

# General Conditions of Service

of Egon Nesper GmbH & Co.KG

## § 1 Scope

(1) Any and all contracts (“Contracts”) entered into by and between Nesper GmbH & Co. KG (“Nesper”) and any Customer (“Customer”), to which Nesper shall deliver goods or services (“Services”), including any associated pre-contractual obligations, shall be exclusively governed by these general conditions of Service (“COS”), unless otherwise expressly agreed upon in writing by the parties hereto. No other terms and conditions of purchase (“Other Terms”) shall govern any Contract, even if Nesper (i) omits to reject such Other Terms, (ii) proceeds with the provision of Services while having knowledge of such Other Terms without objection thereto or (iii) Nesper was notified in writing of such Other Terms.

(2) In the event of a previous or current business relationship between Nesper and Customer, those COS in the form as published at [www.nesper.com/agb](http://www.nesper.com/agb) shall govern any subsequent similar Contract made by and between Nesper and Customer, even if Nesper did not expressly refer to the COS, unless otherwise agreed upon by Nesper and Customer. Upon Customer’s request, Nesper shall provide Customer with a hardcopy of the most current version of the COS free of charge.

## § 2 Conclusion of Contract

(1) Nesper’s offers are subject to confirmation and non-binding unless otherwise stated by Nesper in writing. Customer shall be bound by its offer acceptance for three (3) weeks.

(2) Nesper and Customer shall be legally bound only if (i) they mutually execute a written agreement, (ii) Nesper issues a written order confirmation or (iii) Nesper’s commencement of the provision of Services as agreed upon. Nesper may request from Customer to confirm any oral contractual declarations in writing.

## § 3 Subject Matter of the Contract

(1) The scope, type and quality of deliveries and Services shall be determined by the signed agreement or Nesper’s order confirmation; otherwise by Nesper’s offer. Additional specifications or requirements shall only become part of the Contract, if Nesper and Customer agree thereon in writing or if Nesper confirms such addition expressly in writing. Any subsequent changes to the scope of Services shall be valid only upon mutual written agreement or Nesper’s express written confirmation.

(2) Product descriptions, illustrations and technical data are mere descriptions of the Services to be provided; in no event shall any such description, illustration or technical data be construed as a warranty. Any warranty given by Nesper must be expressly stated as such in writing.

(3) Nesper reserves the right to make minor modifications to the Services, provided these modifications are of immaterial nature and can be reasonably imposed on Customer. In particular, Customer shall accept any commercially customary deviations in quality, quantity, weight or other deviations, even if Customer referred to brochures, illustrations or pictures upon placing an order, unless specifically agreed upon as a binding condition.

#### **§ 4 Time of Performance, Delays, Partial Performances, Place of Performance**

(1) Any information with regard to time of delivery and performance shall be non-binding, unless otherwise stated by Nesper in writing. All terms of delivery and performance are subject to correct and timely availability of supplies and raw materials.

Terms of delivery shall commence with Nesper's dispatch of the order confirmation, but in no event before all commercial and technical questions between Customer and Nesper have been resolved and Customer has fulfilled all incumbent obligations (e.g. provision of all necessary governmental authorizations; approvals or payment of stipulated down payments).

(2) Terms of delivery and performance shall be extended (i) by the period of time in which Customer is in default of payment under the terms of the Contract and (ii) for as long as circumstances exist, for which Nesper does not bear responsibility, but which will prevent Nesper from rendering delivery of Service, with such extension to continue during a reasonable start-up time after the end of the delay. Such circumstances shall include force majeure, shortage of raw materials in relevant commodity markets, any delays caused by Nesper's suppliers and industrial disputes. Any delivery and performance periods shall also be extended by any such time in which the Customer in violation of the Contract does not meet its contributory obligations, e.g. by not providing information, not granting access, or not supplying its employees.

(3) If Nesper and Customer subsequently agree upon different or additional Services affecting any previously agreed upon terms, such terms shall be extended by a reasonable period of time.

