

# General Terms and Conditions

Consist Software Solutions GmbH,  
Falklandstrasse 1-3, 24159 Kiel, Germany

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## Area of application

**1.1** The following General Terms and Conditions apply to all contracts relating to the delivery of software, studies, devices and installations, as well as to the provision of consultancy services by Consist Software Solutions GmbH (hereinafter abbreviated as "Consist").

**1.2** These General Terms and Conditions apply only if the customer acts in the performance of his/its commercial or independent professional occupation when concluding the contract or if the customer is a legal person organized under public law or a public-law special fund.

**1.3** These General Terms and Conditions are an integral part of the contract by mutual agreement. They apply exclusively. Deviating purchase conditions or similar conditions of the customer's do not apply.

## 2 Written Form

Side agreements must be confirmed in writing by Consist to be valid. The same applies to later amendments to the contract.

## 3 Scope of Deliveries and Services

The written confirmation of an order by Consist is decisive for the scope of deliveries and/or services. If Consist makes an offer with a time limit which is accepted within the specified period, the offer is decisive if there is no order confirmation in due time.

## 4 Deadlines for Deliveries and Services

**4.1** Unless otherwise agreed by contract, the deadlines for deliveries to be made by and/or services to be provided by Consist begin to run when the contract is concluded.

**4.2** If the customer does not produce necessary documents, required permits or approvals in due time, deadlines for deliveries to be made by and/or services to be provided by Consist will be extended appropriately. The above provision also applies if the customer does not comply with the agreed payment terms or other obligations. This is also applicable to any other case of delay for which Consist is not responsible.

## 5 Liability

**5.1** Without prejudice to Clause 5.5, Consist is liable for simple negligence solely in the event of a breach of a material contractual duty (that is, when a breach of the duty jeopardizes the purpose of the contract and/or its performance is indispensable for proper performance of the contract and the other party can normally rely on the duty being performed), but limited in amount to the damage foreseeable at the time the contract is concluded and typical of the contract.

**5.2** Without prejudice to Clause 5.5, Consist is liable for the simple or gross negligence of simple vicarious agents solely in the event of a breach of a material contractual duty, but limited in amount to the damage foreseeable at the time the contract is concluded and typical of the contract.

**5.3** Without prejudice to Clause 5.5, the liability of Consist for property damage and pecuniary loss caused by simple negligence is furthermore limited in total to the amount of the business liability insurance, that is, to  
5.000.000.00 € for person and/or property damage and  
2.500.000.00 € for pecuniary loss.

**5.4** Without prejudice to Clause 5.5, as far as the liability for damages is excluded pursuant to Clauses 5.1 to 5.3, reimbursement of futile expenditure pursuant to § 284 of the German Civil Code (BGB) is excluded as well.

**5.5** Clauses 5.1 to 5.4 do not affect the liability of Consist under the German Product Liability Act (*Produkthaftungsgesetz*), in the event of assumption of a guarantee, in the event of fraudulent motive and in the event of culpable injuries to life, body and/or health.

## 6 Passing of Risk

The risk passes to the customer, even if delivery carriage paid has been agreed on:

**6.1** In the event of delivery without installation, at the time of handover for delivery or collection by customer. The goods will be packaged with the best care. The goods will be shipped according to Consist's best judgment. If desired by the customer, the shipment will be insured against breakage, transport damage and fire damage at the customer's expense.

**6.2** In the event of delivery with installation, on the day on which the goods are put into operation by the customer; if a trial operation has been agreed on, at the beginning of trial operation. It is assumed in this context that the trial operation or the beginning of operation by the customer will take place immediately when the goods have been installed and are ready for operation. If the customer does not accept the offer of trial operation or the commissioning of the goods in its own operations, the customer will bear the risk for the period of the delay as of 14 days after the offer was made.

**6.3** If shipment, delivery or the beginning or the execution of the installation is delayed at the customer's request or for reasons for which the customer is responsible, the customer will bear the risk for the period of the delay. Consist is obligated, however, to take out the insurance de-

manded by the customer at the customer's request and expense.

