

Terms & Conditions

§ 1 General information; Scope of application

1. The following Terms & Conditions are applicable to all of the transactions of SM Coating GmbH.
2. These Terms & Conditions apply in particular to contracts for the sale and/or supply of movable items (hereinafter also referred to as „goods“), irrespective of whether we manufacture the goods ourselves or buy them in from suppliers (§§ 433, 651 BGB (= German civil code)). These Terms & Conditions shall apply in their latest issue at any given time as the background agreement to future contracts for sale and/or supply of movable items with the same Client, without having to reiterate the Terms & Conditions in each individual instance.
3. Our Terms & Conditions apply with exclusive effect. The Client's terms & conditions to different, to contrary or to supplementary effect may become part & parcel of contract only to the extent that we have expressly confirmed their validity. This requirement for confirmation shall apply in each instance, even – for example – if we supply goods to the Client in the knowledge of the Client's terms & conditions but without contesting them.
4. In each instance, any arrangements made with the Client on an individual basis (including subsidiary agreements, supplements and changes) shall take priority over these Terms & Conditions. The content of such arrangements shall be subject to a written contract or to our written confirmation.
5. The validity of legally significant declarations and notices that have to be presented to ourselves by the Client after negotiation of contract (such as the setting of deadlines, reports of deficiencies or the declaration of withdrawal or of a claim for reduced charge) shall be subject to written form.
6. References to statutory regulations shall be of merely explanatory significance. Consequently – even without such clarification/explanation – legal regulations shall be applicable provided that they are not directly adapted in (or expressly excluded from) these Terms & Conditions.

§ 2 Negotiation of contract

1. Our offers are open and non-binding. The same shall apply if we have handed to the Client any catalogues, technical documentation (e.g. drawings, plans, sets of figures, calculations or references to DIN standards), other product descriptions or documents (even in an electronic form) where we hold the rights of ownership and copyright over such materials. SM Coating GmbH expressly reserves the right to apply changes to or deviations from these Terms & Conditions in the open and non-binding offers which it submits in any individual instance.
2. The Client's ordering of goods shall stand as a binding offer to enter into contract. Unless otherwise indicated in the order, we shall be entitled to accept such offer to enter into contract within four weeks after receiving it.
3. Acceptance may be declared to the Client either in writing (e.g. by confirmation of order) or by the delivery of the goods to the Client.

§ 3 Delivery deadline; Delay in delivery

1. The delivery deadline is individually negotiated and/or indicated by ourselves when accepting the order.
2. To the extent that we are unable to adhere to binding delivery deadlines for reasons which are not our responsibility (impossibility of fulfilment), we shall promptly notify the Client and at the same time indicate the prospective new delivery date. If fulfilment is not possible even within the prospective new delivery date, then we shall be entitled to withdraw from the contract in whole or in part; in which case we shall promptly reimburse the Client for any financial consideration already deposited. A „case of impossibility of fulfilment“ as described here is held to arise if our suppliers fail to make punctual delivery, if we have negotiated a suitable covering transaction. This does not affect rights of withdrawal and cancellation, together with statutory regulations concerning the processing of the agreement where the service obligation is excluded (e.g. impossibility of fulfilment and/or rectification, or an instance where it would not be reasonable to be held to it). The Client's rights of withdrawal and of cancellation, corresponding to § 8 of these Terms & Conditions, also remain unaffected.
3. The onset of arrears in supply attributable to ourselves shall be determined in line with legal regulations. In all instances, however, a reminder from the Client by registered letter is required, allowing us a reasonable period of grace.

§ 4 Delivery; Transfer of risk; Acceptance; Delay in acceptance

1. Delivery is made from the store, which shall also be the place of fulfilment. At the Client's request & expense, the goods will be sent to a different destination (mail order). Unless otherwise agreed, we shall be entitled to determine the mode of dispatch ourselves (with particular reference to shippers, mode of transport and packing).
2. The risk of accidental loss of the goods and of accidental damage to the goods shall transfer to the Client no later than at the stage of handover. In the case of mail order, however, the risk of accidental loss of the goods and of accidental damage to the goods, together with the risk associated with delay, shall transfer to the shipper, to the carrier or to whichever persons or firm have been entrusted with transportation. Where acceptance has been agreed upon, this shall also apply in respect of the transfer of risk. The statutory provisions of service contract regulations shall also apply, in any case, to agreed acceptance. If the Client incurs arrears in acceptance, then this shall be equated with completed handover/acceptance.

