

GTC | General delivery conditions - endocon GmbH

17.03.2016

1 General Provision - Scope

- 1.1 Any deliveries, performance or offers by endocon GmbH ("Supplier") shall be exclusively subject to these General Terms and Conditions ("GTC"). These GTC shall be incorporated into all contracts made between the Supplier and its contractual partners ("Customer") regarding products and services offered by the Supplier. These GTC shall apply especially for any sale or rental of products. These GTC shall also apply to all future deliveries, performance or offers to Customers, even if they have not again been separately agreed.
- 1.2 Any general terms and conditions of the Customer or any third party shall only apply if the Supplier has expressly accepted their application. They shall not apply solely because the Supplier has failed to object to their application in any particular case or if the Supplier carries out his performance without reservation or makes reference to documents by the customer that contain or refer to terms and conditions of the Customer or a third party.
- 1.3 These GTC shall apply in their respective current version. The Supplier shall inform its Customers about any changes to these GTC in due time. Any changes shall also apply to ongoing contractual relationships if the Customer does not object within 14 days after having been informed of the changes. The current version of these GTC can be accessed and downloaded at <http://AGB.endocon.de>.
- 1.4 Any binding notices or declarations of one party to the other party and/or a third party must be made in writing. Amendments or changes to these GTC must be made in writing. With the exception of general managers or registered managers no employee of the Supplier may make any oral changes to these GTC.

2 Offer and Conclusion of Contract

- 2.1 Any offers made by the Supplier do not constitute binding offers unless a time for the acceptance of the offer has been stipulated. In the latter case they may only be accepted within the set period of time. Catalogues, price lists and the internet presence of the supplier do not constitute binding offers in the legal sense but only information on the products or shipping.
- 2.2 A contract shall be made if an offer by the Supplier is accepted by the Customer within the period stipulated for acceptance, if the Supplier accepts an offer by the Customer or if the Supplier commences an ordered performance or delivery. Unless stipulated otherwise in an offer the Supplier may accept offers by the Customer within a period of four weeks from the date the offer was received. .

3 Scope of Deliveries and Performance

- 3.1 The legal relationship between the Supplier and the customer shall be governed solely by the respective contract including these GTC. The contract shall be deemed to represent all agreements and the entire agreement between the parties.
- 3.2 Any details given by the Supplier regarding products (for instance weight, dimensions and technical specifications) as well as any visual representations of such products (for instance samples, models, drawings and pictured) shall not constitute any binding description of a product's properties but shall only serve to individualise the subject of a contract, unless stipulated otherwise in the contract.
- 3.3 Customary variances and variances that occur due to legal requirements or represent technical improvements, as well as the replacement of spare parts by equivalent parts are permitted insofar as they do not impair the contractually agreed use of the product. Any changes or variances that can be discovered in an inspection of the product shall be deemed accepted if the Customer accepts the product without reservation.
- 3.4 Any changes to orders after conclusion of a contract need to be approved by the Supplier. They are subject to a written agreement. In case of a change request after the conclusion of a contract the Supplier may discontinue the performance of the changed order until the change has been approved or refused or the order has been withdrawn. Any supply dates or shipment times shall be extended or moved accordingly.
- 3.5 The Supplier may make partial deliveries as is customary.

- 3.6 Any agreements on deliveries or performance to customers outside of Germany shall be made under the condition that such delivery of goods or performance does not meet any restrictions due to national or international law, in particular regulations on export control or embargoes or any other restriction. The Customer shall provide all information and documents required for export/shipment/import. Delays occurring due to export inspections or authorisation procedures shall extend shipment times or move delivery dates accordingly. Insofar as required authorisations cannot be obtained the contract shall be deemed invalid. The Customer may not make any claims for damages in this regard. Any product is only to be kept and used in the country of destination. If the Customer intends to re-export any product it will be the Customer's duty to observe all applicable export regulations. The Customer may not re-export any products – individually or in a system-integrated form - in violation of such regulations.

