

General Terms and Conditions

General conditions of sale and delivery for EMPUR® Produktions GmbH

Last revised January 2019

Section 1

Scope of Application

Each and every contract is concluded solely and exclusively on the basis of the General Terms and Conditions of Sale, Supply and Payment of EMPUR®. EMPUR® does not accept the Buyer's contrary or deviating terms and conditions unless EMPUR® has expressly agreed to their application in writing. EMPUR®'s terms and conditions of sale apply even if delivery is made to the Buyer without reservation in awareness of Buyer's contrary or deviating terms and conditions of purchasing. EMPUR®'s General Terms and Conditions of Sale, Supply and Payment apply to any future transactions with the Buyer even if no express reference to their application is made during the conclusion of future contracts.

Section 2

Conclusion and Content of Contract

- EMPUR®'s sales offers are subject to change. The Buyer is required to submit an order within a period of 4 weeks. The contract is concluded by EMPUR®'s issue of an order confirmation within this period or by a delivery undertaken immediately in response to the order. The requirement of written form is satisfied by the transmission of order confirmations using web-based technology and/or fax. Oral agreements or oral modifications of or amendments to orders are not legally effective unless expressly confirmed in writing by EMPUR®. EMPUR® is entitled to give notification in its order confirmation of any deviations from the order which the Buyer can reasonably be expected to accept. Any such deviations become binding on both Parties unless the Buyer submits written objection to the content of the order confirmation no later than 12 days after its dispatch. In the event such objection is raised, EMPUR® is entitled to cancel the contract by sending a written statement to this effect within a further period of 12 days; any and all claims to damage compensation are excluded.
- Rescheduling of an order which has effectively been concluded is possible only by mutual agreement.
- EMPUR® is entitled to immediately cancel the contract, in whole or in part:
 - If and when the effects of force majeure (natural disaster, civil unrest, war, government actions, transport disruptions, strikes, lock-outs, operational disruptions) interfere long-term with fulfilment of the contract;
 - If and when EMPUR® does not receive supplies from its own suppliers and is not accountable for the supply failure;
 - If and when a petition for the initiation of bankruptcy proceedings (or equivalent proceedings according to local law) against the Buyer's assets is filed.

Section 3

Place of Performance

- The supply and shipment of the goods is made from EMPUR®'s company headquarters. The Buyer will be billed costs for freight, packaging, shipping and unloading only for a net product value of less than €3,950.00 unless the Parties have otherwise agreed.
- EMPUR® is entitled to make partial deliveries and to issue separate invoices for such deliveries.
- EMPUR® will package the goods properly.
- The regulations of the INCOTERMS as most recently revised (EXW) apply as a supplement to deliveries outside of Germany.

Section 4

Delivery Period

- Compliance with agreed delivery times presumes the receipt in good time of any and all documents, necessary permits and releases to be provided by the Buyer, in particular, but not limited to, plans, as well as the Buyer's compliance with the agreed terms and conditions of payment. If these prerequisites are not fulfilled in good time, the delivery times will be extended by a reasonable period unless EMPUR® is accountable for the delays.
- The day on which the Seller gives notification of the readiness of the purchased goods for shipping is authoritative for determining that the delivery is in good time. If and when the goods are not accepted in due time through the Buyer's fault, EMPUR® may at its discretion, after setting a subsequent period of 10 days, either request immediate payment of the purchase price without regard for any agreed credit line (arrear invoice) or cancel the contract and request damages for non-fulfilment.
- Agreed delivery periods will be extended by a reasonable period in cases of force majeure, industrial actions and other operational disruptions for which EMPUR® is not accountable or in cases of delay in the delivery of essential preliminary materials if the hindrance continues for more than one week. The delivery period will be extended by the duration of the hindrance, but by no longer than 8 weeks plus subsequent delivery period. EMPUR® is obligated to notify the Buyer without delay of the reason for the hindrance as soon as it can be seen that compliance with the agreed delivery periods will not be possible. If a hindrance continues for a period in excess of 5 weeks, both of the Parties have the right to cancel the contract. However, the Buyer's right to cancel the contract must be announced in writing no less than 2 weeks before it is exercised.