3. If the Client incurs arrears in acceptance, if it fails to complete a co-operative action or if our delivery is delayed for any other reasons attributable to the Client, then we shall be entitled to require reimbursement for the cost of the loss consequently arising, including additional expenditures (such as storage costs, for example). In this context, we shall claim a flat rate compensation charge of 5% of the value of the goods, starting on the date of delivery or – in the absence of any date of delivery – starting upon indication of readiness for dispatch of goods. This does not affect the right to bring proof of a higher loss and to substantiate our legal claims (with particular reference to the reimbursement of additional expenditures, reasonable compensation, cancellation); however, the flat rate charge may be offset against further financial claims. The Client is at liberty to bring proof (in connection with the flat rate charge mentioned above) that we have not suffered any loss at all or that the loss suffered was substantially less.

§ 5 Prices; Payment conditions

1. Unless otherwise agreed in an individual instance, our current prices at the time of negotiation of contract — ex-stores, and subject to VAT at the rate applicable at the time — shall apply.
2. In the context of mail order (§ 4, paragraph 1), the Client shall bear the costs of transport from store and the costs of any transport insurance which the Client may specify. The Client shall bear the cost of any Customs duties, charges, taxes or any other public duties payable. We are not required under packaging regulations to take back any transport packs or any other packs; rather, these become the Client's property. This does not apply to pallets.
3. Remuneration falls due for settlement and must be paid within 30 days after invoicing and after the supply and/or acceptance of the goods. In the case of contracts where the value of the consignment exceeds €20,000, however, we shall be entitled to require a down payment amounting to 30% of the total. The down payment falls due for settlement and must be paid within 14 days after invoice.
4. The Client is held to have incurred arrears upon expiry of the above-defined payment deadline. Payment shall attract interest at the statutory rate of interest in lieu of delay applicable at the time. We reserve the right to claim further loss consequent upon delay. This does not affect our entitlement for commercial interest effective from the due date for payment (refer § 353 HGB (=German commercial code)).
5. The Client holds rights of offset and reservation only to the extent that its claim has been confirmed in law or is undisputed. This does not affect § 7, paragraph 6 with regard to deficiencies in delivery.
6. Should it transpire, after negotiation of the contract, that our claim for remuneration is jeopardised due to lack of solvency on the Client's part (e.g. due to an application for the institution of insolvency proceedings), then we shall be entitled in pursuance of legal regulations to decline service and – following the setting of a deadline, where appropriate – we shall be entitled to withdraw from the contract (refer § 321 BGB). In the event of contracts for the manufacture of items that cannot be disposed of elsewhere (one-off productions), we may declare withdrawal immediately; this does not affect statutory regulations regarding the necessity (or otherwise) for the setting of the deadline.

§ 6 Reservation of ownership

1. We reserve the right of ownership over sold goods until all of our present and future claims arising from the purchase contract and from any ongoing business connection (secure claims) have been paid up in full.
2. Goods still subject to reservation of ownership may neither be pledged to third parties nor made over as security before our secured claims have been paid in full. The Client must promptly notify us in writing if and to the extent that any third parties attempt to gain possession of goods that are our property.
3. In the event of breach of contract on the Client's part – with particular reference to the failure to settle outstanding payment – then we shall be entitled in pursuance of statutory regulations to withdraw from the contract and to require the return of the goods on the grounds of reservation of ownership and on the grounds of our withdrawal from contract. If the Client fails to settle outstanding payment, then we may substantiate the above-mentioned rights only once we have given the Client a reasonable period of grace, without satisfactory response, or if it is no longer necessary, in the context of statutory regulations, to set any period of grace.
4. The Client is entitled in the normal course of business to sell on and/or to process goods still subject to reservation of ownership. However, the Client does not have the right in the normal course of business to sell on and/or to process goods that are still subject to reservation of ownership if the Client is in arrears with payments for ongoing business. In such a case, the following provisions shall, furthermore, apply.
 - a) The reservation of ownership extends to the full value of the products created by processing, mixing or combination of our goods, in which context we shall stand as the manufacturer. If any third parties still hold a right of ownership in connection with their goods being involved in processing, mixing or combination, then we shall acquire co-ownership in proportion to the billed values of the goods that have been processed, mixed or combined. Otherwise the resultant product shall be subject to the same conditions as those applicable to goods delivered under reservation of ownership.
 - b) Claims against third parties that arise from the resale of the goods or of the product are hereby assigned by the Client to ourselves in their entirety or to the