4 Pricing and Payment Conditions

- 4.1 All prices for products as well as the charging of expenses (hotel accommodation, travel costs, daily allowance) by the Supplier shall be agreed in the order or in a separate agreement. Any payments made by the Customer shall be allocated according to sec. 366 and 367 of the German Civil Code (BGB).
- 4.2 Any prices shall only be valid for the scope of delivery of goods or performance as stipulated in the respective contract. Additional or extraordinary orders shall be priced separately. Unless otherwise agreed all prices shall be in EUROs and ex works (EXW) and all costs for shipping or delivery, in particular but not exclusively costs for packaging, transport, loading and unloading, transport insurance, tariffs and taxes as well as other public duties shall be borne by the Customer.
- 4.3 Any prices are net prices attracting additional VAT. If a delivery of goods is exempt from VAT, the Customer must present the relevant documentation without undue delay. If not, the Supplier may invoice the applicable amount of VAT to the Customer.
- 4.4 Invoiced amounts are payable within 14 days without any deductions unless agreed otherwise in writing. Payment date shall be the date the payment is credited to the Supplier's accounts. If the Customer does not pay when the payment is due an interest of 5 per cent p.a. shall be payable on any outstanding payments if the contract is a mutual commercial contract ("Handelsgeschäft" under German law) for both parties. This shall not bar any party from claiming further damages or interest payments.
- 4.5 The Supplier may demand a down payment of 25 per cent of the agreed price upon conclusion of the contract. Any trade discount is subject to a written agreement between the parties.
- 4.6 In case deliveries are to be made outside of Germany, any delivery shall be subject to an irrevocable letter of credit by the Customer to the Supplier confirmed by a German bank unless otherwise agreed in writing between the parties.
- 4.7 The Supplier may make open deliveries of goods or performance subject to pre-payment or the provision of collateral by the Customer if the Customer is in arrears or default of payment regarding the delivery of goods or performance in question or any other delivery of goods or performance. The same shall apply if, after the conclusion of a contract, the Supplier becomes aware of circumstances that may significantly reduce the Customer's creditworthiness or jeopardise the payment of the Supplier's open claims for payment.

5 Deliveries

- 5.1 Any delivery dates or performance dates or shipping times envisioned by the Supplier shall non-committal unless a definite date or timeframe has been agreed and committed to by the Supplier.
- 5.2 Definite dates or timeframes need only be kept by the Supplier if the Customer provides all information and documents in time, if all permits and authorisations, releases, especially of planning material have been granted and if Customer meets all payment dates and other obligations as agreed between the parties. Delivery dates or shipment times shall be moved or extended accordingly if the Customer does not fulfil its obligations towards the Supplier. Any further rights and claims of Supplier shall remain unaffected.

- 5.3 The Supplier shall not be liable for any delays or impossibility of performance insofar as these are caused by force majeure or by other circumstances that were unforeseeable at the time the contract was made and that have not been caused by a fault of the Supplier, such as disruptions at the Suppliers site, difficulties to obtain raw materials or energy, delays in transportation, strikes, lawful lockouts, lack of skilled labour, raw materials or energy, difficulties in obtaining required administrative authorisations, administrative measures or failure or delay of necessary deliveries by suppliers. If such circumstances make the performance or delivery significantly more difficult or impossible for the Supplier and if such interference is not only temporary the Supplier may rescind the contract. In cases of temporary interference delivery dates or shipment times shall be moved or extended until the disappearance of such interference plus an additional adequate restarting period.
- 5.4 In case of shipping of products, delivery dates or shipment times shall be deemed to have been met if the operational shipment has been handed over to the shipping agent, carrier or other forwarding agent or otherwise been sent within the agreed period or, if such action has been made impossible due to Customer's fault, the Customer has been notified that the product is ready for shipping. For any ex works (EXW) deliveries the delivery dates or shipment times shall be deemed to have been met when the product is picked up by the customer or when the Customer has been notified that the product is ready for shipping.
- 5.5 If the Supplier is in default with a delivery or performance the Customer may claim compensation for any proven damage incurred, such claim however being limited to .5 per cent per week of delay or part thereof and to a maximum of 5 per cent of the agreed price of for the delivery of goods or of performance. Section 10 shall apply accordingly to this limitation of liability. The Customer's right to rescind the contract after having unsuccessfully set the Supplier an adequate period for performance shall remain unaffected.
- 5.6 In case the Customer is in default of acceptance the Supplier may claim compensation for any additional costs (section 6.5 shall apply accordingly) and for any damages incurred. Further rights of the Supplier arising from the Customer's default shall remain unaffected.