Section 5

Subsequent Delivery Period and Damage Caused by Delay

- Upon expiration of the agreed delivery period, a subsequent delivery period of 14 days will commence without further declaration, unless the provisions of Section 4 (3) apply. Upon expiration of this subsequent delivery period, the Buyer is entitled to set in writing a subsequent period of 4 weeks for EMPUR®. Upon expiration of this period, the Buyer is entitled to withdraw from the contract, provided that it has announced this intention when setting the subsequent period. If no such statement was made when the subsequent period was set, EMPUR® will, at its discretion, be released from the obligation to make delivery upon expiration of this period if and when the Buyer has not stated, upon being asked, within the subsequent period whether it insists on fulfilment of the contract.
- No fixed-date transactions are concluded.

- EMPUR® is liable for damage or loss claimed by the Buyer in the event of delays in delivery, including claims for the reimbursement of expenses pursuant to Section 284 BGB [German Civil Code], only if and when it caused the delay in delivery through wilful intent or gross negligence. The above exclusion of liability does not apply in cases of injury to life, body or health, of breach of legally binding warranties and of fraudulent behaviour and gross culpability. In all other respects, compensation claims based on the breach of material obligations of the contract are limited to the foreseeable damage or loss typical of the contract and to 50% of the foreseeable damage or loss in cases of slight negligence unless the possibility of a greater damage or loss was pointed out to EMPUR® at the time the order was placed.

Section 6

Acceptance Obligation

If the Buyer does not accept the goods, announces its refusal to accept before delivery is made or returns delivered goods without justification, or if EMPUR® is entitled to refuse delivery in accordance with Section 11, EMPUR® has the right to request that the Buyer fulfil the contract within a period of 12 days. The Buyer bears the costs incurred for storage, insurance and any other protective measures resulting from the delay in acceptance. EMPUR® is entitled to bill these costs in the lump-sum amount of 0.5% of the order value for each and every week of delay, limited, however, in the aggregate to 5% of the order value. Upon expiration of this period, EMPUR® is entitled to dispose otherwise of the goods and to bill the suffered loss or damage as a lump sum of 33% of the agreed purchase price or, at its discretion, to assert the loss in earnings which it has verifiably actually suffered. The Buyer is entitled to prove that loss or damage actually suffered was lower.

Section 7

Examination for Defects

- The Buyer is obligated to inspect the goods immediately after their receipt and to submit notification of any defects – including the delivery of goods in deviation from the order – within a preclusion period of 7 days after receipt of the goods. In the event of hidden defects, the period commences upon their discovery. EMPUR®'s field representatives are not authorised to accept complaints of defects. Upon expiration of the period, any complaints – including recourse pursuant to Section 478 BGB – are excluded. The above provision also applies in cases in which the Buyer has modified the delivered goods.

