

Terms of Service

1. General Information

1.1 The following "Terms of Service – Service Contract", in here later referred to as "terms of service", apply to all service contracts between the Thermodyne GmbH, Nordstraße 15, 49086 Osnabrück, Deutschland (in here later referred to as "contractor") and entrepreneurs according to Section 14 German Civil Code, legal bodies under public law and legal assets under public law (in here later referred to as "client").

1.2 Contradicting or differing Terms of Service of the client are no subject to the contract even if the contractor is fulfilling the contract without having explicitly refused those terms. Differing terms only apply if explicitly agreed to by the contractor in writing.

2. Contract proposal and conclusion, offers, orders

2.1 The offers of the contractor are non-binding and shall be considered as a proposal towards the client to conclude a service contract with the contractor. The service contract (in here later referred to as "order") is concluded with the placement of the order by the client and the acceptance of the order by the contractor. If the acceptance notice differs from the order, it is to be considered a new, non-binding offer of the contractor.

2.2 By placing the order the client bindingly declares to willingly order a service. The contractor is entitled to accept the ordered service within 2 weeks after the placement of the order. By placing the order, the client agrees to the present terms of service. The same applies to all future orders even if the terms of service are not explicitly referred to.

2.3 The client is obligated to immediately revise the acceptance notice/order confirmation of the contractor. If no formal acceptance notice has been issued, the former applies also to instalments, partial or final accounts.

2.4 The granting of a certain property or suitability of the contract-related delivery/service concerning a certain intended use as well as taking over a guarantee is only binding if confirmed by the contractor in writing. The properties of patterns or samples are only binding as long as explicitly agreed to be properties of the product.

2.5 As far as the contractor provides advice and support services, those are provided to the best of his/her knowledge.

3. Remuneration, payment, default, off-set, retention, subrogation

3.1 (a) For the agreed service the contractor pays the remuneration as agreed upon or according to the contractor's catalogue prices at the time of the conclusion of the contract. All prices are ex office of the contractor, unless otherwise agreed upon in the contract.

(b) The remuneration generally is excluding present statutory VAT as far as legal tax obligations apply. If the statutory VAT rate increases between the conclusion of the contract and the issuance of the invoice, the client is to pay the higher VAT rate if the agreed delivery term exceeds 4 months.

(c) On deliveries and services within the EU, the client has to provide his/her VAT Id number used for his/her turnover taxation prior to the payment. For non-electronic export declarations concerning deliveries and services from the Federal Republic of Germany to countries outside of the EU which are not carried out or initiated by the contractor, the client has to provide the export declaration necessary for taxation. If the export declaration is not provided, the client has to pay the VAT for the service in addition to the invoiced amount for deliveries within Germany.

(d) The contractor is entitled to claim down payments according to the value of already performed partial services.

3.2 If the agreed delivery term exceeds 4 months, the contractor reserves the right to reasonably adapt the agreed remuneration according to changes of actual costs, including material costs and labour expenses as well as shipping costs if necessary. The same applies in case of increase of customs or fees required for deliveries at the contractor's expense. If the price unproportionally increases compared to the consumer price index, the price increase will be limited to gained market price. Paragraph 3.12 remains untouched.

3.3 The agreed remuneration is due within 7 days without deductions beginning with the statutory due date, unless otherwise agree upon. The same applies to partial services. Discounts may only be deducted if the payment has been credited to the contractor's account in due time and if the client is not in default with other claims of the contractor at the time of the respective payment. Discounts may only be deducted from the net price, NOT from fees or shipping costs etc.

3.4 Drafts and checks will only be accepted on account of performance and upon explicit agreement. They will not be considered as payment until they are encashed. Discounts, draft charges and taxes will be at the client's expense after the expiry of the agreed payment term.

3.5 The client defaults after the expiry of the term stated in paragraph 3.3, sent. 1.

3.6 (a) The client may only off-set against claims of the contractor with undisputed, final and absolute counter claims.

(b) Letter (a) respectively applies to the execution of retention rights by the client.

3.7 The client is not entitled to retain claims of the contractor resulting from this contract due to unsettled claims not subject to this contract.

3.8 The client's right to lien according to Section 369 German Commercial Code (HGB) does not apply.

3.9 If there are reasonable doubts concerning the liquidity or credit status of the client and if the client is not willing to pay in advance or provide a suitable financial security on demand of the contractor, the contractor is entitled, if he/she has not performed yet, to demand an advanced cash payment before a possible further/subsequent delivery or performance. This particularly applies to agreed, but not yet carried-out subsequent business transactions.