6 Place of Performance, Shipping, Packaging, Transfer of Risk and Acceptance

- 6.1 Place of performance for any duties and obligations from the contractual relationship shall be the Supplier's seat of business.
- 6.2 If the Supplier is obligated to package and ship products, the Supplier is to choose the means of packaging and shipping unless otherwise agreed between the parties. The Supplier shall use its standard packaging material. If the Supplier chooses another packaging based on its own due discretion and professional judgement or if the Customer asks for another packaging the Customer shall bear any additional costs.
- 6.3 The risk of damage or destruction shall pass to the Customer ("Gefahrübergang") when the product is handed over to the shipping agent, carrier or other forwarding agent (whereby the beginning of the loading process shall be decisive) or, if and to the extent a formal acceptance is required, upon acceptance. The above shall also apply if deliveries are made in parts or if the Supplier has agreed to perform other tasks (e.g. posting or installation) as well.
- 6.4 If shipping, handing over to the shipping agent or acceptance by the Customer is delayed due to events caused by the Customer, the risk of damage or destruction shall pass to the Customer on the day on which the product is ready for shipping, pick-up or acceptance and the Customer has been informed of such fact.
- 6.5 Costs for storage after the risk of damage or destruction has passed to the Customer or while the Customer is in default of acceptance shall be borne by the Customer. Any storage at the Supplier's or by the Supplier shall attract a fee of .5 per cent per week or part thereof of the agreed price as invoiced for the products to be stored. The Customer and the Supplier, respectively, may claim and prove that further or lesser storage costs have been incurred.

7 Retention of Title

- 7.1 Title to the delivered goods shall remain vested in the Supplier and shall not pass to Customer until full settlement of all payments due from the Customer to the Supplier resulting from any contractual obligations between the Parties (reserved goods). The retention of title shall also apply regarding any outstanding balance in a current account (current account reservation; "Kontokorrentvorbehalt" under German law).
- 7.2 In case of breach of contract by the Customer, in particular if the Customer is in arrears, the Supplier may rescind the contract pursuant to the regulations of the law an, based on the rescission of the contract and the retention of title, demand that the Customer returns the goods delivered. The Customer may not pledge or give as collateral the products to which title was retained. If, in spite of the above, the Customer pledges or gives as collateral reserved goods, the Supplier may rescind the contract without notice. In case of attachment of or other interference with reserved goods, the Customer shall immediately inform the Supplier so that the Supplier can enforce its rights to the reserved goods.
- 7.3 The Customer may resell the reserved goods in the ordinary course of his business. Customer hereby assigns to the Supplier his rights and ancillary rights from a resale of the reserved goods against the buyer regardless of whether or not the goods have been processed. The Customer shall be authorised to collect payments on the assigned rights in the ordinary course of business without detriment to the Supplier's right to demand and collect payment. However, the Supplier shall not collect payment as long as Customer maintains his payments to the Supplier and is not in arrears. If the Supplier can demonstrate an adequate interest in that regard, it can require the Customer to disclose its claims and its debtors to the Supplier, give all information required to realise the claims against the debtors to the Supplier, hand over all relating documents and to disclose the assignment to their debtors.
- 7.4 The Supplier shall, on Customer's request or at the request of a third party prejudiced by the securities, release its securities in so far as these securities exceed the Supplier's secured claims by more than 10 per cent. The Supplier shall select the securities to be released at its own discretion.
- 7.5 For as long as the Customer is in possession of reserved goods the Customer shall be obliged to treat and maintain reserved goods with due care and to insure the reserved goods against damages resulting from fire, water or theft to their original value at his own expense. The Customer shall bear the costs for any necessary investments such as maintenance and repair works.