(4) If Customer requests and Nesper agrees to a change in delivery date or the time of performance, Nesper shall be entitled to payment at the time when such payment would have been due without such change. Any agreement with respect to a change regarding a delivery date or time of performance shall be in writing.

(5) Customer's reminders and setting of deadlines shall be in writing in order to be valid. Any grace period must be of an adequate nature. A period of less than two (2) weeks shall only be adequate in case of special urgency.

(6) Nesper shall have the right to make partial deliveries, provided that Customer can reasonably use the delivered parts.

(7) Nesper shall be in compliance with stipulated dates of delivery as soon as the goods have been released into the custody of the carrier on the agreed upon date of delivery or as soon as Nesper has communicated its de facto readiness for shipment.

(8) In the event that Nesper's supplier (ultimately) fails to deliver, despite Nesper's careful selection of such supplier, and Nesper's order with such supplier complies with the requirements of Nesper's delivery obligation to Customer, Nesper shall be entitled to fully or partially withdrawal from the agreement with Customer, if Nesper notifies Customer of the failed supply, and – as far as legally permissible – to offer the assignment of Nesper's claims against such supplier to Customer.

## **§ 5 Packing, Dispatch, Passing of Risk, Insurance**

(1) Our deliveries shall be packaged in a manner which is customary in the industry at the Customer's sole expense.

(2) Risk of loss shall pass to Customer as soon as the product has left our factory or warehouse. The immediate foregoing shall also apply to partial deliveries, supplementary deliveries and additional Services provided by Nesper, including payment of shipping or delivery charges. For any contracts for services requiring acceptance, risk of loss shall pass upon acceptance.

(3) Nesper shall, at its sole discretion, chose method of delivery, carrier and delivery route, unless Customer has provided Nesper with written shipping instructions. Nesper shall only be liable for intent or gross negligence in making the selection describe immediately above.

(4) At Customer's specific request, Nesper will, provided that it is possible with reasonable effort to do so, buy insurance coverage at Customer's sole expense, insuring the goods against such risks as identified by Customer during transit.

## **§ 6 Prices, Compensation, Payment, Offset**

(1) All prices are valid ex works unless otherwise agreed upon by Nesper and Customer. All prices and compensations are in Euro plus applicable value added tax and other applicable duties and charges in the country of delivery, plus transportation costs, expenses, packaging, dispatch and, if applicable, insurance of goods in transit.

(2) Customer shall pay the prices stated in the Contract subject to this Paragraph 6.

(3) Unless otherwise agreed upon by Nesper and Customer, payments are due without discount immediately after Nesper's performance and Customer's receipt of invoice and are payable within fourteen (14) days after the billing date.

(4) Upon Customer's default of payment, the invoiced amount shall be subject to a late payment charge of eight percentage points (8%) above the currently applicable legal interest rate. Nesper reserves its rights to claim damages due to any delay in payment.

(5) If (i) Customer's default of payment continues for more than thirty (30) calendar days, (ii) Customer's bills of exchange or checks are being protested or (iii) insolvency proceedings or comparable proceedings under other legal systems are filed against Customer's assets, all receivables against Customer shall immediately become due and

payable, and Nesper shall be entitled to withhold all deliveries and Services, and to exercise all title retention rights.

(6) Customer may only set-off against claims which are either undisputed by Nesper or legally established as final and absolute. Notwithstanding § 354 a HGB (German Commercial Code), Customer may assign claims based on this Contract to third parties only with Nesper's prior written consent, such consent not to be unreasonably withheld. Customer shall have a right to withhold performance or to claim non-performance by Nesper only with respect to the Contract from which such claim arises.

## **§ 7 Retention of Title**

(1) Nesper retains full title to its Services until payment in full of all of its receivables against Customer arising from the Contract. Such receivable shall include claims based on checks and bills of exchange as well as open accounts receivable.

(2) Customer hereby represents and warrants to treat the goods subjected to and for the duration of retention of title with due care and in particular to insure the goods at its sole expense against any damage caused by fire, water and theft at replacement value. Customer hereby assigns all claims for damages under the insurance policy to Nesper and Nesper hereby accepts such assignment. If the assignment is not permitted under applicable law, Customer shall irrevocably instruct the insurance carrier to effect any insurance payments exclusively to Nesper. All of Nesper's other rights associated with the foregoing shall remain unaffected.