Section 8

Liability for Defects

- Deviations in quality, dimensions or weights that are usual in trade or technically unavoidable do not qualify as defects. Manufacturer's public statements, promotions or advertising do not qualify as agreements regarding characteristics.
- If and when the Buyer has proved that it fulfilled its obligations pursuant to Section 377 HGB [German Commercial Code], EMPUR® has the right, at its discretion, in cases of legitimate complaints to carry out subsequent improvement or substitute delivery. EMPUR® is entitled to subsequent performance within a period of 2 months after return of the defective purchased goods. The Buyer's warranty rights are forfeit if and when, in the event of a complaint, it does not make the goods available to EMPUR® despite the latter's express request within a period of 10 days. If and when the subsequent performance has failed, the Buyer is entitled either to cancel the contract or to reduce the purchase price; this option is limited, however, to the goods about which complaint was made.
- There are no claims due to material defects for natural wear and tear of the purchased goods or due to damage occurring after the passing of risk as a consequence of incorrect or negligent handling, overuse or unsuitable operating materials or arising from unusual external influences that were not foreseen in the contract. If the Buyer or third parties undertake improper modifications or repair work, there are also no claims due to defects for these and the resulting consequences. The following circumstances also result in the exclusion of warranty and liability claims:
 - Improper use of the purchased goods
 - Improper installation, commissioning, operation and maintenance of the purchased goods
 - Failure to observe the information in the operating instructions regarding transport, storage, installation, commissioning, operation, maintenance
 - Unauthorised construction changes
 - Effects of force majeure
- If the complaint of defects proves to be unjustified, the Buyer is obligated to reimburse any expenditures incurred by the complaint (transport costs, inspection costs etc.).
- If the Buyer has installed the defective product in another object or attached it to another object in accordance with its character and intended purpose, EMPUR® is entitled to point out to the Buyer the reimbursement for expenses pursuant to Section 439 (3) BGB in addition to the liability for the defective purchased product. Reworking by the Seller instead is subject to agreement. The expenses within the sense of Section 439 (3) BGB do not include the costs that result because parts that do not belong to the delivered product are destroyed, in whole or in part, during the installation and removal, unless it can be proved that the Seller acted culpably within the sense of wilful intent or gross negligence.
- In the event that the costs for subsequent improvement are unreasonable, EMPUR® is entitled to refuse to carry out the subsequent performance or the type of subsequent performance as well as the claim to reimbursement of expenses pursuant to Section 439 (4) BGB.
- If transport, road, labour and material costs increase because the purchased product has been conveyed to a site other than the contractually agreed destination, the resulting increase in the expenses will not be borne by EMPUR®.
- There are no warranty claims for parts subject to wear and tear.
- The warranty period for new goods is 1 year as of the passing of risk. This period is a limitation period and also applies to the assertion of loss or damage which did not occur to the supplied goods themselves, presuming that any liability at all pursuant to Subsection 4 is to be assumed. Claims for actions in tort or for allegations of bad faith on the part of EMPUR® are subject to statutory limitation periods. There is a warranty for used or restored products solely if such a warranty has been specifically agreed; otherwise, any such warranty is excluded. If legal provisions prescribe longer warranty periods (e.g. Section 438 BGB), these periods apply.

10. In the event of legitimate complaints due to defects, the Buyer may retain payments solely in a scope that is in a reasonable relationship to the defects that have occurred and the subsequent improvement costs required for the remedy. If and when payment obligations beyond this scope are not fulfilled:
- EMPUR® is entitled to refuse subsequent performance until payment of the legitimate claim has been made;
 - Regress claims in accordance with Section 478 BGB are excluded.
11. The Seller is liable additionally, pursuant to the provisions governing contracts for works in the BGB, for defects in the milling and installation work (laying of heating pipes and installation of the distributor) carried out by the affiliated company EM-solution within the framework of the CUT-THERM® modernisation. Liability for defects is excluded or restricted in the event of a breach by the end customer (heating engineer or installer) of the "General Notes and Information for the End Customer" provided to it by the Seller.

Section 9

Limitation of Liability

If and when EMPUR®'s subsequent performance fails, the Buyer is not entitled to the assertion of any claims, regardless of the legal basis (including provisions concerning actions in tort), in excess of the rights pursuant to Section 437, nos. 2 and 3 BGB. EMPUR® is not liable for damage or loss which did not occur to the goods themselves or for lost profit or other pecuniary losses of the Buyer. To the extent that EMPUR®'s liability is excluded or limited, said exclusion or limitation also applies to the personal liability of its management, its permanent employees, worker representatives and vicarious agents. The indemnification from liability does not apply to injury to life, body or health; if and when loss or damage has been caused wilfully or through gross negligence; or, if EMPUR® has assumed a warranty of characteristics, or EMPUR® can be blamed for fraudulent behaviour. Moreover, it does not apply to claims asserted pursuant to Sections 1 and 4 of the German Product Liability Act. If and when EMPUR® is in breach of a cardinal obligation or other material obligation of the contract due to negligence, the compensation obligation is limited to the foreseeable damage or loss typical of the contract and to 50% of the foreseeable damage or loss in cases of slight negligence.