8 Warranty for Sale

- 8.1 The following regulations shall apply for the warranty for the sale of products. This section 8 shall, however, not apply to claims for damages, for which section 10 shall apply exclusively.
- 8.2 The warranty period shall be six month from the date of delivery or, if an acceptance is required, one year from the date of acceptance.
- 8.3 If the sale is a mutual commercial contract for both parties, section 377 of the German Commercial Code ("HGB") shall apply, provided that any defects not obvious upon inspection may not be claimed later than one year after delivery. If the sale is not a mutual commercial contract for both parties the following rules apply: The Customer must inspect the product without undue delay, at the latest within 7 working days of delivery by the Supplier and, if a defect shows, inform the Supplier without undue delay, at the latest within 7 working days. If the Customer fails to inform the Supplier the product shall be deemed accepted unless the defect was not discernible in the inspection. If such defect shows at a later point in time the Customer must inform the Supplier within 2 weeks of finding the defect; otherwise the product will be deemed without defect also in regard to this defect. It shall be deemed as accepted with regard to such defect at the latest after one year from delivery. The Customer's rights shall be reserved upon timely sending of the relevant information to the Supplier.
- 8.4 Upon the Supplier's request, the Customer shall keep any product claimed to be defective ready for inspection by the Supplier's or return it, freight paid, to Supplier. If the claim is justified, the Supplier

shall reimburse the costs for the cheapest way of shipping; this shall not apply if costs are increased due to the product having been moved to a different place than the agreed place of use.

- 8.5 If the product is outside of Germany the Customer shall bear any costs arising herefrom, in particular costs of return shipping to the Supplier or any travel costs of the Supplier or its agents. This shall not apply if it is unreasonable for the Customer to bear such costs. The Supplier's right to refuse supplementary performance pursuant to sec. 439 para 3 BGB due to disproportionate costs remains unaffected.
- 8.6 Any resale, intended use or other use of the product claimed to be defective shall be considered as the Customer's acceptance of the product being in accordance with the contract.
- 8.7 In case of a defective product the Supplier shall be obligated and entitled, at his discretion to be exercised in due time, to either repair or replace the defective product.
- 8.8 The Customer shall take all possible and reasonable measures to limit the effort necessary for supplementary performance by the Supplier. The Customer shall bear all costs incurred by the Supplier due to an unjustified claim for a defective product.
- 8.9 If the Supplier fails to provide supplementary performance, e.g. due to performance being impossible or unreasonable, refusal of performance or unreasonable delay of performance, the Customer may rescind the contract pursuant to the law or adequately reduce the purchase price.
- 8.10 There shall be no claims for defective product if there is only an immaterial deviance from the agreed or presumed quality, in case of a merely immaterial reduction of the usability, natural wear and tear or damages that have occurred after the passing of the risk of damage or destruction or that are due to intentionally or negligently faulty treatment of the product by the Customer, excessive use, unsuitable operating materials or due to special external factors. If the Customer makes improper alterations or repairs to the product, these as well as any resulting effects shall not give rise to any claims against the Supplier.
- 8.11 Warranty shall be void insofar as the Customer makes or has made any changes to the products, in particular changes parts or uses operating materials, that do not meet the original specifications, and as a result supplemental performance becomes impossible or is made unreasonably more difficult. It shall be deemed a change to a product if the Customer or any third party makes improper repairs to the product without first having given the Supplier an opportunity to render supplementary performance. The Supplier shall not be liable for any changes made by the Customer or by any third party employed by the Customer.
- 8.12 The Customer may claim damages pursuant to the legal provisions and in accordance with sec. 10 below.