3.10 The contractor reserves the right to use payments to settle the oldest open invoice item plus incurred default interests according to the following order: costs, interests, principle claim.

3.11 The contractor is entitled to assign claims resulting from or in relation to this service contract. The client may not assign his claim against the contractor to third parties. Section 354a German Commercial Code (HGB) remains unchallenged.

3.12 On default of payment of remuneration claims, the contractor is entitled to claim default interest of 8 %-points above the basic interest rate according to Section 247 German Civil Code (BGB) valid at the time of default occurrence. Section 352 German Commercial Code (HGB) as well as claims towards further actual default damages remain unchallenged, so do legal rights to claim damages for the failure of performance as well as with-drawal from the contract.

3.13 On default, all claims resulting from all contract relationships of the parties are due immediately, unless the default is related to only minor claims.

3.14 The tool costs to be borne by the client are due for payment net immediately after the tool has been manufactured. By paying a share of the costs for tools, the client does not acquire any right to the tools themselves. These remain the property of the contractor and can also be used for other customers. If the client has not purchased any products from the tools for more than 2 years, the seller is entitled to scrap the tool.

4. Delivery, acceptance, transfer of risk

4.1 If no explicit execution term has been granted by the contractor, the agreed service may be claimed not until 8 weeks after the conclusion of the contract. An agreed execution term does not begin until receipt of all necessary documentations and information to fulfilling the service contract, such as engineering drawings, examples.

4.2 If a specific delivery term has been agreed upon, the delivery term is to be considered as complied with if all agreed deliveries and services are carried out by the end of the agreed deadline.

4.3 However, the liability in case of delay in delivery shall be limited to 0.5% of the delivery value, and to not more than 5% of the delivery value for each completed week of delay within the framework of lump-sum damages.

4.4 The acceptance of the contractor's services by the client takes place as agreed upon, otherwise according to legal regulations, such as Section 640 German Civil Code. In case of client's default of acceptance the remuneration is due immediately.

4.5 The transfer of risk concerning the services and deliveries by the contractor to the client takes place according to legal regulations.

4.6 The client is responsible for the compliance with legal and official regulations concerning import, delivery, storage and use of the services and deliveries performed by the client in the country or place of destination as well as in the transit countries as well as responsible for the acquisition of required import and transit documents (custom etc.) as long as those are not exclusively to be provided by the contractor due to legal reasons.

4.7 Deliveries and services are subject to correct and due supply of the contractor.

4.8 If it has been exceptionally agreed upon that the contractor is to bear customs or export/import costs of the country of origin/destination or of transit countries, the cost increase occurring in between the time of the acceptance of order and delivery of the contractual products transfers to the client.

5. Reservation of title

5.1 Until complete payment of all receivables resulting from the business relationship with the client the contractual products remain property of the contractor.

5.2 The reservation of title also persists if single claims of the contractor are added to a running account and the account is balanced and confirmed.

5.3 The return of reserved products does only represent a withdrawal from the contract if explicitly declared by the contractor in writing. If the contractor withdraws from the contract, he/she may claim a reasonable compensation for the duration the products were in possession of and in use by the client.

5.4 (a) The customer shall be entitled to process the delivered goods within the framework of their regular business operation. The goods shall be processed for the supplier without committing it; the new items shall become the contractor's property. If the goods are processed with other goods that do not belong to the contractor, the contractor shall acquire co-ownership of the newly manufactured item according to the proportion of the invoice value of the reserved goods to the other processed items. Should the contractor still lose ownership and the customer become (co-) owner, it shall hereby transfer its ownership to the contractor according to the proportion of the invoice value of the reserved goods to the other processed items as collateral. In all of the stated cases, the customer shall store the items owned or co-owned by the contractor for it free of charge.

(b) The customer's authorisation to dispose shall automatically expire with an unsuccessful enforcement attempt at its premises, with protest against a cheque or bill of exchange to be honoured by the purchaser as well as with the filing of an application for the opening of insolvency proceedings for the purchaser's assets. In all other cases, other disposals of the reserved goods, particularly pledge and transfer by way of security shall be inadmissible and shall lead to restraint on alienation.

(c) The customer shall hereby assign to the contractor all claims arising from the resale of the reserved goods in processed and unprocessed state including all ancillary rights. If processed, combined, intermixed or mingled reserved goods are sold, the supplier shall acquire the principal partial amount that corresponds to the percentage of the invoice value of its delivered goods plus a security premium of 5%.

