

HERZOG GmbH

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# TERMS OF DELIVERY AND PAYMENT

- As of October 2021

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## 1. General / Scope of Application

- 1.1. No other than the General Terms & Conditions (GTCs) as outlined below shall apply to all sales, deliveries and performances (hereinafter called "services") provided by HERZOG GmbH („HERZOG“); available at <https://herzog-online.com/gtc/>.
- 1.2. Objections will be entered to any terms & conditions of a customer that differ from these terms & conditions for delivery or payment or the legal provisions. Said terms & conditions shall not become part of any contract even in cases where HERZOG accepts or processes orders in full knowledge of these contradictory or differing terms & conditions of a customer.
- 1.3. On placing an order, the customer shall accept the terms & conditions for delivery and payment as legally binding.

## 2. Offers, Conclusion of a Contract, Subject and Scope of Performance

- 2.1. Unless otherwise expressly agreed, offers made by HERZOG shall be non-binding and subject to confirmation. With respect to submitted offers, HERZOG shall be entitled to either accept or reject an offer within 14 days of receipt by sending an order confirmation or the ordered goods or service.
- 2.2. Contracts shall come into being only through a written order confirmation, delivery of goods or rendering the service by HERZOG.
- 2.3. Side agreements require our written confirmation to be legally effective. Orders once placed are irrevocable and can not be revoked.
- 2.4. HERZOG is generally not obliged to check whether the customer's specifications or specifications on which HERZOG bases its offer or the order confirmation are correct or whether the execution of the order interferes with third party property rights. Risks that HERZOG recognizes are communicated to the customer.
- 2.5. Information and data contained in data sheets, brochures or other advertising and information material supplied by HERZOG shall merely serve as guidelines and will only become binding content for the contract if expressly agreed by HERZOG.
- 2.6. Properties of samples and specimens will not be binding for HERZOG unless expressly agreed with the customer.
- 2.7. Structure and durability details do not represent a guarantee unless expressly stated as such. The same shall apply to the assumption of procurement risk.
- 2.8. Unless otherwise agreed in writing, HERZOG delivers within the tolerances admissible in accordance with the relevant German or European Industrial Standards, in particular as per DIN, VDE, EN ISO etc.
- 2.9. Technical changes caused by manufacturing processes or legislative changes or changes resulting from normal product maintenance shall be admissible, provided they are deemed acceptable to the customer.

## 3. Scope of delivery

- 3.1. Kind and extent of services shall be based on the written order confirmation provided by HERZOG. HERZOG shall be entitled to render partial services, provided this is deemed acceptable to the customer.
- 3.2. Contracts concluded with representatives of HERZOG shall be immediately binding for the customer, however, for HERZOG not until a written confirmation was issued. In the case of a missing order confirmation by HERZOG the invoice shall be deemed to be the written order confirmation.

## 4. Time of delivery

- 4.1. The agreement about the period of delivery has to be made in writing. The specified delivery dates are not binding. HERZOG does everything in its power to adhere to the delivery dates with great care.

- 4.2. The period of delivery shall not start until all essential issues regarding the performance of a contract have been clarified with the customer and the customer has met any obligations necessary for the performance of the contract by HERZOG. This entails in particular the submission of documents by the customer, such as specifications, drawings as well as all the details (order clarification) required for the production of the contractual products. Above all the period of delivery shall not commence before HERZOG has received all the information required for delivery from the customer or before the customer has provided proof that he – where required – has issued a letter of credit or has made a down payment or payment in advance or has furnished security.
- 4.3. Alterations requested by the customer after the contract will interrupt the period of delivery. The period of delivery will recommence after an agreement has been reached about the desired alterations.
- 4.4. Events such as Acts of God, industrial action, unrest, regulatory action and similar circumstances beyond the control of HERZOG shall release HERZOG for the duration of the disturbance and the extent of repercussions from its duty of fulfilment of contract. This shall also apply when these circumstances happen at subcontractors of HERZOG or when these events occur at a point in time at which HERZOG is already in default. HERZOG will inform the customer about the commencement and end of such impediments to performance immediately.
- 4.5. Claims for compensation by the customer due to non-fulfilment or delayed fulfilment on the part of HERZOG shall in any case be excluded, with the exception of the restrictions dealt with in clause 6.7. In each instance, HERZOG will be granted a waiting period of 2 weeks in the case of exceeding the delivery date agreed upon in writing.
- 4.6. HERZOG delivers goods in unpacked condition. If the customer wishes to have packaging, he shall bear the cost.
- 4.7. Time of delivery is met, if the delivery item has left the factory on or before the delivery date or the readiness for dispatch has been communicated.
- 4.8. HERZOG delivers ex works (INCOTERMS). In cases where HERZOG arranges transportation, the customer shall bear the cost of shipping and goods in transit insurance.
- 4.9. Price risk, that is, the risk of accidental destruction or accidental degradation will be transferred on provision of goods at HERZOG's factory to the customer even if HERZOG has taken on services such as loading or transportation.
- 4.10. In cases where the service is delayed for reasons that are the responsibility of the customer, the risk will be transferred to him at the point of receiving the note of readiness for operation. HERZOG shall in such cases be entitled to charge the customer for the goods as if delivery had taken place, and store them at the customer's expense and risk. Upon the customer's request, HERZOG shall insure the goods against theft, breakage, transport and fire and water damage.