extent of any co-ownership share accruing to ourselves and in line with the section set out above with regard to security. We accept the assignment. The Client's obligations mentioned in paragraph 2 above shall also apply in respect of assigned claims.

- c) The Client is entitled, in conjunction with ourselves, to collect on the claim. We undertake not to collect on the claim provided that the Client complies with its payment obligations in relation to ourselves, provided that the Client does not enter into arrears of payment, provided that no application for the institution of insolvency proceedings has been submitted and provided that there is no other deficiency in the Client's ability to make payment.

Should any one of the above-mentioned criteria arise, however, then we may require that the Client should notify ourselves of the assigned claims and of their debtors, should provide us with all information necessary for collection/pursuit of the debt, should provide us with the corresponding documents and should notify the (third-party) debtors of the fact of assignment.

- d) Should the value of securities that can be realised exceed our claims by more than 10%, then upon the Client's request we shall – at our own discretion – release some securities.

§ 7 Claims held by Client upon deficiency

1. Unless ruled otherwise below, the Client's rights in the event of material or legal deficiencies (including incorrect supply, short supply and poor workmanship or deficient instructions for assembly) shall be subject to the statutory provisions of law. In no case shall this affect the particular provisions of law concerning the final delivery of the goods to a consumer (right of recourse held by suppliers under §§ 478, 479 BGB).
2. Our liability in the event of any deficiencies shall be based primarily on the agreement made concerning the condition of goods. Such agreement concerning the condition of goods shall be constituted by product descriptions – designated as such – which have been made over to the Client before it issued the order, or shall be incorporated into the contract in the same way as these Terms & Conditions.
3. Where no particular condition had been agreed upon, then the relevant statutory provisions of law must be consulted in order to determine whether or not a deficiency has arisen (§ 434, paragraph 1, clauses 2 & 3 BGB). However, we accept no liability for the manufacturer's public statements or those of any other third parties (e.g. advertising claims).
4. The Client's claims upon deficiencies are dependent on its having fulfilled its statutory obligations for examination and reporting (§§ 377, 381 HGB). Should any deficiency come to light at the stage of examination or subsequently, then we should be promptly notified in writing. „Promptly notified“ implies that we should be notified within two weeks, whereby notification is deemed prompt if served within that timeframe. Irrespective of this obligation for examination and reporting, the Client must send a written report of any obvious defects (including incorrect supply or short supply) within two weeks following delivery, whereby notification is – in this case, also – deemed prompt if served within that timeframe. If the Client fails to fulfil the correct examination and/or reporting of a deficiency, then our liability is excluded for the deficiency that was not reported.
5. If the supplied item is defective, then the Client may in the first instance require, at its own discretion, elimination of the deficiency (rectification) or the supply of a problem-free product (replacement supply). If the Client does not indicate which of the two options it prefers, then we may give the Client a reasonable period within which to decide. If the Client has still made no decision within the allotted period, then the right of option shall revert to ourselves upon expiry of the period.
6. We are entitled to make the required rectification dependent on the Client having settled any due payment. However, the Client shall be entitled to withhold a portion of payment commensurate with the deficiency.
7. The Client must give us the necessary time and opportunity to conduct any due rectification, and in particular must hand over the problematic goods for us to examine them. In the event of replacement supply, the Client must – as legal regulations require – hand the defective product back to ourselves.
8. Expenditures entailed by the process of inspection and rectification – with particular reference to the costs of transportation, expenses arising in transit, labour costs and material costs – shall be borne by ourselves if there actually is a defect present. However, should any request for rectification presented by the Client prove to be unfounded, then we may require the Client to reimburse the costs we have incurred in the process.
9. In urgent cases, for example should industrial safety be jeopardised – or in the interests of preventing disproportionate damage – the Client shall be entitled to rectify the deficiency itself and to require us to reimburse it for the expenditures actually entailed. We should be notified promptly – beforehand, if possible – of any such instance of direct action on the Client's part. There shall be no right of

direct action if we would have been justified in declining rectification in line with statutory regulations.