(3) Customer shall only be entitled to sell the goods subjected to retention of title in the ordinary course of business. Customer shall not be entitled to pledge the goods subjected to retention of title, transfer the goods by way of security or make other dispositions that potentially compromise Nesper's title to the goods. In the event of attachment or garnishment or other third party interventions, Customer shall inform Nesper immediately in writing and provide all necessary information, so as to enable Nesper to inform such third party with respect of its ownership rights and shall assist Nesper in its activities to protect its goods subjected to retention of title.

(4) Customer hereby assign all claims or demands resulting from the re-sale of goods and any ancillary rights thereto to Nesper, regardless of whether the goods subjected to retention of title were sold with or without additional processing and Nesper hereby accepts such assignment. If the assignment is not permitted under applicable law, Customer hereby irrevocably instructs the third party debtor to make any payments exclusively to Nesper. Nesper hereby revocably authorizes Customer to collect the claims assigned to Nesper in a fiduciary capacity on behalf of Nesper. Customer shall immediately pay any amount collected to Nesper. Nesper reserves the right to revoke Customer's authority to collect any amounts due and to sell the goods, in the event that Customer (i) does not fulfill its payment obligations to the benefit of, (ii) defaults on any payments due to, (iii) stops making any payments due to Nesper, or (iv) if insolvency proceedings are filed against Customer's assets. Customer shall not re-sell any claims without Nesper's prior consent. Customer's authority to collect shall terminate upon notice of assignment to the third-party debtor. In the event of withdrawal of the authority to collect, Nesper shall be entitled to

request that Customer notify Nesper of assigned claims and identity of debtor, provide all information necessary for collection, deliver all pertinent documents and inform the debtor of the assignment.

(5) If Customer's claims stemming from the re-sale are transferred into a current account, Customer hereby assigns its claim against its customer based on the current account to Nesper, in an amount equal to the agreed upon purchase price of the re-sold goods subjected to retention of title plus VAT.

(6) If Nesper exercises its rights in accordance with § 6 para. 5 above, Customer shall (i) grant Nesper immediate access to the goods subjected to retention of title, (ii) provide Nesper with a detailed list of all the existing goods subjected to retention of title, (iii) separate the goods for Nesper and (iv) surrender the goods to Nesper upon request.

(7) Customer's processing or alteration of the goods subjected to retention of title shall be deemed to be carried out to the sole benefit of Nesper. Customer's deferred right to the goods subjected to retention of title shall extend to the processed or altered items. If Nesper's goods will be joined, mixed or processed with other products not owned by Nesper, then Nesper shall become co-owner of the newly produced goods at an ownership-ratio of the value of Nesper's supplied goods to the value of all other products at the time of joining, mixing or processing. Customer shall keep custody of the newly produced goods on behalf and to the benefit of Nesper. The newly produced goods stemming from processing or alteration shall in the same manner be subjected to retention of title as the original goods.

(8) At Customer's request, Nesper shall be required to partially release the collateral to which it is legally entitled, if the liquidity value of the collateral under consideration of standard banking practices exceeds Nesper's claims stemming from its business relationship with Customer by more than ten percent (10 %), to the extent by which the collateral exceeds one hundred ten percent (110%) of Nesper's claims against Customer. Such calculation shall be based on the invoice value of the goods subjected to retention of title and on the nominal value of the claims.

(9) If goods are delivered to countries having a different legal system, under which the concept of retention as set forth in this paragraph will not grant Nesper the same degree of protection as in the Federal Republic of Germany, Customer hereby agrees to provide Nesper with a corresponding security interest. If further declarations or actions are necessary, Customer hereby agrees to make such declarations and take such action accordingly. Customer hereby agrees to participate in all procedures necessary for and beneficial to the effectiveness and enforceability of such security interest.

