

General Terms and Conditions of Franz Kessler GmbH

Date: July 2018

I. General terms and conditions

The deliveries, services and offerings of Kessler (referred to in the following as "KESSLER") are made solely on the basis of these terms and conditions of business. They therefore also apply to all future business relationships, even if such relationships have not yet been expressly agreed. Any general terms and conditions of business of the CUSTOMER that contradict or deviate from these terms and conditions will not be recognised.

II. Offer/conclusion of contract

1. For the scope of the delivery the written order confirmation from KESSLER is decisive, in the case of an offer from KESSLER this is subject to a time limit and acceptance of the offer within the time limit if no timely order confirmation is present. Additional agreements and changes require written confirmation from KESSLER.
2. All offers are non-binding. If, in individual cases, a binding offer is submitted by KESSLER, such an offer shall remain binding for a period of 2 weeks from receipt.
3. Additions and changes to the agreements concluded, including these General Terms and Conditions of Delivery, must be made in writing in order to be valid. With the exception of directors or authorised signatories, employees of the vendor are not entitled to make verbal agreements differing from written agreements. The requirement for the written form is met by transmission by telecommunication, in particular via fax or via e-mail, provided the copy of the signed declaration is transmitted.

III. Prices and terms and conditions of payment

1. The prices are quoted ex-works without packaging and are subject to VAT at the applicable rate. If the agreed prices are based on the list prices of KESSLER and the delivery is not to be made until more than 4 months after conclusion of the contract, then the list prices valid on delivery shall be used (less an agreed discount as a percentage or fixed amount in each case).
2. If KESSLER has taken on the installation, erection or assembly and no other agreements are in place, then the CUSTOMER will pay, in addition to the agreed remuneration, all necessary ancillary costs such as travel costs, costs for transportation of the hand tools and personal luggage, as well as accommodation allowances.
3. In the absence of any special agreements, payments are due within 30 days of the invoice date, in cash without any deductions to the payment office of KESSLER:
4. The CUSTOMER is only entitled to rights of set-off and rights of retention if his counterclaims are legally binding, undisputed or recognised by KESSLER. Moreover, the right of retention may only be asserted where the counterclaim is based on the same contractual relationship.
5. Payments by cheque, bill of exchange or using the so-called cheque-bill-of-exchange procedure apply, unless agreed otherwise, as payment on account of performance. Payment is only deemed to have been made in these cases after encashment via cash payment or credit; at the earliest, however, this is from the time at which recourse liability is ruled out.
6. KESSLER reserves the right to transfer claims against the CUSTOMER or to resell them, in particular for the purpose of factoring and debt collection.
7. KESSLER expressly reserves the right to bill the outlay for creating offers and quotations based on actual expenses.
8. If the CUSTOMER ceases payments, has excessive debts or insolvency proceedings are applied for, or if the CUSTOMER falls into arrears with the cashing of due bills of exchange or cheques, then the total claim amount of KESSLER shall become immediately due for payment. The same applies in the event of any other significant deterioration in the financial circumstances of the CUSTOMER. In this case, KESSLER is entitled to demand adequate securities or to terminate the contract.
9. KESSLER expressly reserves the right to bill the outlay for creating offers and quotations based on actual expenses.