## **5. Prices, Payment and delay**

- 5.1. Unless otherwise specified, prices will be calculated in Euros ex works, exclusive of packaging, carriage charges, cargo insurance, assembly, auxiliary, lubricating and operating materials as well as other ancillary expenses. They are quoted exclusive of VAT.
- 5.2. Invoices shall become due for payment immediately upon receipt and without any discount. Cheques shall only be accepted on condition of fulfilment. The customer shall agree to receive invoices by electronic transmission.
- 5.3. Except as otherwise provided in writing the following payment terms are agreed upon 3/10 with the order as down payment after having received order confirmation; 7/10 at readiness of dispatch.
- 5.4. In the event of delay in payment, HERZOG will charge interest of 6 percent p.a. above the current base interest rate as per article 247 section 1 German Civil Code. We reserve the right to further compensation for additional loss against proof.
- 5.5. HERZOG shall not be obliged to contractual performance until the customer has fulfilled his duties including those arising from other contracts HERZOG as agreed, in particular any payments due.
- 5.6. The customer may withhold payments and set them against counterclaims only if they are undisputed in writing and have been legally established.
- 5.7. In cases where the customer is in default of payment or in circumstances that cause doubt about the customer's ability to pay based on standards in line with banking practice, HERZOG shall be entitled to render outstanding services exclusively upon advance payment or on furnishing a security. Furthermore, HERZOG shall in such a case be entitled to demand payment for the entire debt irrespective of their term and to demand the provision of a security.
- 5.8. If a performance that is ready for collection, is not collected punctually or not collected in its entirety, despite a reasonable period of notice and this is not the fault of HERZOG, then HERZOG will store the goods at the expense and risk of the customer.

HERZOG will charge a flat rate of 0.5% of the invoice amount per month of non-collection. Alternatively, HERZOG reserves the right to charge for storage according to the number of days and tonnage.