9 Leasing

- 9.1 In case a product is temporarily let (leasing) the following regulations shall apply:
- 9.2 The Supplier commits to let the product to the Customer for the purposes (regularly to conduct a particular surgery) and period of time specified in the lease contract. The Customer may extend that period of time unilaterally or in accord with the Supplier by one week by notifying the Supplier in writing if the agreed use has been postponed accordingly. Any further extension of the lease period needs to be agreed to in writing by the Supplier. If the agreed use is not possible at all or not possible within one week of the planned date of use due to circumstances that have not been intentionally or negligently caused by the Supplier, the Customer shall have to pay the agreed price and return the product.
- 9.3 The product is let to the Customer for the agreed purpose only; any other use must be agreed to by the Supplier. The Customer uses the product at its own risk. It shall be the Customer's sole responsibility to ensure the proper use of the product in compliance with the entire manufacturer's specifications and instructions and observing all regulations and laws applicable. The Customer may not sub-let the product to, or have it used by, any third party without the Suppliers expressed prior approval.
- 9.4 Sections 5 and six shall apply accordingly regarding the delivery of the product unless agreed otherwise between the parties. Shipping from and to the Customer shall be done by Supplier or its agents to and

from the place specified in the lease contract. The Customer shall bear all shipping costs. The Customer shall accept the delivery without undue delay.

- 9.5 The Supplier shall deliver the product in a functioning state and without any defects. The duty to inspect the product and inform the Supplier of and defects pursuant to sec. 8.3 shall apply accordingly. The Customer must treat the product with due care and maintain and service it in accordance with applicable the instructions and manuals. The Customer shall inform the Supplier of any damage to the product. Sections 8.10 and 8.11 shall apply accordingly.
- 9.6 The product will not be sterilised when delivered and must undergo a validated cleaning, disinfecting and sterilising procedure at the Customer's before being put to use. After each use, and before the product is returned to the Supplier, the Customer must have the product undergo a validated cleaning, disinfecting and sterilising procedure. The Customer must confirm the professional cleaning treatment by the Customer or its service provider using the Decontamination Form.
- 9.7 Immediately after the product has been used for the purpose as specified in the contract or, if a different date has been agreed, at that date, the Customer must return the product to the Supplier or its agent in the same state it was let to the Customer and professionally cleaned according to sec. 9.6. The Customer shall leave the product for collection properly packaged and safe to transport in the state it has been received from the Supplier.
- 9.8 The Customer shall be liable for any damage occurring due to improper handling or due to any use, servicing or maintenance of the product not in compliance with the relevant product specifications. If the product is lost or becomes unusable due to reasons within the Customer's responsibility the Customer shall bear any costs for replacement.

10 Liability

- 10.1 The Supplier's liability shall be limited to damages that have been foreseeable at the time the contract was made and are typical to the kind of contract (limitation of liability).
- 10.2 The Supplier may not be held liable for damages, regardless of their legal grounds if and insofar as such claims require the Supplier to be at fault, i.e. to have acted intentionally or negligently, unless the Supplier, its legal representatives or its agents have acted intentionally or grossly negligently (exclusion of liability).
- 10.3 Such limitation or exclusion of liability shall not apply to damages to life, body or health, unless these damages are not caused by any intentional or negligent act or failure to act by the Supplier, its legal representatives or its agents. They shall not apply, either, if the Supplier has guaranteed a certain result or is liable under Product Safety Regulations.
- 10.4 Such limitation or exclusion of liability shall not apply, either, to damages caused by an intentional or negligent (i) breach of an essential contractual duty, i.e. an obligation, the fulfilment of which enables the proper execution of the contract at all and on the compliance with which the contractual partner relies or may rely, or damages caused by delay of performance (damages for delay).
- 10.5 Insofar as the Supplier's liability is limited under the above regulations, any claims for damages shall be time-barred at the latest after one year from the end of the year in which the claim arises and the claimant has become aware or should, without being grossly negligent, have become aware of the circumstances giving rise to such claim.
- 10.6 Insofar as the Supplier gives technical information or other advice and such information or advice is not part of the contractually agreed performance, such information or advice shall be given free of charge and without any liability.