IV. Delivery times/terms and conditions of delivery

1. Compliance with agreed deadlines for deliveries is based on the timely receipt of all documents, necessary approvals and releases that are to be supplied by the CUSTOMER, in particular of plans and schedules, as well as compliance with the agreed terms and conditions of payment and other obligations on the part of the CUSTOMER. The delivery time is deemed to have been satisfied if the delivery object has left the plant by the end of the delivery time or if readiness for shipment has been communicated. We right to a plea of non-fulfilment of the contract is reserved.
2. The delivery time shall be extended appropriately for measures as part of labour disputes, in particular strikes or lockout, as well as in the event of unforeseen hindrances that are beyond the control of KESSLER, as well as such hindrances that demonstrably have a significant impact on the completion or delivery of the delivery object. This also applies if these circumstances arise at sub-suppliers. KESSLER still cannot be held responsible for the circumstances described above if they arise during an already existing delay. The start and end of such hindrances will be communicated in important cases by KESSLER to the CUSTOMER as soon as possible.
3. If the CUSTOMER is responsible for a delay in acceptance or he culpably violates the duty of cooperation stated in section IV no. 1 or any other duties of cooperation, then KESSLER is entitled to demand compensation for the losses thus incurred, including any additional expenditure. The right to assert further claims or rights is reserved.
4. If the shipment is delayed at the request of the CUSTOMER, or in cases of delayed acceptance, the CUSTOMER will be billed, starting one month after notification of readiness for shipment, the costs accrued due to storage, or if the items are stored at the factory of KESSLER, at least 0.5% of the invoice amount for every month. However, after an appropriate grace period has been set and expired without resolution of the problem, KESSLER is entitled to otherwise dispose of the delivery object and to resupply to the CUSTOMER after an appropriately extended time period.
5. If the orderer accrues damages due to a delay that arises due to the own culpability of the supplier, then he is entitled, under exclusion of further claims, to demand compensation for delay. The maximum amount for this is 0.5% for every full week of delay, with the total not to exceed 5% of the value of the portion of the overall delivery that cannot be used on time or as arranged in the contract due to the delay.
In all cases, the liability due to delays is limited to the foreseeable, typically occurring damages.
6. KESSLER is entitled to make partial deliveries if the partial delivery can be used by the CUSTOMER within the context of the contractual right of determination, the delivery of the remaining ordered goods is ensured and the CUSTOMER does not accrue significant additional expenses or additional as a result (unless KESSLER agrees to bear these costs).

V. Transfer of risk/acceptance

1. The risk is transferred to the CUSTOMER at the latest on dispatch of the delivery to the CUSTOMER or to the end user appointed by the latter, even if partial deliveries are made or KESSLER has taken on further services such as the shipping costs or delivery and installation. Where the contract requires acceptance and approval of the delivery object, this is decisive for the transfer of risk. If an acceptance inspection is to be performed, the delivery object is deemed to have been accepted if:
 - the delivery and – in cases where KESSLER is also responsible for installation – the installation are completed,
 - KESSLER has communicated this to the CUSTOMER with reference to the assumed acceptance in accordance with section V. number 1 of this document and has asked the CUSTOMER to perform the acceptance inspection.
 - 12 working days have passed since delivery of the installation, or the CUSTOMER has started using the object (for example by commissioning the delivered objects) and 6 working days have passed in this case since delivery or installation, and
 - the CUSTOMER has failed to perform the acceptance inspection within this time period for reasons other than due a defect that has been communicated to KESSLER and substantially impedes or renders impossible any use of the delivery object.
2. If the shipment is delayed for reasons for which the CUSTOMER is responsible, the risk is transferred to the CUSTOMER from the day of notification of readiness for shipment.
3. The CUSTOMER is not entitled to refuse acceptance and approval of the delivery on account of an insignificant defect. The same applies to cases in which acceptance of the service is agreed in a separate contract.
4. Unless agreed otherwise, the place of performance for all obligations arising from the contractual relationship is the head office of KESSLER/Bad Buchau.

VI. Installation and assembly

Unless agreed otherwise in writing, the following terms and conditions apply to installation and assembly:

1. The CUSTOMER shall bear his costs and must provide the following in time:
 - a) All additional works outside of our particular trade, include the skilled and unskilled workers, building materials and tools required for this.
 - b) The consumption items and materials required for installation and commissioning, including scaffolding, lifting gear and other devices, fuels and lubricants.
 - c) Energy and water at the point of use, including the connections for heating and ventilation.
 - d) At the assembly site: sufficiently large, suitable, dry and lockable rooms for the storage of the machine parts, equipment, materials, tools etc. as well as appropriate work and break rooms for the installation personnel, including suitable sanitary facilities; otherwise, the CUSTOMER must put the same measures in place in order to protect the property of KESSLER and the installation personnel at the construction site that he would put in place to protect his own property.
 - e) Protective clothing and protective devices that are required on account of the special circumstances at the installation sites.
2. Installation instructions, operating manuals and maintenance instructions must be checked by the CUSTOMER immediately to check that they are complete and do not contain errors; KESSLER should be notified straight away if there are any problems. Corresponding work should be suspended if necessary until any arising problems relating to difficulties understanding or defects in the installation instructions, operating manuals and maintenance instructions have been clarified.
3. Before the start of assembly work, without being asked the CUSTOMER must make available the necessary information about concealed electricity cables, gas/water pipes or similar systems, as well as the necessary structural data.
4. Before the start of installation or assembly, the provisions and objects required for assumption of the work must be present at the installation or assembly site, and all preparatory work prior to the start of the assembly must have progressed far enough to allow the installation or assembly to be commenced and performed without interruption in the contractually agreed manner. Access routes and the installation or assembly site must be levelled and cleared.
5. If the installation, assembly or commissioning are delayed due to reasons for which KESSLER cannot be held responsible, then the CUSTOMER must bear reasonable costs for the waiting time and additionally required trips by KESSLER or the assembly personnel.
6. The CUSTOMER must confirm to KESSLER at least on a weekly basis the duration of the working time of the assembly personnel and, without delay, the end of the installation, assembly or commissioning.

