

# Terms and Conditions of Sale

emp Biotech GmbH and emp Biotech LLC



Terms and Conditions of Sale for emp Biotech GmbH and emp Biotech LLC

## 1. INTERPRETATION

1.1 In these conditions:

"BUYER" means the person who accepts a quotation or whose order for the goods is accepted by the Company.

"GOODS" means the goods (including any instalment of the goods or any parts of them) which the Company is to supply in accordance with these conditions.

"COMPANY" means emp Biotech GmbH and/or emp Biotech LLC.

"CONDITIONS" mean the standard terms and conditions set out in this document and (unless the context otherwise requires) includes any special terms and conditions agreed in Writing between the Buyer and the Company.

"CONTRACT" means the contract for the purchase and sale of the Goods.

"WRITING" includes e-mail, letters, telex, cable, facsimile and comparable means of communication.

1.2 Any reference in these Conditions to any provision of a statute shall be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.

1.3 The headings in these Conditions are for convenience only and shall not affect their interpretation.

## 2. BASIS OF THE SALE

2.1 The Company shall see and the Buyer shall purchase the Goods in accordance with any written quotation of the Company which is accepted by the Buyer, or any written order of the Buyer which is accepted by the Company, subject in either case to these Conditions, which shall govern the Contract to the exclusion of any other terms and conditions subject to which any such quotation is accepted or purported to be accepted, or any such order is made or purported to be made by the Buyer.

2.2 No variation to these Conditions shall be binding unless agreed in Writing between the authorised representatives of the Buyer and the Company.

2.3 The Company's employees or agents are not authorised to make any representations concerning the Goods unless confirmed by the Company in Writing. In entering into the Contract the Buyer acknowledges that it does not rely on, and waives any claim for breach of, any such representations which are not so confirmed.

2.4 Any advice or recommendation given by the Company or its employees or agents to the Buyer or its employees or agents as to the storage, application or use of the Goods which is not confirmed in Writing by the Company is followed or acted upon entirely at the Buyer's own risk, and accordingly the Company shall not be liable for any such advice or recommendations which is not so confirmed.

2.5 Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the Company shall be subject to correction without liability on the part of the Company.

## 3. ORDERS AND SPECIFICATIONS

3.1 No order submitted by the Buyer shall be deemed to be accepted by the Company unless and until the Company commences to perform its obligations under the Contract.

3.2 The Buyer shall be responsible to the Company for ensuring the accuracy of the terms of any order (including any applicable specification) submitted by the Buyer and for giving the Company any necessary information relating to the Goods within sufficient time to enable the Company to perform the Contract in accordance with its terms.

3.3 The quantity, quality and description of and any specification for the Goods shall be those set out in the Company's quotation (if accepted by the Buyer) or the Buyer's order (if accepted by the Company).

3.4 If the Goods are to be manufactured or any process is to be applied to the Good by the Company in accordance with a specification submitted by the Buyer, the Buyer shall indemnify the Company against all loss, damages, costs and expenses awarded against or incurred by the Company in connection with or paid or agreed to be paid for infringement of any patent, copyright, design, trade mark or other industrial or intellectual property rights of any other person which results from the Company's use of the Buyer's specification.

3.5 The Company reserves the right to make any changes in the specification of the Goods which are required to conform with any applicable safety or other statutory requirements or, where the Goods are to be supplied to the Company's specification, which do not materially affect their quality or performance.

3.6 No order which has been accepted by the Company may be cancelled by the Buyer except with the agreement in Writing of the Company and on terms that the Buyer shall indemnify the Company in full against all loss (including loss of profit), costs (including the cost of all labour and materials used), damages, charges and expenses incurred

by the Company as result of cancellation.

#### 4. PRICE OF THE GOODS

4.1 The price of the Goods shall be the Company's quoted price or, where no price has been quoted (or a quoted price is no longer valid), the price listed in the Company's published price list current at the date of dispatch of the order. All prices quoted are valid for a maximum of forty five (45) days only or the validity period as set forth in the quotation or until earlier acceptance by the Buyer, after which time they may be altered by the Company without giving notice to the Buyer.