11 Confidentiality

During and after the end of the business relationship with the Supplier, the Customer shall keep confidential and not disclose to third parties all technical, business-related and operative information of the Supplier, its products, its employees and its business partners gained in connection with such business relationship as long and to the extent that such information has not become public knowledge in

other ways or the Supplier has waived such confidentiality obligation in written form.

12 Compliance with all legal requirements by the Customer

- 12.1 For as long as products of the Supplier are within the Customer's domain the Customer shall ensure that
- all relevant and applicable Products Safety regulations and requirements of the Medical Products Act and its ancillary rules and administrative regulations ("Medizinproduktegesetz", MPG) are complied with,
 - the Customer contributes to the observation and notification duties for medical products pursuant to sec. 29 MPG and fulfils all notification obligations arising therefrom,
 - only qualified staff with the required training may handle the products,
 - the products are not mixed or combined with products of other manufacturers unless such combination has been officially authorised and
 - any products may only be resold by persons qualified under the MPG, such persons ensuring the proper instruction of the buyers.

13 Intellectual Property and Rights of Third Parties

- 13.1 Unless expressly agreed otherwise no transfer of copyrights or other intellectual property rights including know-how shall be the subject of the contract between the parties. Any such transfer or granting of rights to use intellectual property to the Customer shall require an explicit written agreement.
- 13.2 The Customer shall ensure, and be liable for any failure to do so, that any use of documents or information provided by him does not infringe any rights of any third party. The Customer shall indemnify and hold harmless the Supplier from any third party's claims.

14 Set-off, Right of Retention and Assignment

- 14.1 The Supplier may set-off own claims against the Customer or claims of any company legally connected with the Supplier against the Customer with claims of the Customer against the Supplier.
- 14.2 The Customer may only set-off own claims against the Supplier's claims if the Customer's claims are undisputed, have been determined by a legally binding judgment or been accepted by the Supplier. In addition, the Customer may set-off own claims for damages from malperformance or non-performance insofar as such claims are based on the same contractual relationship, and with synallagmatic claims.
- 14.3 The Customer may only claim a right of retention if his own claims are undisputed, have been determined by a legally binding judgment or been accepted by the Supplier.
- 14.4 The Customer may not assign its claims under the contract.

15 Applicable Law - Competent Court – Place of Performance

- 15.1 Place of Performance for all contractual duties shall be the Supplier's place of business, unless agreed otherwise.
- 15.2 If Customer is considered a merchant according to the German HGB, a legal entity under public law or special fund under public law or if the Customer does not have its place of jurisdiction in the Federal Republic of Germany, the courts at the Supplier's place of business shall have exclusive jurisdiction. Such exclusive jurisdiction shall also apply for any legal action against the Customer and also in case the Customer moves its place of business or its residence outside of the jurisdiction of the German Act of Civil Procedure after the contract is made or if the Customer's place of business or its residence is unknown at the time legal proceedings are initiated.
- 15.3 The Supplier may initiate legal action at the Customer's place of business.
- 15.4 German Law, excluding international and supranational legal regulations, in particular the UN Convention on the International Sale of Goods shall apply.

16 Final Provisions; Survival

- 16.1 In the event that a provision of the contract these GTC apply to, or any provision in these GTC should be or become invalid or unenforceable, the validity of the entire contract and/or these GTC shall otherwise not be affected.
- 16.2 Insofar as the contract or these GTC are incomplete, those legally effective provisions which the contracting partners would have agreed according to the commercial aims of the contract and the purpose of these GTC if they had been aware of the incompleteness are considered to be agreed in this respect.

17 Information on Data Protection

The Customer acknowledges that, in conformity with German Federal Data Protection Act, the Supplier may save data from the contractual relationship for data processing and reserves the right to transmit data from this contractual relationship to third parties (such as insurance companies) insofar as this is necessary for the fulfilment of the contract.