

# **KOA Europe GmbH - General Terms and Conditions of Sale**

## **Current as of May 2015**

### **I. SCOPE AND CONCLUSION OF CONTRACT**

1. These General Terms and Conditions of Sale (hereinafter referred to as the "**Terms and Conditions**") apply to the sale and supply of goods and services (hereinafter referred to as "**deliveries**") to the customer by KOA Europe GmbH (hereinafter referred to as "**KOA**"). These Terms and Conditions govern the contract exclusively. Any terms and conditions submitted by the customer that vary from or conflict with them will not be binding unless expressly agreed in writing by KOA and the customer. These Terms and Conditions will apply even if KOA makes delivery, without objection, despite knowing that the customer's terms and conditions vary from or conflict with these Terms and Conditions.
2. Quotations given by KOA will be subject to confirmation and will remain valid for a period of 10 days unless the quotation provides otherwise. KOA will examine the customer's order, which will be deemed a binding purchase offer by the customer, and, if KOA accepts the offer, it will then send the customer an order confirmation. Otherwise KOA will contact the customer to agree on possible changes to the order. The parties will be bound by the details in the order confirmation unless the customer brings any discrepancies to KOA's attention without delay.

### **II. DELIVERY, DELAY AND DEFAULT IN ACCEPTANCE**

1. All deliveries will be made in accordance with the ICC Incoterms 2010. Except where KOA and the customer have agreed otherwise, all quotations and prices stated by KOA are "ex works", see Article III. section 2(a).
2. The goods will be made available for pick-up in KOA sales packaging. If the customer requests that the goods be delivered in special packaging or specially marked, it will bear the related costs. As long as this would not be an unreasonable burden on the customer, KOA has the right to deliver in installments.
3. KOA's compliance with the agreed delivery dates will be conditional upon the customer's performance of any other duties for which it is responsible (see, for example, Article III. section 3 of these Terms and Conditions) as well as its provision on

a timely basis of the documents to be supplied by it, as well as the necessary approvals and releases, in particular, but not limited to plans. If these preconditions are not met on a timely basis, the agreed delivery dates will be extended accordingly.

4. The customer may only rescind the contract on the basis of late delivery if the late delivery is due to fault on KOA's part and the customer has, in accordance with the statutory provisions, set KOA a reasonable grace period for performance in writing and KOA has failed to perform within this period. These restrictions do not apply where KOA and the customer agreed at the time they entered into the contract that the delivery time would be of the essence so that late delivery would not constitute performance.
5. If KOA's failure to comply with an agreed delivery date is due to an event of force majeure, the delivery date will be extended by a reasonable amount of time, i.e. by the length of time that the impediment lasts plus an additional reasonable start-up period. Force majeure is any occurrence beyond KOA's control which prevents it from performing its obligations, in whole or in part, including but not limited to mobilization, wars, riots, strikes, earthquakes, interruptions to power supplies, fires, floods, lock-outs, interruptions to operations for which KOA is not responsible or orders made by a public authority. Supply problems and other defaults by KOA's subcontractors will also be considered force majeure events if the subcontractor's failure to perform its obligations is due to an event described in the previous sentence. KOA will notify the customer as to the time when an event of force majeure begins and when it ends. It will use its best efforts to eliminate the event of force majeure and to mitigate its effect as much as possible. Under the rules governing frustration of contract [*Wegfall der Geschäftsgrundlage*] (§ 313 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*)), either party may request an adjustment of contract where it cannot be reasonably expected to adhere to the contract in light of the circumstances in the individual case. Notwithstanding the foregoing, either party may cancel the customer's orders which are affected by the event of force majeure if 12 weeks after the agreed delivery date the force majeure has still not ended.
6. If the customer fails to take delivery of the goods on time, it will be liable to pay storage fees to KOA in the amount of 0.5% of the net price of the goods to be delivered for each month of delay or any part thereof, but at most 5% of the net price unless the parties have agreed otherwise. Either party may present evidence to show that the storage costs were higher or lower.
7. As the customer is a trader, it cannot avail itself of the right of withdrawal provided in § 312 g (1) and § 355 – § 356 of the German Civil Code. KOA will not accept returns unless it has been notified of and agreed to them in advance, and the customer has

complied with KOA's instructions for returning goods. Where KOA has agreed to a return in an individual case, the customer will be obliged to use the "Return Material Authorization (RMA) Number" issued by KOA and to comply with any further instructions for returning goods. KOA will notify the customer of the RMA number and the customer will ensure that the number is clearly visible on any return. The goods must be returned in their original packaging or otherwise suitably packaged.

