our legal representatives or vicarious agents. Our liability and that of our legal representatives and vicarious agents for minor negligence is excluded only insofar as such does not relate to (1) a breach of a substantial contractual duty, (2) breach of any duty in terms of § 241, section 2 Civil Code (BGB), if it would no longer be reasonable for the Customer to accept our performance, (3) any injury to life, personal injury or injury to health, (4) the acceptance of any guarantee for the quality of any performance, for the successful performance or for any risk of procurement, (5) deceit, (6) initial impossibility, (7) claims in accordance with the German Product Liability Act (Produkthaftungsgesetz) or (8) any other cases of mandatory legal liability.

"**Substantial contractual duty**" is any duty which contractually protects the substantial legal position of the Customer, such being entitled to be protected in terms of the content and purpose of the contract; substantial duties also refers to those contractual duties, which must be performed in order to allow the due performance of the contract itself and the compliance with which the Customer regularly relies on, and may rely on.

8.2 To the extent that we cannot be made liable for intentional breach of obligations and there is no case of injury to life, personal injury or injury to health or any other case of mandatory legal liability, we shall be only liable for typical and foreseeable damage.

8.3 Any liability for indirect damage and consequential damage is hereby excluded insofar as such is not the result of a wilful act or gross negligence or a breach of a substantial contractual duty (for definition see section 8.1).

8.4 Any further liability for damages other than that set out in the above sections shall be – regardless of the legal nature of such – excluded. This shall apply in particular for any claims for damages resulting from fault at the time of the concluding of the contract, due to any other breaches of duties or any claims under torts for compensation for damage in terms of § 823 Civil Code (BGB).

8.5 Any exclusions or limitations of a liability in terms of the above sections 8.1 to 8.4 shall apply to the same extent in favour of our managers and non-managerial employees as well as our vicarious agents and our subcontractors.

8.6 Any claims of the Customer for damages arising out of this contractual relationship may be made only within a period of one year from the commencement of the statutory limitation period. The same shall apply for any competing claims arising out of torts as well as any claims for consequential damage. This shall not apply in case of deceit, gross negligence or wilful acts on our part. The limitation period in case of any recourse for delivery in accordance with §§ 478, 479 Civil Code (BGB) shall not be affected.

8.7 The above provisions shall not constitute a reversal of the burden of proof.

## **9. JURISDICTION AND APPLICABLE LAW**

9.1 The place of jurisdiction for any and all disputes arising out of this contract shall be Düsseldorf, Germany.

9.2 The law of the Federal Republic of Germany shall apply to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

9.3 If any of our order confirmations contains a clause from INCOTERMS, the respective applicable provision of INCOTERMS in the latest version shall apply unless otherwise stated in our respective order confirmation.

## **10. SEVERANCE CLAUSE**

In the event that individual provisions hereof should be invalid for any other reason than those in §§ 305 – 310 Civil Code (BGB) the remaining provisions shall not be affected. Any invalid provision shall be deemed to have been replaced by a valid substitute provision which most closely reflects the originally-intended commercial purpose.

### **Note:**

**In accordance with the provisions of the German Federal Data Protection Act (Bundesdatenschutzgesetz) we must inform you that we operate IT-systems and that data received from the Customer on the basis of the commercial relationship will be electronically recorded and stored.**