## **§ 8 Contractual Commitment and Termination of Contract**

(1) Customer shall be entitled to terminate the Contract, in addition to any statutory grounds, only if Nesper conducts a breach of its contractual duty, irrespectively of the legal basis (e.g. contract rescission, claim for damages in lieu of provision of Services, termination for an important reason), if one of the following circumstances is present:

a) Customer shall specifically protest Nesper's breach of contract and shall request Nesper to remedy the breach within a specific time period. In addition, Customer shall notify Nesper of the fact that after expiration of such

time period without remedial action, Customer will not accept any further deliveries with respect to the protested breach and therefore the partial or complete exchange of Services shall be terminated.

b) The time period for correcting the breach must be adequate. A time period of less than two (2) weeks shall only be appropriate in case of an exceptional urgency. Customer shall not be required to set such time period in the event of Nesper's earnest and final refusal of performance or if § 323, para. 2 BGB (German Civil Code) is applicable.

c) Customer must declare the termination of the exchange of Services (in part or completely) due to Nesper's inability to correct the breach within three (3) weeks after expiration of this time period set forth in subsection (a) above. Such time period shall be suspended for the duration of negotiations.

(2) Customer may request rescission of the Contract due to a delay in performance only if Nesper bears exclusive or predominant responsibility for the delay, unless, after assessing the interests of Nesper and Customer, Customer cannot be reasonably requested to adhere to the Contract based on the Nesper's delay.

(3) All declarations made in this context shall be in writing in order to be effective.

(4) A termination in accordance with § 649 BGB (German Civil Code) shall remain applicable subject to statutory laws.

(5) Nesper retains the right to cancel the contractual relationship with immediate effect for the following reasons: if Customer has provided incorrect information regarding his credit worthiness, Customer ultimately discontinued payments, proceedings have been filed against Customer to issue a declaration under oath, insolvency proceedings against Customer's assets or comparable proceedings under a different legal system have been commenced, or if an application for such commencement has been filed, unless Customer pays in advance without delay.

## **§ 9 General Duties of the Customer**

(1) Customer shall be obliged to have all of our deliveries and Services inspected by a competent employee either immediately after delivery or upon receipt in accordance with § 1, para. 1 above, or upon accessibility in accordance with the regulations under commercial law (§ 377 HGB), and to send an objection with respect to the apparent defects immediately and in written form, including a detailed description of the defect.

(2) Customer shall be obliged to test all deliveries and Services thoroughly for usability in the concrete situation prior to commencing productive use thereof. This shall also apply to delivered items, which the Customer receives free of charge in addition to the order or under warranty. The Customer shall be obligated to perform functional tests before delivering its products to its end customers.

(3) Customer shall provide for adequate precautions in the event that Nesper partially or completely fails to accomplish deliveries and Services appropriately (e.g. by securing data, failure diagnosis, examination of the results on a regular basis, emergency planning).

## **§ 10 Limitation of Use, Indemnity**

(1) Unless otherwise expressly agreed upon in writing by Nesper, Nesper's Services (particularly goods or software purchased from or programmed by Nesper) shall not be used in life-sustaining or life-supporting devices and systems, nuclear power plants, for military, aeronautics or other purposes, where a malfunction of the product may, within reasonable assessment, lead to life-threatening situations or cause catastrophic consequential damage.

(2) If Customer violates subsection (1) above, Customer shall solely bear all risk and responsibility associated therewith. Upon first request, Customer shall hereby indemnify Nesper from any liability resulting from the use of goods in the above mentioned contexts and indemnify and hold Nesper harmless, to the fullest extent, including for Nesper's cost for an appropriate legal defense.

## **§ 11 Material Defects**

(1) Nesper's deliveries and Services possess the agreed upon character and condition, and are suitable for the contractually agreed upon usage, or, in the absence of such agreed upon character and condition, are fit for normal usage. In the absence of an express additional agreement, Nesper shall only be responsible for the Services to be free from defects according to the current state of technology. It shall be Customer's sole responsibility to provide for the fitness and safety of Nesper's Services for an end customer application, if not otherwise expressly agreed upon by Nesper.