VII. Retention of title

1. The delivery items (reserved goods) remain the property of KESSLER until all of the claims he has against the CUSTOMER arising from the business relationship have been satisfied. If the value of all security rights to which KESSLER is entitled exceeds the value of all secured claims by more than 20%, KESSLER will release a corresponding portion of the security rights on request from the CUSTOMER.

2. While the retention of title is in force, the CUSTOMER is not permitted to pledge the retained goods or use them as security, and resale shall be possible only for resellers in the ordinary course of their business and only on condition that the reseller receives payment from his customer or makes the provision that the ownership is transferred to his customer only when the latter has made the payment in full.
3.
 - a) If the CUSTOMER sells or disposes of reserved goods, he hereby assigns to KESSLER all his future claims against his customers resulting from the sale, along with all subsidiary rights including any claims relating to payment of the balance, without special declarations being required at a later date. If the reserved goods are sold or disposed of together with other objects without a separate price being agreed for the reserved goods, then the CUSTOMER shall assign to KESSLER, with precedence over the remaining receivables, that part of the total price requirement that corresponds to the price invoiced by KESSLER for the reserved goods.
 - b) If a justifiable interest is credibly demonstrated, the CUSTOMER must provide KESSLER with the information required to assert his rights over the third-party customer and must hand over the required documents.
 - c) Until further notice, the CUSTOMER is authorised to collect the assigned claims resulting from the resale. Where good cause exists to do so, in particular in the event of default in payment, stoppage of payment, the commencement of insolvency proceedings (bankruptcy, settlement, total enforcement), bill protest or if similar, justified indications are present that suggest insolvency of the CUSTOMER, KESSLER is entitled to cancel the collection authority of the CUSTOMER. In addition, KESSLER can – after prior warning that the assignment for security will be disclosed or that the assigned receivables will be used after an appropriate period – disclose the assignment for security, use the assigned receivables and demand from the third-party customer disclosure of the assignment for security by the CUSTOMER.
4.
 - a) The CUSTOMER is permitted to process or transform the reserved goods or to combine them with other objects. Any processing, transformation or combination is undertaken on behalf of KESSLER. The CUSTOMER will hold the new product in safekeeping for KESSLER with all due commercial care and attention. The processed, transformed or combined object shall be regarded as reserved goods.
 - b) Where the goods are processed, transformed or combined with other objects that are not the property of KESSLER, KESSLER is entitled to co-ownership of the new object in a proportion that corresponds to the ratio of the value of the processed, transformed or combined reserved goods to the value of the remaining goods at the time of processing, transformation or combination. If the CUSTOMER acquires sole ownership of the new object, KESSLER and the CUSTOMER agree that the CUSTOMER shall grant KESSLER co-ownership of the new object created through processing, transformation or combination in a proportion that corresponds to the ratio of the value of the processed, transformed or combined reserved goods to the value of the remaining processed, transformed or combined reserved goods at the time of processing, transformation or combination.
 - c) If the new object is resold or disposed of, the CUSTOMER hereby assigns to KESSLER his claim against the purchaser from the sale with all subsidiary rights as security, without the need for further special declarations. However, this assignment only applies to a value corresponding to the amount billed by KESSLER for the processed, transformed or combined reserved goods. The portion of the claim assigned by KESSLER is to be given priority for settlement. In terms of the collection authority and the prerequisites for a withdrawal, number 3. c) applies accordingly.
 - d) If the reserved goods are affixed by the CUSTOMER to real estate or movable objects, the CUSTOMER shall, without the need for any further specific declaration, also assign as security to KESSLER his claim to remuneration for the combination to which he is entitled, including all subsidiary rights as security, totalling the ratio of the value of the combined reserved goods to the other combined goods at the time of combination.
5. In the event of attachments, seizures or other third party dispositions, the CUSTOMER must immediately notify KESSLER.
6. In the event of a culpable breach of the CUSTOMER against essential contract obligations, in particular in the event of a default in payment, KESSLER is entitled to take back the goods after issuing a warning. The CUSTOMER is obliged to surrender the goods. If KESSLER takes back the goods, asserts the retention of title or seizes the delivery object, this does not represent a withdrawal from the contract unless this is declared expressly by KESSLER. After prior warning, KESSLER is entitled to sell or dispose of the reserved goods that are taken back and to settle his claims with their proceeds.