(d) Subject to revocation that is possible at any time, the customer shall be entitled to collect the claims assigned to the contractor in the regular course of business. The contractor shall not use its own authorisation to collect as long as the purchaser complies with its payment obligations – also to third parties – as agreed. If the customer assigns its subsequent claim to a factoring institution within the framework of a so-called real factoring by assuming the non-payment risk, the customer shall assign its claims against the factoring institution for payout of the factoring proceeds to the contractor and shall undertake to inform the factoring institution about this assignment immediately after invoicing by the contractor.

(e) The customer shall be obliged to hand over to the contractor on demand an exact list of the receivables the contractor is entitled to with the name and address of the buyers, amount of the individual receivables, invoices, etc. and to provide the contractor with all information required for the assertion of the assigned claims and to permit the review of this information. The customer shall be obliged to handle the goods with care. 5.5 In the event of resale of contractual products, the client is obligated to arrange regulations concerning the reservation of title with his customers without revealing the original reservation of title agreed upon with the contractor. (Secondary reservation of title).

5.6 If the contractor has reasonable concerns that the client is not fulfilling or will not fulfil his/her duties towards the contractor, the client is to order his/her customers on demand of the contractor to abstain from demands to receiving information about the stock of contractor-owned products and receivables transferred to the contractor as well as to being handed out documents to enforce transferred receivables. The same applies in case of withdrawal of the direct debit authorisation. Access to reserved products by third parties and transferred receivables is to be reported immediately.

5.7 If the security value exceeds the claims of the contractor to more than 10 %, the contractor will release securities on the client's request.

5.8 In case of pledge or other interventions by third parties, the customer shall notify us without delay. Any processing, installation, combination or transformation (sections 946, 947, 950 BGB) of the goods that are still property of the contractor to be carried out then shall only be permitted to the customer upon the supplier's prior written consent.

6. Warranty/guarantee

6.1 If not individually agreed upon, the contractor delivers and performs according to the stated delivery and service specifications if available (catalogues etc.), otherwise according to standard terms. Additional properties of the contractual delivery/service in other publications or advertisements of the contractor or his/her suppliers/manufacturers may not be written by the client unless the contractor has confirmed these additional properties in writing. Guarantees require an explicit written confirmation by the company management of the contractor.

6.2 Concerning the contractual deliveries and services of the contractor, the client is bound to inspection and objection obligations according to Section 377 German Civil Code. Objections are to be handed in writing.

6.3 Disregarding paragraph 6.2, guarantee claims of the client are excluded if the client fails to hand in complaints about obvious defects in writing within 2 weeks, beginning with the acceptance of the contractual deliveries or services until dispatch of the written complaint.

6.4 In case of violation of inspection and objection obligations, the delivery or service will be considered as accepted, despite the defect.

6.5 Subject to compliance with inspection and objection obligations, the contractor compensates for defects of contractual deliveries and services firstly through supplementary performance choosing between rectification of the defect or new delivery/service. The client is entitled to immediately claim a new delivery/service if the rectification of the defect appears to be an unreasonable burden.

After the effectlessness expiry of the period for supplementary performance set by the client, in which the contractor is granted several reperformance attempts according to the kind and complexity of the defect, the client is optionally entitled to claim the reduction of the remuneration, withdrawal from the contract or to rectify the defect him/herself and to claim compensation for the necessary expenses of the rectification.

The right of the client to legally claim compensation for damages or necessary expenses according to the law, in addition to withdrawing from the contract, remains unchallenged, except the limitations for claims of the client according to paragraph 7 of this agreement.

6.6 The liability / warranty for containers always includes the legal framework only the container itself, but not the contents or foam. Warranty claims of any kind are excluded if the container changed, damaged or physically altered in some other way or treated improperly or abused.

Further claims of the customer shall be excluded, particularly claims for compensation of damage that has not occurred at the delivered item itself.

7. Liability

In cases of contractual or non-contractual liability, the contractor compensates for damages or lost expenses according to the following regulations:

7.1 The contractor is liable to the full amount in cases of intent or gross negligence.

7.2 On lack of a property for whose existence the contractor has taken over a guarantee or which has been assured to the client, the contractor is liable for the typical, foreseeable damage which was supposed to be prevented through the guarantee or assurance as long as the lack of the guaranteed/assured property was caused by intent or gross negligence.

7.3 In case of light negligent violation of essential contractual obligations (cardinal obligations), the liability of the contractor is limited to the compensation for the typical, foreseeable damage; in case of light violation of non-cardinal obligations, liability of the contractor is excluded.

7.4 The above mentioned limitations of liability do not apply to claims of the client under the Product Liability Act and resulting from harm to life, body and health caused by the contractor.

