General Terms and Conditions (GTC) for the sale of goods, for deliveries and services of Carl Aug. Picard GmbH (CAP)

§ 1 – Scope

1.

The respective version of the terms below valid at the time of conclusion of the agreement shall only apply to entrepreneurs, legal entities governed by public law or special fund under public law according to § 310 Paragraph 1 of the German Civil Code (BGB).

2.

The terms below shall apply, unless modified or excluded as expressly consented by us in writing, to all our orders, contracts, deliveries and other services, consultation and advice. They shall also apply in particular if we perform deliveries/services without reservation whilst being aware of deviating conditions of our contracting party. The general terms and conditions of our contracting party shall only apply if we confirm this writing; they shall not become subject matter of the contract even if we do not expressly contradict them.

3.

Our terms shall also apply in the version valid at the time of conclusion of the agreement for all future orders, contracts, deliveries and services, even if their text is not sent again to our contracting party with our offer or order confirmation upon conclusion of the agreement.

§ 2 - Offer and conclusion of contract; written form

1.

Our offers are non-binding. Contracts and other agreements shall only become binding following our written confirmation or following our delivery/service.

Amendment of this written-form clause is only possible in writing.

2.

All agreements between us and our contracting party shall be recorded in writing upon conclusion of the agreement. Agreements reached between our employees or representatives and our contracting party either on or following conclusion of the agreement shall only be valid if confirmed by us in writing; the power of representation of our employees and representatives is insofar restricted.

3.

Our failure to object to commercial letters of confirmation sent by a contracting party shall not be construed as a tacit agreement to a contract whose contents diverges from our own written confirmations and our other written declarations.

§ 3 – Written form, text form

Insofar as the written form is provided for in these terms, it is also preserved if corresponding declarations are transmitted by fax or e-mail. A written agreement shall also be considered to be concluded if we and our contracting party submit declarations in written form respectively that cover this as regards content. Possible amendments to this written-form requirement shall adhere to the written-form requirement.

§ 4 – Prices, price increases and payment

1.

Our prices are set in Euro. Unless otherwise agreed, our contracting party shall be required to effect payment in Euro.

The agreed price is understood to be net exclusive of the relevant rate of value-added tax.

2.

Unless otherwise agreed, our prices are valid for ex-works deliveries (EXW) exclusive of packaging, transportation charges, taxes, customs duties, insurance, costs for letters of credit or other documents required for fulfilment of contract.

3.

We reserve the right to deliver only as and when the payment of the agreed prices has been made.

Unless otherwise agreed, our invoices are payable within 30 days of the invoice date and delivery/service without deduction.

4.

Our invoices are deemed to have been accepted if our contracting party does not object in writing within 10 days from receipt of the invoice.

5.

Once the due date is exceeded, we shall be entitled without further reminder to charge interest at the standard market rate for overdrafts on business accounts, but no less than the statutory rate of interest. Further claims – in particular in respect of default of the other party – shall remain unaffected.

6.

Offsetting by a counter-claim of our contracting party is only permissible if this counter-claim is uncontested or is legally established. The same shall apply for the assertion of a right to retention due to such a counter-claim, unless the counter-claim is based on the same contractual relationship as our claim and is in a proportionate relationship to said claim.

7.

If one of the following events occurs or if the existence of such an event prior to conclusion of the contract becomes known to us after conclusion of the contract, we shall be entitled to demand advance payment of the agreed price by our contracting party, revoke any credit agreed or granted or return any outstanding bills of exchange and demand immediate payment. This shall apply to the following events:

– Our contracting party makes an application for judicial or out-of-court insolvency or composition proceedings or a judicial or out-of-court insolvency or composition proceedings over the assets of our contracting party are opened or the opening of such proceedings is declined due to insufficient assets.

– We receive a written credit report from a bank or credit reporting agency which shows that our contracting party is unworthy of credit (e.g. credit rating index of Creditreform or other agencies) or that its financial circumstances have deteriorated materially or a cheque or bill of exchange made out by our contracting party and accepted by us is not paid or is dishonoured.

– Our contracting party is in payment default in relation to another transaction with us.

8.

If our contracting party fails to meet our legitimate request for advance payment within an appropriate period of grace set by us, we shall be entitled to grant him a further grace period of 1 week to effect the requested advance payment(s). If this further grace period expires without result, we shall be entitled to withdraw from the contract or demand damages in lieu of performance, however, the latter shall only apply to the part of the agreement not yet performed by us.

§ 5 – Transport and delivery, packaging, insurance

1.

Irrespective of the location from which delivery is effected, the risk shall pass to our customer when the goods are dispatched, and including those exceptional cases where other INCOTERMS have been agreed. This shall not apply in cases where the goods are transported by our own employees or when our employees are responsible for any damage to or loss of the goods.

2.

If we receive no shipping instructions from our contracting party or if a deviation from such instructions is deemed necessary, we shall ship the goods as we see fit without obligation to use the cheapest or fastest shipping method.

3.