(2) In addition, Customer's shall have no rights against Nesper based on any defect in Services or title unless it has properly exercised its duties of inspection of and objection to any non-conformity in accordance with §9 para. 1 above and has objected to hidden defects in writing immediately after discovery.

(3) In case of material defects, Nesper reserves the right to supplemental performance. Nesper shall have the right, in its sole discretion, to correct the defect or to deliver goods and/or Services that are free of any such defect. Nesper shall have the right to at least two attempts to remedy a defect.

(4) Nesper may demand from Customer reimbursement for any expenses if no defect can be ascertained. Customer shall bear the burden of proof. § 254 BGB (German Civil Code) shall apply.

If expenses, including cost of transport, travel, work and material increase while Nesper attempts to remedy the defect, Nesper shall not be responsible for such increased expenses, if such increase in expenses is due to the fact that the delivered item was subsequently transported by Customer to a place other than the place of delivery, unless such transport complies with delivered item's contractual and intended use. Customer's claimed personnel and material cost associated with any defect shall be charged to Nesper only on the basis of net cost.

(5) If Nesper finally refuses to remedy the defects, or if the remedy finally fails or is unreasonable to the Customer, Customer shall be entitled to either rescind the Contract in accordance with § 8 above, or reduce compensation adequately and claim damages or reimbursement for expenses in accordance with § 13 below. Customer's claims hereunder shall be time-barred in accordance with § 14 below.

## **§ 12 Defects of Title**

(1) Unless otherwise expressly agreed upon, Nesper shall be obligated to render its Services free of third-party intellectual property (in the following called IP) only in the country of the place of delivery. If a third party asserts a claim against Customer based on an IP violation caused by Services rendered by Nesper on the basis of this Contract, Nesper shall be liable to Customer within the time period set forth in § 14 below as follows:

(2) Nesper will, at its sole discretion and its expense, obtain a license for the Services in question, modify the Services in a manner that no IP will be violated or exchange the Services. If, under reasonable circumstances, Nesper will not be in a position to do so, Customer shall have the right to rescind the Contract or to reduce the compensation for the Services. Customer shall not have the right to claim damages for futile expenses.

(3) Nesper's obligation to payment for damages shall be based on applicable legal provisions and in accordance with § 13 below.

(4) Nesper's aforementioned obligations shall be only valid if Customer (i) immediately notifies Nesper in writing of any claims asserted by third parties, (ii) does not acknowledge any violation and (iii) and defers any defense mechanisms and settlements negotiations to Nesper. If Customer ceases the use of the delivery for reasons of reduction in damages or other important reasons, Customer shall be obligated to instruct the third party that such action shall not constitute an acknowledgement of any IP right violation.

(5) Customer's shall have no rights against Nesper if Customer bears responsibility for the IP right violation. Customer shall also have no rights against Nesper, if the IP right violation was caused by (i) special Customer requirements, (ii) an application that was unforeseeable for Nesper or (iii) a change in delivery by the Customer, or (iv) if the delivery was used together with products not delivered by Nesper.

(6) § 11 shall be applicable to this paragraph.

(7) Any further claims or claims other than those of the Customer set-forth in this paragraph against Nesper or Nesper's vicarious agents due to a defect in title shall be expressly excluded.

## **§ 13 Liability**

(1) Nesper shall pay damages or compensation for futile expenses, regardless of any legal basis (e.g. contractual or similar obligations, defect in goods or title, violation of duty or tort) only to the following extent:

a) Liability based on intent and warranty shall be without limitation.

b) In the event of gross negligence, Nesper shall be liable for typical and foreseeable damage.

c) In other cases, Nesper shall only be liable in the event of a violation of a material contractual obligation, a claim for defects and delay, but only for typical and foreseeable damage.

Any single liability hereunder shall be limited to the value of the agreed upon compensation for the order/part of the Contract and the total liability hereunder shall be limited to ten (10) times the value of the agreed upon compensation payable under this Contract.

(2) In the event of injury to life, body and health and of claims based on the Product Liability Act, the statutory law shall apply exclusively.

(3) Nesper retains the right to raise the objection of contributory negligence.