### **III. PRICES AND TERMS OF PAYMENT, DEFAULT IN PAYMENT, RIGHTS OF SET-OFF**

1. The price payable by the customer is the price stated in KOA's order confirmation/invoice.
2. Unless otherwise agreed, the following will apply:
  - a) The prices stated are EXW (= ex works in accordance with the ICC Incoterms 2010) Dägeling, Schleswig-Holstein, Germany, and include packaging costs; prices stated are exclusive of any applicable value-added tax which may be owed. Upon the customer's request and at its expense, KOA will, however, provide it with all of the information it needs to insure the goods against transport risks.
  - b) KOA's goods and services will be invoiced at the prices valid on the day of the delivery.
  - c) Invoices are payable to KOA without deduction in the respective currency in which they are expressed within 30 days of the invoice date. The customer's payment obligations will not be considered satisfied until the money is credited to KOA's bank account. If the customer fails to make payment within 30 days, it will be automatically in default.
3. KOA may refuse to make any further deliveries to the customer if it becomes apparent that the customer's financial standing poses a risk to KOA's claim for payment or if the customer is in default in relation to invoices for previous deliveries. The foregoing also applies to unconnected claims, i.e. where the length of time between previous deliveries and the new contract is not short, or the subject matter of the previous deliveries is not closely related to the subject matter of the new contract.
4. KOA may set off all claims which it or any company in which it directly or indirectly holds a majority of shares (KOA Group companies) has against the customer against any claim of the customer against the KOA Group. Upon request, KOA will send the customer a list of the companies belonging to the KOA Group. The customer may only

set off against KOA's claims those of its claims which are undisputed or non-appealable, or which are in proportion to KOA's claim for payment against it.

#### IV. RETENTION OF TITLE

1. The goods delivered (hereinafter referred to as "**goods to which KOA retains title**") will remain the property of KOA until all of KOA's claims against the customer that arise from their business relationship have been satisfied. If the value of all the security interests to which KOA is entitled exceeds the value of all the secured claims by more than 20%, KOA will upon request by the customer release a corresponding part of its security.
2. The customer must treat the goods with due care. It will be obliged, at its own expense, to take out adequate replacement value insurance to cover damage by fire, water or from theft.
3. In the event that the goods are worked and/or processed, this will be for the benefit of KOA; where contingent rights in the old goods have validly accrued to the customer, these rights will continue to exist in the worked and/or processed goods. To cover the eventuality that the goods to which KOA retains title are combined and/or mixed with other goods which are not the property of KOA, the parties hereby agree that KOA will have co-ownership rights in the new and/or mixed product (hereinafter referred to as the "**new product**") in an amount proportional to the ratio of the value of the combined and/or mixed goods to which KOA retains title to the value of the other combined and/or mixed goods, at the time they were combined and/or mixed. The customer will, with the diligence of a prudent businessman, store and protect the new product on KOA's behalf and will do so free of charge.
4. The customer is not permitted to pledge or assign the goods as security while they remain subject to KOA's retention of title. It may, however, resell them in the ordinary course of business if it also imposes a retention of title clause on its own purchaser. The customer will only be entitled to do this if it is not in default of payment in relation to KOA.
5. To cover the eventuality that it sells the goods to which KOA retains title, the customer herewith assigns to KOA, as security, any claims that it may have against its purchaser from a resale of the goods to which KOA retains title as well as any claims that it may have against its purchaser or a third party, irrespective of the reason, in respect of the goods to which KOA retains title (e.g. claims based on tort or claims to insurance

payments) – including outstanding balances in any running accounts. The assignment will, however, be limited to the price invoiced by KOA for the goods to which KOA retains title. Priority in satisfaction will be given to the portion of the claim which was assigned to KOA.

The customer may collect the claims assigned to KOA from the resale until KOA revokes this authorization. The customer will require the written consent of KOA to assign or pledge such claims. Except where KOA has no legitimate interest in the notification of third parties of the assignment, the customer will be obliged to notify third parties thereof when requested to do so by KOA. Furthermore, the customer will be obliged to supply KOA with the information and documents necessary to collect the claims.