## **6. Warranty, Customer's duties for Claims for defects, liability and Claims for Compensation**

- 6.1. The term of warranty for machines and parts delivered by HERZOG is 12 months (6 months if multi-shift operation), from the date of delivery ex works. This warranty shall not apply to parts subject to natural wear and tear. All defects and flaws detected during the above stated period of time where the cause is demonstrably traceable to faulty material or HERZOG will remedy improper execution. The supply of replacement parts is determined based on "ex works Oldenburg". Replaced parts shall pass into the ownership of HERZOG.
- 6.2. In case shipment, installation or commissioning is delayed without HERZOG being responsible, HERZOG's liability expires latest 12 months after readiness of dispatch.
- 6.3. The customer has to grant HERZOG the necessary time and opportunity to carry out all subsequent improvements that are deemed necessary at its reasonable discretion and to supply replacement machines or parts; otherwise, HERZOG is released from liability for defects. Only in urgent cases, in particular in the event of a long-term business interruption or to prevent disproportionately large damage, or if HERZOG is in arrears with the remedy of the defect, the customer has the right, after prior agreement, to have the defect remedied by himself or by third parties and by HERZOG to request reimbursement of the necessary costs.
- 6.4. In cases where faulty parts are sent for repair to the delivering factory, the cost of transport both ways shall be borne by the customer. Cost of transport shall be borne by HERZOG merely in cases where defects have to be remedied that are definitely the responsibility of HERZOG. Damages arising from excessive strain, the use of unsuitable materials, faulty operating conditions, insufficient maintenance, faulty operation, chemical, electromechanical or electric impacts or any other use than the intended shall not be covered by warranty. HERZOG explicitly declines any liability for other indirect and direct damages.
- 6.5. Faulty assembly or commissioning by the customer or third parties or, modifications or inappropriate repairs carried out by the customer or third parties will result in loss of warranties and/or granted guarantees. The warranty obligation of HERZOG applies only to the customer. It will expire when the goods are sold by the customer to third parties.
- 6.6. Minor variations from the agreed or common condition do not constitute a defective product or service. The general operating instructions or examples of application contained in the HERZOG product brochures or other advertising media do not release the customer from his duty of examining whether the products are suitable for the exact purpose intended. Special wishes of application by the customer shall only be binding if HERZOG has confirmed to the customer in writing that the products delivered will be suitable for the use intended by the customer.
- 6.7. The customer shall only be entitled to reduction or withdrawal if HERZOG fails to carry out supplementary performance within a reasonable period or when this does not remedy the defect despite several attempts (a minimum of 3).  
HERZOG shall be liable without limitation if assuming explicit guarantee or procurement risk, for culpable injury to life, body or health, for claims resulting from the product liability law as well as other deliberate or grossly negligent violations of duty. Any other warranty claims shall be excluded. This applies above all to claims for damages including those resulting from missed profits or other financial losses suffered by the customer.  
In the case of violation of essential contractual duties by HERZOG without the fulfilment of which due performance of the contract would be impossible and the due fulfilment of which the customer may rely upon to a special degree, HERZOG's liability shall be limited to the damage typical for the contract and predictable on completion of contract. In the event of default, HERZOG shall be liable at 0.5% of the value of delayed service for each full week, however, limited to a maximum of 5% of this value. Any liability going beyond the liability for damages shall be excluded irrespective of the legal nature of the claim being asserted.
- 6.8. The reasons and amounts for the aforementioned liability limits will also apply to the benefit of legal representatives, employees and other proxies and/or vicarious agents of HERZOG.

## **7. Reservation of title/ ownership**

- 7.1. HERZOG shall remain the owner of all delivered products until settlement in full of all claims arising from the business relationship with the customer. This shall also apply if payments are received for specially marked accounts payable. This shall also include claims from cheques and bills of exchange as well as claims from open bills or current account.

- 7.2. The customer must not attach or assign as security any products that are subject to such reservation of ownership.
- 7.3. Potential machining, processing, or mixing by the customer shall take place on behalf of HERZOG. Insofar as the property of HERZOG should get lost in the process, the customer herewith assigns his rights of ownership in the new product to HERZOG. The product henceforth will be deemed on loan to the customer. In the case of resale of delivered products subject to retention of title, the customer shall herewith assign to HERZOG all receivables and other claims against the purchaser, including all ancillary rights resulting from this resale as security to the full amount, that is, also with respect to a surplus, until the settlement of all claims of HERZOG against the customer. HERZOG hereby accepts the assignment. The customer shall store the property originating from processing or moderation of goods subject to retention of title free of charge for HERZOG.
- 7.4. The customer shall ensure that the goods subject to retention of title are insured appropriately against all usual risks, in particular against fire, burglary and water damage risks at his own expense and that they are handled with care and properly stored.
- 7.5. Any attachments or captures by third parties of goods subject to reservation of title that were delivered by HERZOG must be reported to HERZOG immediately. Any costs of intervention that may arise shall in any case be borne by the customer.
- 7.6. In the case of a transfer of his business to a third party, the customer shall be obliged to inform the third party about the reserved property of HERZOG and the extended and expanded retention of title and has to transfer the duties arising hereof to the third party.
- 7.7. In cases where the total value of the securities existing for HERZOG exceeds the claims of HERZOG by more than 10% and upon the customer's request, HERZOG shall release those securities at its own choice.
- 7.8. In cases where the customer is in default of payment, HERZOG shall be entitled to take back goods subject to retention of title after the successful expiration of a period of grace set by HERZOG, even if HERZOG has not rescinded the contract.