10. If the attempt at rectification is unsuccessful or if a reasonable deadline for rectification – to be set by the Client – has expired without response or is not in any event required by legal regulations, then the Client may withdraw from the contract or reduce the amount of payment considered due. However, there is no right of withdrawal on the grounds of a deficiency which is not substantial.
11. The Client shall hold claims for compensation or for the reimbursement of wasted expenditure only as outlined in § 8 below, otherwise all such claims are excluded.

§ 8 Further liability

1. Unless otherwise indicated in these Terms & Conditions, including the provisions set out below, our liability in the event of infringing contractual and extra-contractual obligations shall be governed by the applicable provisions of law.
2. We are liable to pay compensation – on whatsoever legal grounds – in the event of wilful intent and gross negligence. In the event of plain negligence, we are liable only
 - a) for losses in the form of fatality, physical injury or damage to health,
 - b) for losses arising from the infringement of a cardinal obligation of contract (obligation whose fulfilment is a prerequisite for the correct execution of the contract and whose fulfilment is normally (and duly) expected by the partner in contract); in such a case, however, our liability is restricted to compensation for the foreseeable loss that typically arises.
3. The restrictions upon liability that arise from paragraph 2 shall not apply to the extent that we deliberately fail to disclose the fact of a deficiency or to the extent that the condition of the goods is covered by a guarantee. The same shall apply in respect of claims arising under product liability regulations.
4. The Client may withdraw from contract or cancel the contract on the grounds of an infringement which does not take the form of a deficiency only if the infringement was caused by ourselves. The Client's unrestricted right of termination (particularly as defined by §§ 651, 649 BGB) is excluded. Otherwise the standard legal requirements and legal consequences shall apply.

§ 9 Expiry

1. The general period of expiry for claims arising from material and legal deficiencies shall be one year as from delivery. To the extent that acceptance was arranged, the period of expiry shall start to run upon acceptance.
2. However, if the goods take the form of a building project or of an item which – corresponding to its normal mode of operation – was used for a building project and caused such project to be deficient (as in the case of building materials), then the period of expiry shall come to 5 years from delivery as the law requires (refer § 438, paragraph 1, clause 2 BGB). This does not affect particular legal rules applicable to third parties' contingent claims for release (refer § 438, paragraph 1, clause 1 BGB), nor the legal rules applicable to cases of wrongdoing on the vendor's part (refer § 438, paragraph 3 BGB) and does not affect claims arising from the supplier's recourse upon supply to an end-user (refer § 479 BGB).
3. The periods of expiry outlined above are also applicable to the Client's contractual and extra-contractual compensation claims that are based on a deficiency in the goods, unless a shorter period of expiry would – in any individual instance – arise from the application of the standard legal period of expiry (§§ 195, 199 BGB). In all cases, the expiry periods defined under product liability regulations are unaffected. Otherwise, the Client's compensation claims arising from § 8 shall be covered exclusively by the standard legally-defined periods of expiry.

§ 10 Choice of legal system; Jurisdiction

1. These Terms & Conditions and all dealings between ourselves and the Client shall be governed by German law to the exclusion of all international and supranational (contract-related) regulations, with particular reference to UN purchasing law. The prerequisites and the effects of the reservation of ownership corresponding to § 6 above shall, on the other hand, be subject to the law governing the respective storage location of the item if a corresponding option in favour of the German legal system would be inadmissible or invalid.
2. If the Client is a businessman as defined by German commercial code, is a public corporation or is a public legal special fund, then the exclusive place of jurisdiction (including internationally) for any disputes arising directly or indirectly from this contractual relationship shall be the place of our head office, which is currently in Heinsberg. However, we shall also be entitled to bring action in the Client's general jurisdiction.