Section 10

Payment

1. The invoice will be issued on the day of delivery or when the goods are made available. Invoices are payable net within 30 days. The Buyer is entitled to deduct a cash discount of 3% if payment is made within 8 days of the issue of the invoice and to deduct a cash discount of 2% if payment is made within 14 days of the issue of the invoice.
2. If and when EMPUR® shows the prices in foreign currency, they will not be affected by changes in the official exchange rate of the euro to the foreign currency. Payment in these cases must be made in the foreign currency and in the amount of the invoice. Bills of exchange or cheques are accepted only on account of performance.
3. When payment is made by cheque, the date of the redemption of the cheque is authoritative; when payment is made by bank transfer, the date the payment is credited to EMPUR®'s account is authoritative.
4. Payments are always attributed to settlement of the oldest due claim plus any default interest which has accrued to this claim.
5. EMPUR®'s prices are shown excluding legally applicable VAT. VAT in the statutory amount will be itemised in the invoice on the day of the issue of the invoice.
6. For transactions outside Germany, the purchase price must be paid in advance before shipment/provision of the goods.

Section 11

Default of Payment

1. In the event of default of payment, EMPUR® is entitled to charge default interest in the amount of 9 percentage points over the base lending rate or to request compensation for verifiably higher loss or damage owing to the default.
2. EMPUR® has the additional rights shown below in the event of default of payment caused by exceeding the granted credit line:
 - a) EMPUR® is entitled to refuse to make further deliveries pursuant to current contracts. Delivery periods for current contracts which have not been fulfilled will be suspended, without specific notice, retroactively as of the time from the default of payment until full payment has been made.
 - b) EMPUR® is entitled to request immediate payment before delivery of the goods for any outstanding deliveries from any and all current contracts, any agreed credit lines notwithstanding.
 - c) EMPUR® is entitled to exercise the rights agreed in Section 13 (securing retention of title) and/or to cancel, in whole or in part, any and all current contracts.
3. EMPUR® is also entitled to the above-mentioned rights if a significant worsening of the Buyer's financial position occurs (e.g. suspension of payment to other parties, petition for bankruptcy, execution measures, protests to cheques or bills of exchange, closing of business).
4. In the event of default of payment, the Buyer must bear any and all costs and fees incurred by EMPUR®. Moreover, the Buyer must bear any and all costs EMPUR® incurs for the engagement of a German or foreign lawyer, including a correspondence lawyer.

Section 12

Offset and Retention

The Buyer may offset counterclaims only if and when they are undisputed or have been finally adjudicated. The above provision also applies to a right of retention, provided that the Buyer is a merchant. If this is not the case, a right of retention may be asserted only if and when the counterclaim arises from the same contractual relationship.

Section 13

Securing of Retention of Title

1. EMPUR® retains title of ownership to the goods (reserved goods) until full payment of any and all claims from the delivery of goods from the entire business relationship, including subsidiary claims, damage compensation claims and the redemption of cheques and bills of exchange. The retention of title also remains effective if and when individual claims have been assimilated into a current invoice and the balance has been determined and acknowledged.

2. Any processing or working undertaken by the Buyer is done on behalf of EMPUR®, but does not establish any obligations on EMPUR®. If and when reserved goods are processed, used and mixed with other goods that do not belong to EMPUR®, EMPUR® is entitled to a share of co-ownership in the new product in the ratio of the invoice value to the other processed goods at the time of the processing, use or mixture. If the Buyer acquires sole ownership of the new product, the Parties are in agreement that the Buyer will grant to EMPUR® a share of co-ownership in the new product in the ratio of the invoice value of the processed, combined or mixed reserved goods and will safeguard the new goods on EMPUR®'s behalf free of charge.
3. The Buyer is entitled to resell the goods in the ordinary course of its business. However, it assigns here and now any claims, including any and all subsidiary rights, arising from the resale of the reserved goods. EMPUR® accepts this assignment. The Buyer remains authorised to collect the assigned claims.
4. The Buyer is not authorised to utilise the reserved goods within the scope of global assignments to financing institutes or similar institutions or to pledge or assign them by way of security in any other fashion. The Buyer shall notify EMPUR® immediately in writing of any attachments or other seizures by third parties so that it is in a position to assert its rights in accordance with Section 771 ZPO [German Civil Procedure]. If and when the third party is not able to reimburse EMPUR® for court and out-of-court costs of a suit in accordance with Section 771 ZPO, the Buyer is liable for any loss or damage that is suffered.
5. In the event of breach of contract by the Buyer, in particular in case of default of payment, EMPUR® is entitled to cancel the contract and to take back the purchased goods. The Buyer agrees to this condition here and now. After reclaiming possession of the purchased goods, EMPUR® is entitled to utilise them, whereby the resulting loss or damage may be billed in accordance with Section 6.
6. If and when the value of EMPUR®'s collateral exceeds that of its claims by more than 20%, EMPUR® will, upon petition by the Buyer, release the excess collateral at its discretion.