7.5 Other legal obligations concerning compensation or exclusion of liability, such as Section 281, para. 1, sent. 3 German Civil Code (BGB) remain unchallenged.

7.6 Usually container and foam inserts are designed and manufactured for the protection of products. The Contractor recognizes but basically no claims due to damage to the products of the client. The customer is obliged, as part of the incoming inspection and before use of the container / the goods delivered, check for proper execution. The client is also obliged to validate whether the container and the foam insert to provide reasonable protection for its products in the context of the intended use. The solution of the contractor is always just a suggestion.

8. Force Majeure

In case of events or circumstances, such as natural events, war, labour disputes, raw material and energy shortage, traffic and facilities disturbances, fire and explosion

damages, orders of higher authorities whose occurrence are outside the sphere of influence of the contractor, even under consideration of careful commercial planning and precaution, and which impair the availability of deliveries and services so that the contractor is not able to fulfil his/her contractual duties (under partial consideration of other internal and external delivery obligations), the contractor is (i) relieved from his/her contractual duties for the duration and extent of the disturbance and (ii) is not obligated to obtain the products from third parties.

Sentence 1 also applies as long as the events and circumstances make the execution of the respective business sustainably uneconomic for the contractor or influence the contractor's suppliers. If those events last longer than 3 months the contractor is entitled to withdraw from the contract.

9. Confidentiality, data protection

9.1 The parties agree to treat all confidential information and industrial secrets of the other party collected within the scope of execution of the contract confidentially without temporal limits and to use them only within the scope of executing the contract.

9.2 Both parties comply with data protection regulations. The handling of the business relationship will be supported by a data processing system of the contractor, thus data of the client will be automatically collected and stored. The client will be informed about the storage of his/her data.

10. Industrial property rights

10.1 The client is responsible that property rights of third parties are not violated by the contractor receiving and using materials of the client, such as documentations, data, drafts, planes or other execution instructions provided by the client necessary for the execution of the contract, and relieves the contractor from all related claims. The client bears license fees or costs resulting from the avoidance of such violations of property rights.

10.2 If industrial property rights occur within the scope of the execution of contractual agreements, the client is to transfer those rights to the contractor if legally possible. If the full transfer of rights is not possible, the client grants the contractor an exclusive, over-all usage right, unlimited in time and space or, if even this is not possible, a non-exclusive right. Legal regulations which grant the client a reasonable compensation for the transfer of rights remain unchallenged.

10.3 The client has no rights towards films, plans, drawings and graphics compile in the course of the preparation of contractual deliveries and services. In particular, industrial property rights on those as well as on contractual delivered services remain with the contractor. By full payment of the remuneration, the client gains the ownership on the delivered services.

10.4 The contractor is entitled to perform or deliver products to third parties, comparable to the deliveries and services delivered to or compiled for the client, in particular films, plans, drawings and graphics. The contractor is entitled to attach an adequate copyright label or label of origin to all contractual products.

10.5 The contractor is entitled to use the deliveries and services performed for the client within reason for own advertising and promotion purposes in any form, such as illustrations of products and the place of use at the client's facilities in brochures or electronic media. This right does not apply only if the client does not explicitly disagree to such use by the time of his/her declaration of intent towards concluding the contract.

11. Place of execution, place of jurisdiction, choice of law, severability clause, written form

11.1 Place of payments by the client is the company residence of the contractor.

11.2 (a) Place of jurisdiction for all claims resulting from or in relation to the respective service contract, concerning its conclusion, its effectiveness and execution is the usual place of jurisdiction of the contractor or, on request of the contractor, the usual place of jurisdiction of the client.

(b) If the client has his/her residence outside of the EU, all law suits resulting from or in relation to the respective service contract, concerning its conclusion, its effectiveness and execution are carried out according to the arbitration regulations of the German Institution for Arbitration (DIS) under exclusion of the legal recourse. Decisions are made by a single arbitrator who has to have a qualification to judgeship and is appointed according to Section 14 of the German DIS Arbitration Code. The place of arbitration is the place of residence of the contractor. The language of arbitration is German. The gathering of evidence takes place under application of the valid regulations of the German Civil Code concerning the gathering of evidence.

11.3 German law is applied under exclusion of CISG law as well as the referral regulations of the German Intern regulations of the German International Civil Law.

11.4 If single regulations of these terms of service are entirely or partially invalid or have legal gaps, the effectiveness of other regulations or parts of regulations remains unchallenged.

11.5 The German version of these terms of service is legally determinative. The publication of a version in another language takes only place for the purpose of easier comprehension.