#### **§ 14 Limitation in Time**

(1) The limitation period shall be as follows:

a) One (1) year from delivery of goods for claims for reimbursement of purchase price, rescission and reduction of purchase price; however, if these claims are based on a proper, not time-barred notice of defects, then no less than three (3) months after submission of an effective notice of withdrawal or reduction;

b) One (1) year from the delivery of goods for claims concerning material defects;

c) One (1) year for claims concerning defects of title; However, if the defect of title stems from a right in rem of a third party on the basis of which such third party may demand delivery, then the statute of limitation shall be applicable.

d) Two (2) years, in case of other claims for damages or reimbursement for futile expenses, starting at the time at which Customer became aware of the circumstances on which the claims are based upon, or at the time at which Customer should have become aware of in the absence of gross negligence.

The limitation period shall run out at the latest with the expiration of the maximum statutory period of limitation (§ 199 para. 3, para. 4 BGB [German Civil Code]).

(2) Notwithstanding the foregoing, the statutory time limitations shall apply for damages and reimbursement expenses based on intent, gross negligence, warranty, fraudulent intent as well as injuries to life, body and health and for claims based on the Product Liability Act.

#### **§ 15 Export**

(1) Nesper's Services are essentially designed to remain in the country of delivery as agreed upon with the Customer. The re-export of products supplied hereunder by the Customer may be subject to governmental approval. The products are particularly subject to German, European and American export controls and embargo laws and regulations. It shall be Customer's duty to independently gather information with regard to these laws and regulations from all appropriate authorities. Nesper shall not be liable for any export permission or export fitness.

(2) It shall be Customer's sole responsibility to obtain all necessary approvals from each respective export authority prior to exporting such products. Any forwarding of products governed by this Contract by the Customer to third parties, with or without Nesper's knowledge, shall require the transfer of the export licensing conditions. The Customer shall at all times remain liable to Nesper for the correct adherence to this condition.

## **§ 16 Non-Disclosure, Data Protection**

(1) Nesper and Customer hereby agree to treat all information which they became aware of or received from the other party prior to the conclusion of or during the term of the Contract, including all documents, information, tools and plans, which are protected by law, or obviously contain business or company secrets or are marked as confidential, notwithstanding the expiration of the Contract, unless such information is publicly known in the absence of a breach of this confidentiality covenant or the other party has no legally protected interest.

Nesper and Customer hereby agree to store and safe-keep all confidential information in a manner so as to prevent any misuse by third parties.

(2) Nesper and Customer hereby agree to disclose the subject matter of this Contract only to employees and third parties as necessary to any of them to execute their business obligations. Nesper and Customer shall instruct any of those persons with regard to the confidentiality requirement of the subject matter of this Contract.

(3) Nesper will process Customer data necessary for the business transactions governed by this Contract under adherence of all applicable data protection laws.

## **§ 17 Social Clause**

When determining any claim for compensation against Nesper in stemming from or in connection with this Contract, Nesper's economic situation, the type, extent and duration of the business relationship, any possible contribution to the cause and/or fault on the part of Customer and an especially unfavorable assembly situation of the product shall be taken into appropriate consideration to the benefit of Nesper. In particular, any compensation, costs and expenses which are to be borne by Nesper shall be in adequate proportion to the value of the delivered goods.

## **§ 18 Written Form Clause**

Any revisions and supplements to the contract must be in writing to be valid. Nesper and Customer shall be deemed to comply with this requirement if they transmit documents in text form, in particular by means of facsimile or e-mail, unless otherwise provided for particular declarations. This written form requirement may only be repealed in writing.

## **§ 19 Applicable Law**

The law of the Federal Republic of Germany shall apply, under exclusion of the United Nations Convention on the International Sale of Goods.

## **§ 20 Jurisdiction**

Customer hereby irrevocably agrees and consents to the exercise of jurisdiction over it by the courts having jurisdiction for the city of Pforzheim, if Customer is a merchant, a public authority or a special fund under public law, or if it is equally treated as such, or if Customer maintain its headquarters or establishment abroad. Nesper reserves the right to commence any legal action in any appropriate jurisdiction.

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