VIII. Warranty

1. The CUSTOMER can only make claims for defects if he has duly complied with his obligation to inspect the goods and provide notification of defects in accordance with § 377 of the German Commercial Code (HGB). To this extent, the CUSTOMER must check the delivery immediately upon receipt and submit any complaints. If complaints relating to recognisable defects are not raised immediately, no later than within 10 working days after receipt, then the delivery is deemed to have been accepted. The same applies if the CUSTOMER refuses an inspection without due cause.
If test operation is agreed, recognisable defects must be notified immediately after performance.
2. KESSLER will offer the following warranty for defects to supplied objects:
 - a) Unless expressly agreed to the contrary, any information relating to quality, performance or service life of the delivery object in offers, order confirmations and other contractual bases (e.g. technical data sheets, operating manuals, maintenance instructions and assembly instructions, other text or drawing-based descriptions of the delivery object) shall not be considered to represent a guarantee of properties and/or shelf life. KESSLER is not liable for advertising statements and other public announcements in connection with delivery objects, including if they are made by third parties.
 - b) Any parts or services that, within a period of 12 months from the day of transfer of risk, fail to offer the contractually agreed or assumed properties, or are not suitable for customary use, or do not offer the properties that are normal and expected for objects of the same type, or that are otherwise defective in the sense of the law as a result of circumstances present prior to the transfer of risk, e.g. due to defective construction, poor materials or defective execution, shall be repaired or replaced (supplementary performance) free of charge at the reasonable discretion of KESSLER with respect to the available options. If, in individual cases, the supply of used objects is agreed with the CUSTOMER, this shall be done under exclusion of any warranty for material defects. This deadline does not apply to claims of the CUSTOMER for damages resulting from fatalities, injuries or harm to health, or to damages resulting from deliberate or grossly negligent breaches of duty on the part of KESSLER or his vicarious agents, which shall expire in accordance with the relevant statutory provisions. KESSLER must be notified in writing of any defects that are discovered. For significant third-party products, the liability of KESSLER shall be limited to the assignment of the liability claims to which KESSLER is entitled against the manufacturer of the third-party products.
 - c) For the performance of all improvements and replacements (supplementary performance) deemed necessary at the reasonable discretion of KESSLER, the CUSTOMER must communicate with KESSLER and give him the time and opportunity required to undertake the work or issue a replacement; if this requirement is not met then KESSLER is freed from the liability for defects. KESSLER is entitled to refuse supplementary performance if this would entail disproportionate costs or disproportionate outlay and work. In individual cases, KESSLER can demand that parts and deliveries that are subject to a complaint are sent to KESSLER for repairs. Only in urgent cases where there is a risk to operational safety and to avert disproportionate further damage, whereby KESSLER must be notified immediately, or if KESSLER is in default in relation to remedying the defect, the CUSTOMER has the right to remedy the defect himself or to have this done by a third party and to demand reimbursement from KESSLER for the resulting costs. Parts that have been replaced shall become the property of KESSLER. The time limit for the liability for defects on the delivery object shall be extended by the time it takes to carry out the improvement work.