## 7 Taking Delivery (Acceptance) and Default in Taking Delivery (Acceptance)

**7.1** If the customer does not take delivery of the goods during the time limit, Consist has the right to set a reasonable grace period for this to be done. After this period has expired, Consist may otherwise dispose of the item and make another delivery to the customer after a reasonably extended additional period. This does not affect the rights of Consist to withdraw from (rescind) the contract after having set a grace period under threat of refusal or to claim indemnity because of non-fulfilment of the contract.

**7.2** Partial deliveries to a reasonable extent are permissible.

## 8 Warranty for Defects

Consist is liable for defects in quality and defects in title as follows:

**8.1** If products are defective upon the passing of risk, Consist must, at its choice, either remedy the defect or produce a new product free of charge. If purchased items are defective upon the passing of risk, Consist must, at its choice, either remedy the defect or deliver a defect-free item free of charge.

**8.2** The warranty for defects does not cover natural wear and tear. Furthermore, it does not cover any damage that occurs after the passing of risk due to faulty or negligent treatment, excessive use, inadequate operating materials and chemical, electrochemical or electrical influences not specified by the contract.

**8.3** The customer is obligated to examine the deliveries and services promptly after their arrival, handover or installation with respect to their volume/scope as far as possible. Defects that are visible to the customer must be reported to Consist in writing promptly, at the latest ten working days after delivery or installation, and defects that are not visible must be reported to Consist in writing immediately after their detection. Otherwise Consist is released from the warranty for defects in this respect.

**8.4** The customer must give Consist the necessary time and opportunity for subsequent fulfilment using equitable discretion. The customer must ensure, in particular, that the objected item is available to Consist or its agents for examination and correction, if applicable. If the customer refuses or delays this in an unreasonable way, Consist is released from the warranty for defects to such extent. A total of three attempts of subsequent fulfilment pursuant

to Clause 8.1 are allowed. Replaced parts will pass into Consist's ownership.

**8.5** If subsequent fulfilment pursuant to Clause 8.4 fails finally, the customer has the right to rescind the contract or to demand reduction of the price and/or to demand indemnity or reimbursement of expenditure at its choice if the legal prerequisites are met. Claims for indemnity or reimbursement of expenditure are subject to Clause 5.

**8.6** There is no right of self-help remedy. Apart from the right of self-help remedy, further-reaching claims of the customer owing to defects – for any legal reasons whatsoever – are excluded.

**8.7** With regard to work the success of which lies in the manufacture, maintenance or alteration of an object or in the provision of planning and monitoring services for this and with regard to the sale of software, licenses/rights of use regarding the software and/or movable objects that are not used for buildings, the limitation period for claims and rights relating to defects is one year. With regard to other work not related to buildings, the limitation period for claims and rights relating to defects is 18 months. The above shortening of the limitation period does not apply to indemnity claims and/or in the event of fraudulent motive and/or intent. With regard to works, the limitation period for claims and rights relating to defects begins when delivery is taken (upon acceptance). The obligation to raise a complaint regarding defects pursuant to Clause 8.3 in good time is not affected by this Clause 8.7.

**8.8** In the event of a sale of used devices or installations, Consist will inform the customer to the best of its knowledge and belief about the present utilization value of the devices and installations. In such case, warranty claims with the exception of indemnity claims will become statute-barred within one year.

## **9 Price Calculation and Offer Period**

**9.1** The prices for delivery without installation or assembly apply ex Consist, freight and packing excluded.

**9.2** Incidental expenses such as travel costs, out-of-pocket expenses, etc., are included in the specified terms, provided that the order contains fixed time blocks of at least three days or no special agreement has been concluded about this. Otherwise, we charge travel costs between Kiel and the job site, daily out-of-pocket expenses based on the maximum fiscal rates, remuneration for travelling time at 50 percent of the agreed hourly rate, and the costs for overnight accommodation. If the customer arranges for travel outside the job site, any related additional costs will be charged to the customer.

**9.3** If a pricing term is offered on a basis of actual time needed, work at night from 7.00 pm to 7.00 am and on Saturdays, Sundays, and holidays will be invoiced at the respective quoted rate (the hourly rate to be determined on the basis of the quoted daily rate) increased by 100 percent.

**9.4** All prices are quoted excluding value added tax, which will be invoiced separately at the applicable rate on the date of delivery.