Any costs arising in connection with the collection of the claims will be borne by the customer. With regard to the goods to which KOA retains title or the new product, the customer will at its own expense take all measures necessary to prevent possible impairment of or loss to KOA's rights.

6. In the event that a third party attaches, seizes or encumbers, or otherwise disposes of the goods to which KOA retains title, the customer will inform KOA in writing without delay and will assist it in resisting such measures.
7. Where KOA requests it to do so and where KOA has a legitimate interest in this, the customer will grant KOA or a party engaged by it access to those goods to which KOA retains title that are in its possession and will supply a detailed list of them and, in the event of KOA's withdrawal from the contract, will hand them over to KOA.
8. The parties agree that as between themselves the customer will bear any costs and expenses that arise as a result of its duty to assist KOA in pursuing and enforcing its rights from its retention of title.

## **V. WARRANTIES**

1. The customer must inspect the goods delivered within five working days and must notify KOA in writing of any obvious defects in quality within two more working days. Otherwise the goods delivered will be deemed to have been accepted. The customer may not refuse to accept deliveries due to minor defects. Notice of hidden defects must be given without delay after their discovery. Notice of such defects will be considered timely if sent without delay.

2. Even where the customer has complied with its duty to examine the goods and to give notice of defects pursuant to Article V. section 1, it will have no warranty claims against KOA if the goods delivered are only slightly different in quality to that which was agreed, if their fitness for use is only slightly impaired, if they are subject to natural wear and tear, or if damage occurs after the passing of risk due to faulty or negligent handling, excessive loads, unsuitable operating equipment, poor workmanship or other external influences which are not provided for in the contract. No warranty claims will be available where the goods delivered are modified or repaired by the customer or a third party improperly.
3. Any warranty claims by the customer become time-barred 12 months after delivery of the goods [*Ablieferung*]. This does not apply in the case of claims arising in connection with loss of life, bodily injury or illness or gross negligence or liability under the Product Liability Act (*Produkthaftungsgesetz*) or in cases where statutory provisions governing the rights of redress of traders (§ 479 of the German Civil Code) prescribe longer mandatory time limits. The customer will have the rights of redress against KOA pursuant to § 478(2) of the German Civil Code unless the customer has agreed with its purchaser to liability that goes beyond the scope of the statutory warranty rights.
4. Irrespective of how long they have been in use, where defects in quality are found in the goods during the warranty period, KOA may, at its discretion, repair or replace the goods, free of charge, within a reasonable period if the cause of the defects already existed at the time the goods were delivered to the customer at KOA's business premises. Notwithstanding any rights that it may have to damages pursuant to Article VII., the customer will be entitled to elect to reduce the purchase price or to rescind the contract if the method of remedying the defects chosen by KOA was unsuccessful. Where it remedies the defects through repair or replacement, KOA will not be responsible for the costs of dismantling defective goods which have already been installed or for installing replacement goods.
5. Where the customer's warranty claims are justified (in the case of defects in quality and/or defects in title), it may withhold payment in an amount which is proportionate to the defects that have occurred. If the warranty claims were unjustified, KOA will be entitled to claim compensation from the customer for those expenses which it has incurred in connection with the unjustified claims.
6. Otherwise, Article VII. (Liability) applies to damages claims against KOA. All further warranty claims for defects in quality and other warranty claims for defects in quality not covered by this Article V. or Article VII. against KOA or its vicarious agents are excluded.