 - d) The indirect costs arising from the improvements or from the supply of a replacement will be borne by KESSLER, provided the complaint proves to be justified, the costs for the replacement piece, including shipment, as well as the appropriate costs for removal and installation, plus – if this can be reasonably demanded depending on the location of the individual case – the costs for the provision of his fitters and auxiliary personnel within an upper cost limit that needs to be agreed separately. Otherwise the CUSTOMER shall bear the costs. The latter shall also bear any additional costs arising because the improvements carried out by KESSLER or the supply of a replacement are performed at a different location to the location of the contractual delivery, for example at an end customer of the CUSTOMER. Costs that accrue for KESSLER on account of unjustified complaints relating to delivered parts and services are to be borne by the customer within reason. In all cases, the additional costs associated with the supplementary performance/replacement shall be limited to 100% of the relevant delivery object.
 - e) Claims for defects and warranty claims shall lapse 12 months after the transfer of risk; if test operation is agreed, after problem-free test operation. If the completion of a potentially agreed test operation is delayed for reasons for which KESSLER cannot be held responsible, the warranty period will be shortened accordingly by the duration of the delay. The warranty period for replacement parts and the improvement itself shall be six months; however, this shall run at least until the end of the original warranty period for the supplied objects/services. In terms of other defects, the delivery objects are deemed to have been accepted and approved by the customer if a notification of defects is not received by KESSLER within 7 working days of the time on which the defect becomes apparent; if the defect is already apparent at an earlier point in time for the CUSTOMER during normal use, then this earlier point in time is, however, decisive for the start of the complaint period.
 - f) No warranty is given for natural wear, component-specific wear, in particular for bearings, sealing rings, seals, tool clamping fixtures, rotary unions, couplings, gearings, belts or brakes, unless they fail to meet the technical standards for wear parts, or for damage that occurs for the following reasons after the transfer of risk: External influences such as liquids, moisture, vibrations etc. or unsuitable or improper use, transport or storage, faulty installation/assembly or commissioning by the CUSTOMER or by third parties, faulty or negligent handling, particularly in violation of the operating manual, assembly instructions and maintenance instructions from KESSLER, use of unsuitable operating media or replacement materials, defective factory work, unsuitable foundations, chemical, electrochemical or electrical influences, as well as software errors that cannot be reproduced. If improper modifications or repairs are carried out by the CUSTOMER or by third parties, no warranty will be given for this work or for any resulting consequences.
 - g) No warranty is given for parts provided by the CUSTOMER. KESSLER is only liable for defective work carried out by personnel provided by the CUSTOMER if KESSLER issues faulty instructions or fails in his duty to supervise. KESSLER is liable for supplementary performance to the same extent as for the original delivery.
If the supplementary performance is not performed in accordance with the requirements set out in the rulings above, or if the supplementary performance fails, the CUSTOMER has the right, at his own discretion, to reduce the purchase price or withdraw from the contract. Further claims from the CUSTOMER due to defects are excluded, in particular claims for compensation for subsequent damages, such loss or production or loss of usage, as well as loss of profit. This does not apply to cases of personal injury or damage to privately used objects in accordance with the Product Liability Act or in cases of mandatory liability after deliberate actions, gross negligence or breaches of material contract obligations. The rulings in section X. (Liability) remain unaffected by this.
3. If the supplementary performance is unsuccessful, the CUSTOMER is, at his own discretion, entitled to demand a reduced purchase price or to withdraw from the contract.