**9.5** Offers by Consist are subject to change without notice unless otherwise agreed. This means that, unless otherwise agreed, offers without fixed periods constitute merely an invitation to the customer to submit an offer. Offers by Consist with fixed periods are revocable until they have been accepted.

## **10 Reservation of Title**

**10.1** The sold devices and installations remain the property of Consist until all claims against the customer arising from the existing business relationship are satisfied. As long as the reservation of title is valid, the customer is authorized to possess and, if applicable, use the devices and installations as long as the customer meets the obligations that arise from the reservation of title, and is not in default with payment.

**10.2** Until Consist's claims against the customer are settled, Consist's devices and installations may not be resold, rented out, lent or given away; the customer may also not hand them over for repair to a third party that is not suitably qualified. Transfers of title by way of security and pledging are also not permitted. Resale is permitted in the usual course of business provided that the receivables arising from the resale, including all of Consist's ancillary rights, up to the invoiced amounts are assigned to Consist already now. No additional assignment agreements are necessary.

**10.3** Consist may demand that the customer disclose to it the assigned receivables and their debtors, provide the information required to collect such receivables, hand over the related documents and inform the debtors of the assignments. In the event of access by third parties, particularly in the event of seizure of the devices and installations or if the manufacturer's lien of a workshop is exercised, the customer must notify Consist immediately in writing and inform the third party without delay of Consist's reservation of title. The customer bears all costs incurred to terminate the access and to replace the devices and installations to the extent they cannot be collected from third parties. As long as the reservation of title is valid, the customer is obligated to maintain the devices and installations in proper condition and to have all maintenance work and necessary repairs carried out at without delay at the customer's own expense except in a warranty case as described under Clause 8.1.

**10.4** If the customer defaults on payment or breaches duties arising from the reservation of title, Consist is entitled to demand that the customer surrender the devices and installations and to turn the devices and work to account, with set-off against the purchase price, by sale on the open market after giving a warning and setting a reasonable deadline. The customer has to bear all costs arising from the return and sale of the devices and installations.

**10.5** Consist undertakes to release the security to which it is entitled to the extent that its value exceeds the receivables to be secured, if they have not yet been paid, by more than 20 percent. The security to be released shall be selected by Consist.

## **11 Terms of Payment**

**11.1** All invoice amounts are payable within 14 days after receipt of the invoice without any deduction to Consist's account.

Payment for sales in installments is possible only if agreed on in writing in advance. In such cases, the entire remaining debt will become due for payment when the customer is in arrears with the payment of at least two consecutive installments in whole or in part.

**11.2** If the customer defaults on payment obligations, the customer must pay to Consist the statutory default interest. This does not affect Consist's right to assert compensation claims in the event of any additional losses.

**11.3** Set-off against the customer's counterclaims is possible only if such claims are undisputed or have been established finally and absolutely (*res judicata*). The customer may assert a right of retention only on the basis of counterclaims arising from the same contract.

**11.4** For orders whose execution exceeds one month – in conformity with the contract or for reasons for which the customer is responsible – progress payments depending on the progress in the amount of 90 percent of the respective value of the performed work are to be paid. Consist has to request the progress payments, and the customer has to pay them within two weeks after receipt of the invoice.

## **12 Confidentiality**

Consist undertakes to treat all business secrets of the customer of which it gains knowledge in the context of the execution of the order as confidential and to impose this obligation also on its employees.

## **13 Jurisdiction, Governing Law**

**13.1** Exclusive place of jurisdiction with respect to all present and future claims and/or entitlements, including all accounts receivable relating to drafts and checks, which arise from the business relationship with registered businesspersons, legal persons under public law and special funds institutions under public law is the domicile of Consist. The same place of jurisdiction applies if the customer does not have a general place of jurisdiction in Germany or if the customer moves his/its domicile or usual residence to a foreign country after conclusion of the contract or if his/its domicile or usual residence at the time when the action is brought is unknown.

**13.2** Governing law shall be the law of the Federal Republic of Germany, excluding foreign law. The UN Convention on the International Sale of Goods shall not be applicable.

## **14 Binding Force of the Contract**

Even if individual points of the contract are legally invalid, the remaining parts of the contract remain binding. This does not apply if the adherence to the contract would constitute an unacceptable hardship for one of the parties.