4.2 Except as otherwise stated under the terms of any quotation or in any price list of the Company, and unless otherwise agreed in Writing between the Buyer and the Company, all prices are given by the Company on an ex. works basis, and where the Company agrees to deliver the Goods to the Buyer's premises or such other address as the Buyer may direct, the Buyer shall be liable to pay the Company's charges for transport, packaging, documentation fees and insurance. The Company will use reasonable endeavours to provide a reasonable estimate of all such expenses upon the request of the Buyer.

4.3 The price of the goods is exclusive of any applicable value added tax, which the Buyer shall be additionally liable to pay to the Company.

#### 5. TERMS OF PAYMENT

5.1 Subject to any special terms agreed in Writing between the Buyer and the Company, the Company shall be entitled to invoice the Buyer for the price of the Goods on or at any time after despatch of the Goods, unless the Goods are to be collected by the Buyer or the Buyer wrongfully fails to take delivery of the Goods, in which event the Company shall be entitled to invoice the Buyer for the price at any time after the Company has notified the Buyer that the Goods are ready for collection or (as the case may be) the Company has tendered delivery of the Goods.

5.2 The Buyer shall pay the price of the Goods no later than the due date of the invoice issued for the sale of the Goods to the Buyer. The time of payment of the price shall be the essence of the Contract. Receipts for payment will be issued only upon request, and only the Company's official receipt or cash credit advance note shall constitute a valid receipt.

5.3 If the Buyer fails to make any payment before or on the due date then, without prejudice to any other right or remedy available to the Company, the Company shall be entitled to:

5.3.1 cancel the Contract or suspend any further deliveries to the Buyer;

5.3.2 appropriate any payment made by the Buyer to such of the Goods (or the goods supplied any other contract between the Buyer and the Company) as the Company may think fit (notwithstanding any purported appropriation by the Buyer) and

5.3.3 charge the Buyer interest (both before and after any judgement) on the amount unpaid, at the rate of two percent (2%) above the Company's banking partner's base interest rate per calendar month on any account which remains outstanding after the due date of the invoice, such interest to accrue from the date of despatch until payment in full is made;

5.3.4 charge the Buyer a late payment handling fee to cover the costs of administration and issuance of a payment reminder;

5.3.5 recover from the Buyer all costs, charges and expenses howsoever incurred in collecting payment of any overdue account.

5.3.6 charge the Buyer any fees levied on or incurred by the Company by any bank or credit card processing organisation for handling payment for Goods or Services.

#### 6. DELIVERY

6.1 Delivery of the Goods shall be made by the Company delivering the Goods to the Buyer's premises or some other place for delivery as notified in Writing by the Buyer to the Company, or by the Buyer collecting the Goods at the Company's premises.

6.2 Any dates quoted for the delivery of the Goods are approximate only and the Company shall not be liable for any delay in the delivery of the Goods howsoever caused. Time for delivery shall not be of the essence unless previously agreed by the Company in Writing. The Goods may be delivered by the Company in advance of the quoted delivery due upon giving reasonable notice to the Buyer.

6.3 The Company may at its sole discretion effect delivery in instalments (part delivery). Additional costs for delivery beyond those as specified by the Company at time at which the order was confirmed by the Company in writing and forms the basis of the Contract are the sole responsibility of the Company.

6.4 Where the Goods are to be delivered in instalments and not encompassed by the provision of Section 6.3 above, each delivery shall constitute a separate contract and failure by the Company to deliver any one or more instalments in accordance with these Conditions or any claim by the Buyer in respect of one or more instalments shall not entitle the Buyer to treat the Contract as a whole as repudiated.

6.5 If the Company fails to deliver the Goods for any reason other than any cause beyond the Company's reasonable control or the Buyer's fault, and the Company is accordingly liable to the Buyer, the Company's liability shall be limited to the excess (if any) of the cost to the Buyer (in the cheapest available market) of similar goods to replace those not delivered over the price of the Goods.