Section 14

Industrial Property Rights and Copyrights, Life Cycle Management Act

1. A review of any documents provided by the Buyer (templates, samples etc.) to determine whether they are subject to any third-party rights, in particular, but not limited to, copyrights and industrial property rights, is the sole and exclusive responsibility of the Buyer. If and when claims pursuant to any such rights are asserted against the Supplier, the Buyer is obligated to compensate the Supplier for any and all loss or damage suffered by the latter as a consequence.
2. Unless otherwise agreed, the Supplier is obligated to perform the delivery free of any and all third-party industrial property rights and copyrights (hereinafter: intellectual property rights) solely in the country of the delivery destination. If and when a third party asserts legitimate claims against the Buyer pursuant to an infringement on intellectual property rights by products delivered by the Supplier and used in accordance with the contract, the Supplier is liable within the period defined in Section VII (3) as follows:
 - a) The Supplier will, at its discretion and at his own expense, either obtain a utilisation right for the pertinent product, modify the product so that it no longer infringes on the intellectual property right or replace the product. If this is not possible under conditions that are reasonable for the Supplier, the Buyer is entitled to statutory rights of cancellation of the contract or reduction of the purchase price.
 - b) The Supplier's obligations described above apply to relationships between entrepreneurs solely if and when the Buyer notifies the Supplier without delay in writing about the claims asserted by the third party and does not acknowledge any infringement and any and all defence measures and settlement negotiations remain the sole responsibility of the Supplier.
 - c) If and when the Buyer suspends use of the products for the purpose of minimising loss or damage or for other good reasons, it is obligated to notify the third party that the suspension of the use of the products does not entail any acknowledgement of any infringement of intellectual property rights.

Section 15

Proper Law

1. The Parties agree that any and all legal transactions will be governed by the laws of Germany. The application of the provisions of the UN Uniform Law on the International Sale of Goods for Movable Items is expressly excluded.
2. If and when goods are exported, EMPUR® is responsible for compliance with the relevant German legal provisions. Observance and performance of the relevant foreign trade legal provisions (e.g. import licences, currency transfer permits etc.) and any and all other laws applicable outside of Germany, including, but not limited to, those of the destination country, fall within the Buyer's purview.

Section 16

Venue

If and when the Buyer is a merchant, the agreed venue for any disputes, including those related to bills of exchange and cheques, is the court having local jurisdiction for EMPUR®'s company headquarters Linz on the Rhine. However, EMPUR® is also entitled to file suit against the Buyer at the latter's registered place of business.

Section 17

Severability and Subsidiary Agreements

1. If and when individual provisions of this contract, in whole or in part, should be invalid or later become invalid, the validity of the remaining provisions of the contract will not be affected. The above provision also applies if it is determined that there is an omission in the regulations of the contract. In lieu of the invalid or unenforceable provisions or to remedy the omission, a regulation will be deemed agreed that corresponds most closely in legally permissible form to the commercial intent of the invalid or unenforceable provision or, in the case of an omission, that takes into account the provision that the Parties would have wanted (in accordance with the sense and purpose of the contract) if they had considered the point at the time of the conclusion of the contract or the later addition of a provision.
2. Subsidiary agreements with persons whose representation authority for EMPUR® is not shown in the Commercial Register are invalid unless EMPUR® expressly confirms them in writing.
3. Oral subsidiary agreements are not valid.