IX. Defects of title, property rights

1. If a third party asserts justified claims against the CUSTOMER due to the violation of an industrial property right or copyright (referred to in the following as property rights) by products supplied by KESSLER and subsequently used pursuant to the contract specifications, KESSLER shall be liable as follows to the CUSTOMER:
2. KESSLER will, according to his choice and at his own cost, either obtain a right of use for the product, modify the product so that the property right is no longer violated, or replace the product. If this is not possible for KESSLER under commercially reasonable conditions, the CUSTOMER is entitled to withdraw from the contract. Under the stated conditions, KESSLER also has a right to withdraw from the contract. In addition, KESSLER will release the CUSTOMER from uncontested or legally established claims of the affected property right owners. Any claims of the CUSTOMER for damages shall be subject to the restrictions in section X (Liability) of these General Terms and Conditions of Delivery.
3. The above obligations of KESSLER only exist if the CUSTOMER immediately notifies KESSLER in writing about the claims asserted by the third party, does not acknowledge an infringement and KESSLER retains access to all defence measures and settlement negotiations. If the CUSTOMER stops using the product in the interest of minimising losses or for other important reasons, he is obliged to inform the third party that the cessation of usage does not represent an acknowledgement of a property right infringement.

4. Claims on the part of the CUSTOMER are ruled out if he is responsible for the property right infringement. Claims from the CUSTOMER are further ruled out if the property right infringement is caused by special requirements of the CUSTOMER, as a result of an application that cannot be foreseen by KESSLER or because the product is modified by the CUSTOMER or used together with products not supplied by KESSLER.
5. Further claims against KESSLER are excluded.

X. Liability

1. The liability of the vendor for damages, regardless of legal grounds, in particular due to impossibility, default, defective or incorrect deliveries, breach of contract, breach of duties during contract negotiations and action in tort is, in so far as there is a question of blame in each case, limited in accordance with section X. in this document.
2. The vendor is not liable in cases of simple negligence on the part of its bodies, legal representatives, employees or other vicarious agents, unless the matter relates to a breach of material contractual obligations. Material contract obligations include the obligation of timely delivery and installation of the delivery object, its freedom from defects in title and the absence of material defects that impair its functionality or usability more than just insignificantly, as well as consultation, protection and duty of care obligations whose purpose is to enable the client to enjoy contractual use of the delivery object or to protect the health and safety or life of personnel of the client, or to protect the property of the latter against substantial damage.
3. Insofar as the vendor is liable for damages on the grounds of and in accordance with section X 2, this liability shall be limited to damage that the vendor has foreseen when concluding the contract (or that he should have foreseen after application of due care and attention) as a possible consequence of a contractual infringement. Moreover, indirect damages and follow-up damages that are the consequence of defects of the delivery object are only subject to compensation to the extent that such damages can be typically expected during proper use of the delivery object.
4. In the event of liability for simple negligence, the obligation of the vendor to compensate for material damage and resulting further financial losses are limited to an amount of €1,000,000.00 per claim (in accordance with the current sum insured via his product liability insurance or liability insurance), even if it relates to a breach of material contract obligations.
5. The above liability exclusions and limitations apply in the same extent in favour of the bodies, legal representatives, employees and other vicarious agents of the vendor.
6. If the vendor provides technical information or acts in a consulting capacity and this information or consultancy does not form part of the contractually agreed scope of services owed by him, this is done free of charge and under exclusion of any liability.
7. The limitations in this section X do not apply to the liability of the vendor in relation to deliberate actions, guaranteed performance specifications, fatalities, physical injuries or harm to health, or to claims in accordance with the Product Liability Act.

XI. Product liability

If the CUSTOMER or his (third-party) customer resells products from KESSLER in countries outside of the European Economic Area (EEA), in particular in the USA, he must release KESSLER from all product liability claims from third parties that exceed European product liability regulations.

XII. Design modifications

KESSLER reserves the right to make changes to the design at any time. He is, however, not obliged to also make such changes to products that have already been delivered.

XIII. Copyright

KESSLER reserves the ownership or copyright for all offers and cost estimates submitted by him and for all drawings, illustrations, calculations, brochures, catalogues, models, tools and other documents and aids made available to the CUSTOMER. The CUSTOMER must not make such items themselves or their content available to third parties, disclose them, use them themselves or allow them to be used by third parties, or duplicate them without express approval from KESSLER. He must, on demand from KESSLER, return these items in full to the latter and destroy any copies made if they are no longer required for regular business purposes or if negotiations do not result in the conclusion of a contract. This does not extend to the saving of data made available electronically for the purpose of normal data backups.

XIV. Final provisions

1. If the CUSTOMER is a general merchant in the sense of the German Commercial Code, a legal entity under public law or a legal entity that is part of a special fund under public law, the sole place of jurisdiction for all disputes arising directly or indirectly from the contractual relationship shall be, at the choice of KESSLER, the head office or branch of KESSLER.
2. The contractual relationship is subject to the laws of the Federal Republic of Germany; the United Nations Conventions on Contracts for the International Sale of Goods (CISG) shall not apply.
3. In the event that individual clauses in these General Terms and Conditions of Sale and Delivery are ineffective, this shall not affect the validity and effectiveness of the remaining clauses. The parties to the contract agree to replace such clauses with new clauses that most closely match the intended purpose of the invalid clause.