6.6 If the Buyer fails to take delivery of the Goods or fails to give the Company adequate delivery instructions at the time stated for delivery (otherwise by reason of any cause beyond the Buyer's reasonable control or by reason of the Company's fault) then, without prejudice to any other right or remedy available to the Company, the Company may:

6.6.1 store the Goods until actual delivery and charge the Buyer for the reasonable costs (including insurance) of storage; or

6.6.2 sell the Goods at the best price readily available and (after deducting all reasonable storage and selling expenses) account to the Buyer for the excess over the price under the Contract or charge the Buyer for any shortfall below the price under the Contract; and

6.6.3 in addition the Buyer shall indemnify the Company against all costs, claims, expenses (including without limitation demurrage) or damages howsoever arising as a result of the Buyer's failure to take or delay in taking delivery.

## 7. RISK AND PROPERTY

7.1 Risk of damage to or loss of the Goods shall pass to the Buyer:

7.1.1 in the case of the Goods to be delivered at the Company's premises, at the time when the Company notifies the Buyer that the Goods are available for collection; or

7.1.2 in the case of Goods to be delivered otherwise than at the Company's premises, at the time of delivery or, if the Buyer wrongfully fails to take delivery of the Goods, the time when the Company has tendered delivery of the Goods.

7.2 Notwithstanding delivery and passing of risk in the Goods, or any other provision of these Conditions, the property in the Goods shall not pass to the Buyer until the Company has received in cash or cleared funds payment in full of the price of the Goods and all other Goods agreed to be sold by the Company to the Buyer for which payment is then due.

7.3 Until such time as the property passes to the Buyer, the Buyer shall hold the Goods as the Company's fiduciary agent and bailee, and shall keep the Goods separate from those of the Buyer and third parties and properly stored, protected and insured and identified as the Company's property in such a manner as to preserve the proper shelf-life of the Goods. Until that time the Buyer shall be entitled to resell or use the Goods in the ordinary course of its business, but shall account to the Company for the proceeds of sale or otherwise of the Goods, whether tangible or intangible, including insurance proceeds, and shall keep all such proceeds separate from any moneys or property of the Buyer and third parties and, in the case of tangible proceeds, properly stored, protected and insured.

7.4 Until such time as the property in the Goods passes to the Buyer (and provided the Goods are still in existence and have not been resold) the Company shall be entitled at any time to require the Buyer to delivery up the Goods to the Company and, if the Buyer fails to do so forthwith, to enter upon the premises of the Buyer or any third party where the Goods are stored and repossess the Goods.

7.5 If the Goods are incorporated into other products the property in those other products is upon incorporation ipso facto transferred to the Company, and the Buyer as bailee of them for the Company will the same for the Company in a proper manner without charge to the Company.

7.6 The Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Goods which remain the property of the Company, but if the Buyer does so all moneys owing by the Buyer to the Company shall (without prejudice to any other right or remedy of the Company) forthwith become due and payable.

## 8. WARRANTIES AND LIABILITY

8.1 Subject to the conditions set out below the Company warrants that the Goods will correspond with their specification at the time of delivery and will be free from defects in material and workmanship.

8.2 The above warranty is given by the Company subject to the following conditions:

8.2.1 the Company shall be under no liability in respect of any defect in the Goods arising from any drawing, design or specification supplied by the Buyer;

8.2.2 the Company shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Company's instructions relating without limitation to the use and application of the Goods (whether oral or as set out in the Company's instruction booklet accompanying the Goods or as otherwise in Writing), misuse or alteration or repair of the Goods without the Company's approval;

8.2.3 the Company shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total prices for the Goods has not been paid by the due date for payment;

8.2.4 the above warranty, does not extend to parts, materials or equipment not manufactured by the Company, in respect of which the Buyer shall only be entitled to benefit of any such warranty or guarantee as is given by the manufacturer to the Company;

8.2.5 the Company shall be under no liability under the above warranty where the Buyer fails to store the Goods in such a manner as shall be the opinion of the Company to be consistent with preserving the proper shelf-life of the Goods.

8.3 Subject as expressly provided in these Conditions, and except where the Goods are sold to a person dealing as a consumer, all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

8.4 Where the goods are sold under a consumer transaction statutory rights of the Buyer are not affected by these Conditions.