## VI. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHTS, LEGAL DEFECTS

1. KOA unconditionally reserves its industrial property rights and copyrights in its cost estimates, construction drawings and other documents (hereinafter referred to as "**documents**"). The documents may only be made available to third parties with KOA's prior consent and must be immediately returned to it upon request where KOA is not awarded the contract. Sentences 1 and 2 apply mutatis mutandis to the documents of the customer; these may, however, be made available to other companies within the KOA Group as well as to those third parties to which KOA is permitted to subcontract deliveries.
2. KOA unconditionally reserves its industrial property rights and copyrights for all standard goods as well as for those goods which have customer-specific features. The customer has a non-exclusive right to use the goods and standard goods it ordered and received from KOA.
3. Unless otherwise agreed, KOA is merely obliged to deliver the goods free from industrial property rights and copyrights of third parties (hereinafter referred to as "**commercial rights**") in the country where the place of delivery is located. If a third party asserts a justified claim against the customer due to the infringement of its commercial rights by the goods delivered by KOA, the customer will be entitled to the following rights against KOA within the time limits specified in Article V. section 3 of these Terms and Conditions:
  - a) KOA will, at its discretion and own expense, obtain a right of use for the goods delivered or modify them so that they do not infringe third-party commercial rights or replace them. If KOA is unable to carry out these measures without incurring unreasonable expense, the customer will be entitled to exercise its statutory right of rescission or its statutory right to reduce the purchase price.
  - b) KOA will be obliged to pay damages in accordance with Article VII. of these Terms and Conditions. All further warranty claims for defects in title and other claims by the customer against KOA or its vicarious agents for defects in title are excluded.
4. The obligations of KOA specified above are conditional upon the customer notifying KOA in writing without delay as to the rights asserted by the third party.

5. In addition, the customer will not recognize the alleged infringement of commercial rights in relation to the third party so that KOA is free to defend and settle all litigation. If the customer ceases to use the delivered goods, it will notify the third party that this does not constitute recognition on its part of an infringement of commercial rights.
6. Claims by the customer are excluded where it is responsible for the infringement of commercial rights. Furthermore, claims by the customer are excluded if the infringement of commercial rights was caused by its special requirements, its use of the goods delivered in a manner unforeseeable to KOA or its changes to or use of the goods delivered in combination with other goods not delivered by KOA.

## **VII. LIABILITY**

1. KOA will be liable for any intentional or gross negligence on the part of its employees, representatives and/or vicarious agents in accordance with the statutory provisions.
2. KOA will also be liable for any breach of a material contractual obligation caused by slight negligence on the part of its employees, representatives and/or vicarious agents in accordance with the statutory provisions; however, in this case its liability will be limited to the foreseeable damage that typically occurs. Material contractual obligations are those obligations that the contract imposes on the seller/agent whose fulfillment is of the very essence for the proper implementation of the contract and, upon whose fulfillment, the customer may regularly rely.
3. Where delivery is late due to slight negligence, the customer's damages for loss from the delay will be limited to a maximum of 10% of the purchase price in respect of that part of the delivery which could not be put to the intended use due to the delay.
4. Any further liability on the part of KOA is excluded. This does not apply to liability for intentional wrongdoing or negligence in connection with loss of life, bodily injury or illness. These remain – as does mandatory liability under the Product Liability Act – unaffected.

## **VIII. JURISDICTION, APPLICABLE LAW AND FINAL PROVISIONS**

1. All disputes arising directly or indirectly from the contractual relationship are subject to the exclusive jurisdiction of the courts of Itzehoe if the customer is a merchant. KOA will



nonetheless be entitled to sue the customer at the place where the customer has its registered office.

2. The legal relationships connected with this contract will be governed by German law, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).
3. The remaining provisions of the contract and these Terms and Conditions will remain valid regardless of whether an individual provision is legally invalid or void. Where these Terms and Conditions require notice to be given in writing, notice given by email or fax will be adequate to comply with these formalities.

#### **IX. COMPLIANCE WITH EXPORT CONTROL REGULATIONS**

1. To cover the eventuality of goods delivered by KOA being resold abroad, the customer warrants that it will comply with all applicable export control regulations in the country where it has its registered office and with the Japanese export control regulations, and warrants that it will not violate U.S. international trade law or the export administration regulations (EAR). Information about EAR may be found by visiting <http://www.access.gpo.gov/bis/index.html> .
2. The customer warrants that the goods delivered by KOA will not be used to develop weapons of mass destruction or for any other purpose prohibited under EAR.
3. The customer will obtain warranties in the same terms as sections 1 and 2 from its purchaser if it resells the goods delivered by KOA. In addition, the customer will take appropriate measures to ensure that its purchaser or subsequent recipients of the goods
4. (i) are not listed on the end user list of the Japanese Ministry of Economy, Trade and Industry (<http://www.meti.go.jp/policy/anpo/catch-all/userlist/gaikoku-risuto.pdf>), which is regularly updated, (ii) are not resident in an embargoed country, and (iii) are not persons or legal entities subject to trade restrictions, control or prohibitions under EAR.

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