#### **8. Commissioning / service operations**

Service operations and / or commissioning are carried out either at a fixed price or at unit rates based on Herzog's GENERAL SERVICE CONDITIONS, which are sent to the customer on request.

#### **9. Shipping and transfer of risk**

- 9.1. Dispatch is always carried out at the expense and risk of the customer "ex works acc. INCOTERMS latest version", even if free delivery has been agreed. The customer bears full responsibility for the correct storage of the materials arriving at the destination. Insurance against fire, theft etc. is the responsibility of the customer.
- 9.2. If dispatch or delivery is delayed by the customer, in both cases the risk passes to the customer from the day the goods are ready for dispatch, but HERZOG is obliged to take out the insurance policies requested by the customer at the customer's request and expense.
- 9.3. The risk of accidental loss or accidental loss of the delivery item passes to the customer at the latest when the goods are handed over to the first carrier. The latest version of the "INCOTERMS" applies to cross-border traffic.

#### **10. Software**

- 10.1. If deliveries also include software, the buyer is granted the non-exclusive right to use the software together with the delivery item, unless otherwise agreed. The buyer is not entitled to make copies (unless for archive purposes, for troubleshooting or to replace faulty data carriers) or to edit the software. In particular, the buyer may not disassemble, decompile, decrypt or reverse engineer the software without prior written consent. In the event of an infringement, the supplier can revoke the right of use. For third-party software, the licensor's terms of use apply.
- 10.2. For the transfer of software that is provided regardless of the delivery of associated hardware, our general license conditions apply in the currently valid version, which we will be happy to provide.

#### **11. Liability**

As far as legally permissible, claims not expressly conceded in these conditions shall be ruled out. Other than that, they shall be restricted to compensation for damage to the delivery item and in total to the damage that typically arises in business of the type in question based on the value of the delivery item, unless caused by deliberate or by grossly negligent violation of contract by HERZOG.

All claims made against HERZOG arising from the aforesaid legal grounds shall come under the statute of limitation after no more than 12 months after the transfer of risk to the customer.

**12. Place of performance and jurisdiction**

- 12.1. The place of performance is Oldenburg in Oldenburg on both sides.
- 12.2. Place of jurisdiction for all disputes arising from the contractual relationship with merchants and corporate bodies under public law shall be solely the Amts- and Landgericht Oldenburg. Apart from that, the place of jurisdiction shall comply with the law.
- 12.3. The law of the Federal Republic of Germany as well as the German text of the Terms & Conditions shall govern the content and interpretation of offers, order confirmations and any other correspondence with HERZOG for Delivery and Payment July 2020.

**13. Data protection**

We point out in accordance with § 26 BDSG that the data of our business partners, insofar as it is necessary for the business and permitted within the scope of the BDSG, is stored in our data department. In this respect, we also refer to our data protection notice on our website: <https://herzog-online.com/privacy-policy/>

**14. Final provisions**

- 14.1. HERZOG reserves all intellectual property and copyrights to its quotes, drawings and other documentation relating to its offers. They may not be made accessible to third parties or given access to in any other way. The reproduction of such items shall only be permitted within the scope of operational requirements and copyright regulations. The same shall apply to products manufactured with the help of these means of production. Upon request, or when no order is placed, all offer documentation must be returned immediately to HERZOG.
- 14.2. Amendments and additions to this contract have to be made in writing. The requirement stipulating written form cannot be waived verbally.
- 14.3. If individual provisions of these terms & conditions for delivery and payment or further agreements should be or become ineffective, this shall not affect the validity of the remaining provisions of the contract. The contracting parties shall strive to replace such an ineffective provision by a provision the economic result of which comes as close as possible to that of the ineffective provision. The same shall apply to any contractual loopholes.
- 14.4. The law of the Federal Republic of Germany shall apply to the exclusion of the United Nations Treaty governing contracts for the international sale of goods dated 11 April 1980 (CISG) as well as the German conflict of laws.
- 14.5. Upon issue of these terms & conditions for delivery and payment, any previous provisions expressed in other words shall cease to be valid.

Oldenburg, July 2020