8.5 Any claim by the Buyer which is based on any defect in the quality or condition of the Goods or their failure to respond with the specification shall (whether or not delivery is refused by the Buyer) be notified to the Company within five (5) days inclusive of the day of delivery and shall be confirmed in Writing with ten (10) days inclusive of the day of delivery. Time to be of the essence in both cases. If delivery is not refused, and the Buyer does not notify the Company accordingly, the Buyer shall not be entitled to reject the Goods and the Company shall have no liability for such defect or failure, and the Buyer shall be bound to pay the price as if the Goods had been delivered in accordance with the Contract.

8.6 Where any valid claim in respect of any of the Goods is based on any defect in the quality or condition of the Goods or their failure to meet specification is notified to the Company in accordance with these Conditions, the Company shall be entitled to replace the Goods (or the part in question) free of charge or, at the Company's sole discretion, refund to the Buyer the price of the Goods (or a proportionate part of the price), but the Company shall have no further liability to the Buyer.

8.7 Except in respect of death or personal injury caused by the Company's negligence, the Company shall not be liable to the Buyer by any reason of any representation, or any implied warranty, condition or other term, or any duty at common law, or under the express terms of the Contract, for any consequential loss or damage (whether for loss of profit or otherwise), costs, expenses or other claims of consequential compensation whatsoever (and whether caused by the negligence of the Company, its employees or agents or otherwise) which arise out of or in connection with the supply of the Goods or their use or resale by the Buyer, except as expressly provided in these Conditions.

8.8 The Company shall not be liable to the Buyer or deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform any of the Company's obligations in relation to the Goods, if the delay or failure was due to any cause beyond the Company's reasonable control. Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond the Company's reasonable control:

8.8.1 Act of God, explosion, flood, tempest, fire or accident;

8.8.2 war or threat of war, sabotage, insurrection, civil disturbance or requisition;

8.8.3 acts, restrictions, regulations, bye-laws, prohibitions or measures of any kind on the part of governmental, parliamentary or local authority;

8.8.4 import or export regulations or embargoes;

8.8.5 strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Company or of a third party);

8.8.6 difficulties in obtaining raw materials, labour, fuel, parts or machinery;

8.8.7 power failure or breakdown in machinery;

and in all such cases the Company shall give notice in Writing to the Buyer accordingly. If any such delay or delays shall continue for a period exceeding twelve (12) week to hinder the Company's performance of the Contract then the Buyer may by notice in Writing terminate the Contract in respect of any unperformed portion thereof provided always that where the Company is unable to terminate its contracts with its suppliers the Buyer shall not be entitled to terminate the Contract.

8.9 Without prejudice to the generality of the foregoing it shall be the sole responsibility of the Buyer to ensure that the Goods comply with all the requirements whether statutory or otherwise of the location in which they are used and for the avoidance of doubt the Company gives no warranty in this respect.

## 9. INDEMNITY

9.1 If any claim is made against the Buyer that the Goods infringe or that their use or resale infringes the patent, copyright, design, trade mark or other industrial or intellectual property rights of any other person, the Company shall indemnify the Buyer all loss, damages, cost and expenses awarded or incurred by the Buyer in connection with the claim, or paid or agreed to be paid by the Buyer in settlement of the claim, provided that:

9.1.1 the Company is given full control of any proceedings or negotiations in connection with any such claim;

9.1.2 the Buyer shall give the Company all reasonable assistance for the purposes of any such proceeding or negotiations;

9.1.3 except pursuant to a final award, the Buyer shall not pay or accept any such claim, or compromise any such proceedings without the consent of the Company (which shall not be unreasonably withheld);

9.1.4 the Buyer shall do nothing which would or might vitiate any policy of insurance or insurance cover which the Buyer may have in relation to such infringement, and this indemnity shall not apply to the extent that the Buyer recovers any sums under any such policy or cover (which the Buyer should use its best endeavours to do).

9.1.5 the Company shall be entitled to the benefit of, and the Buyer shall accordingly account to the Company for all damages and costs (if any) awarded in favour of the Buyer which are payable by or agreed with the consent of the Buyer (which consent shall not be unreasonably withheld) to be paid by any other party in respect of such claim; and

9.1.6 without prejudice to any duty of the Buyer at common law, the Company shall be entitled to require the Buyer to take such steps as the Company may reasonably require to mitigate or reduce any such loss, damages, costs or expenses for which the Company is liable to indemnify the Buyer under this clause.

## 10. INSOLVENCY OF BUYER

10.1 This clause applies if:

10.1.1 the Buyer makes any voluntary arrangement with its creditors or becomes subject to an administration order or (being an individual or firm, becomes bankrupt) or (being a company) goes into liquidation (otherwise than for the purpose of amalgamation or reconstruction); or  
10.1.2 an encumbrancer takes possession or a receiver is appointed, of any of the property or assets of the Buyer; or  
10.1.3 the Buyer ceases, or threatens to cease, to carry on business; or  
10.1.4 the Company reasonably apprehends that any of the events mentioned above is about to occur in relation to the Buyer and notifies the Buyer accordingly.  
10.2 If this clause applies then, without prejudice to any other right or remedy available to the Company, the Company shall be entitled to cancel the Contract or suspend any further deliveries under the Contract without any liability to the Buyer and if the Goods have been delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

## 11. EXPORT TERMS

11.1 Where the Goods are supplied for export from the Federal Republic of Germany the provisions of this clause 11 shall (subject to any special terms agreed in Writing between the Buyer and the Company) apply notwithstanding any other provision of these Conditions.  
11.2 The Buyer shall be responsible for complying with any legislation or regulations governing the importation of the Goods into the country of destination and for the payment of duties thereon.  
11.3 Unless otherwise agreed in Writing between the Buyer and the Company, the Goods shall be delivered FOB (Free On Board) the air or sea port of shipment and shall pass to the Buyer from the time of loading at the Company's premises for delivery.  
11.4 Where the Goods are supplied on a CIF (Cargo, Insurance and Freight) basis the Company shall insure the Goods against such risks as it deems appropriate from the time of loading at the Company's premises until loading at the destination nominated by the Buyer.  
11.5 The Buyer shall be responsible for arranging for testing and inspection of the Goods at the Company's premises before shipment. The Company shall have no liability for any claim in respect of any defect in the Goods which would be apparent at inspection and which is made after shipment or in respect of any damage during transit.  
11.6 Unless otherwise agreed in Writing by the Company, payment of all amounts due to the Company shall be made by irrevocable Letter of Credit (L/C) opened by the Buyer in favour of the Company and confirmed by a bank acceptable to the Company or, if the Company has agreed in Writing on or before acceptance of the Buyer's order to waive this requirement, by acceptance by the Buyer payable thirty (30) days after sight to the order of the Company at such bank account in the Federal Republic of Germany as may be specified on the bill of exchange.  
11.7 The Buyer undertakes not to offer the Goods for resale in any other country notified by the Company to the Buyer at or before the time the Buyer's order is placed, or to sell the Goods to any person if the Buyer knows or has reason to believe that the person intends to resell the Goods in the country so notified.

## 12. GENERAL

12.1 Any notice required or permitted to be given by either party to the other under these Conditions shall be in Writing addressed to that other party at its registered office or principal place of business or such other addresses as may at the relevant time have been notified pursuant to this provision to the party giving notice and shall be deemed received in the case of registered delivery first class prepaid letter post three (3) days after posting and, in the case of any other means of communication, immediately upon transmission by the sender to the recipient.  
12.2 No waiver by the Company or any breach of the Contract by the Buyer shall be considered as a waiver of any subsequent breach of the same or any other provision.  
12.3 If any provision of these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the remainder of the provisions in questions shall not be affected thereby.  
12.4 For Goods offered by emp Biotech GmbH, the Contract shall be governed and interpreted by the laws of the Federal Republic of Germany and any dispute under or in connection with these Conditions or the sale of Goods shall be dealt with under the jurisdiction of the court of the Federal Republic of Germany.  
12.5 For Goods offered by emp Biotech LLC, the Contract shall be governed and interpreted by the laws of the State of New Jersey, USA and any dispute under or in connection with these Conditions or the sale of Goods shall be dealt with under the jurisdiction of the court of the State of New Jersey, USA.

## 13. PREVAILING LANGUAGE

13.1 The language of the Conditions is English. In the event of the Conditions being made available in a language other than English then the translated version is created as a courtesy for reference purposes only. Should any conflict or a dispute arise the Conditions of the English language version remain the controlling, valid and defining text.

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