We shall select the arrangements for delivery including the forwarding agent or haulage carrier. Our deliveries are made with existing transport insurance. Any transport damage shall be reported to us without delay. Furthermore, the recipient shall ensure that the related claims and reservations are reported to the carrier immediately on receipt of the delivery.

4.

If the shipping of the goods is delayed at the request of our contracting party or due to reasons for which our contracting party is responsible, the risk shall pass to our contracting party as soon the goods are ready for shipment and as soon as we notify our contracting party of same. In this case, the goods shall be stored at our contracting party's own expense and risk. We shall also be entitled to store the goods with a third party at the expense of our contracting party.

5.

We shall be entitled to effect partial deliveries and to issue separate invoices insofar as partial deliveries are not unreasonable or unusable for our contracting party.

§ 6 – Delivery and service deadlines and dates; force majeure

1.

Delivery and service deadlines as well as delivery and service dates shall only be deemed binding if confirmed in writing by us. A delivery or service deadline shall commence on the date of agreement of all details of the order content, at the earliest upon our acceptance of the order, but not before the submission of all technical and design details and provision of all of the documents, attachments etc. required from our contracting party.

Any delay to the above mentioned conditions shall cause the agreed deadlines and dates and the delivery time/delivery period that also applies in the absence of such an agreement to be delayed to the extent appropriate and necessary. Our contracting party shall bear the burden of proof as to when and how he has complied with the necessary conditions and provided the documents, plans and specifications required.

2.

Agreed deadlines and dates as well as the delivery time/delivery period that also applies in the absence of such an agreement shall be extended or delayed – also in the context of an existing delay – by an appropriate extent in the event of force majeure and unforeseen impediments that have arisen after the conclusion of the agreement and for which we cannot be held responsible. In particular, our delivery obligation is subject to the timely delivery as stipulated in the contract, insofar as we are not responsible for non-compliant or delayed delivery.

Types of force majeure for which we are not responsible within the meaning of this paragraph also include all strikes and lock-outs.

The provisions above shall also apply if our suppliers or their sub-suppliers are affected by circumstances that give rise to delays.

Insofar as delays in the sense described above persist for more than three months, our contracting party shall be entitled, to the exclusion of all other claims, to withdraw from the contract after setting a further grace period of at least 4 weeks. The right of withdrawal shall be confined to the part of the contract not yet fulfilled.

3.

Agreed deadlines and dates as well as the delivery time/delivery period that also applies in the absence of such an agreement shall be extended or delayed by the period during which our contracting party is in default with its obligations – as part of a current business relationship as well as from other contracts.

§ 7 – Declaration of choice of rights after setting a deadline for supplementary performance

In all cases, in which our contracting party has set us a deadline for subsequent performance owing to a delivery which was not made or not made properly and this deadline has passed without result, we shall be entitled to request from our contracting party that he submits a declaration within a one week whether he shall continue to assert the claim for satisfaction/subsequent performance despite the expiry of the deadline or passes to the other rights granted to him as an option. If our contracting party fails to submit a declaration within the deadline set to him, the claim for satisfaction/subsequent performance shall be excluded. If our contracting party informs us within the set reasonable deadline that he shall continue to demand satisfaction/subsequent performance, then he shall be entitled to set a new deadline in this respect and to exercise other rights for the event of its expiry without result.

§ 8 - Default, exclusion of the service obligation

If we are in default with the delivery or if our service obligation is excluded according to § 275 of the German Civil Code (BGB), we shall only be liable for damages under the pre-requisites and to the extent of § 12 sub-clause 5 of these conditions, but subject to the following additional conditions:

1.

If we are in default with the delivery, justified claims for compensation by our contracting party shall apply if the delay can be attributed to wilful or grossly negligent behaviour by us or by one of our vicarious agents.

2.

In the event of our default, our contracting party shall only be entitled to compensation if he has previously set us a reasonable grace period for delivery of at least 4 weeks, whereby he shall be entitled to grant us a reasonable deadline of less than 4 weeks insofar as a grace period for delivery of at least 4 weeks is unreasonable for him in individual cases.

3.

A right of withdrawal and a claim for compensation to which the contracting party is entitled are limited to the part of the contract not yet fulfilled unless our contracting party can demonstrate with good reason that he no longer has any interest in the fulfilled part of the contract.

4.

Claims for compensation directed against us owing to default or exclusion of the service obligation according to § 275 of the German Civil Code (BGB) shall become statute-barred after the expiry of one year from the statutory commencement of the statute of limitations.

5.

The above regulations shall not apply in cases concerning damages arising from the injury to life, the body or health of our contracting party or if the damages are due to wilful or grossly negligent breach of duty by us, one of our statutory representatives or vicarious agents, in addition not in the event of the default if a fixed business transaction has been agreed.

§ 9 – Call-off orders, arrangement of deliveries

1.

Call-off orders shall only be accepted with deadlines for acceptance of deliveries. If the deadline for accepting delivery is not precisely defined, it shall end 3 months after the contract concludes or ends. Our contracting party shall accept goods in approximately identical monthly quantities. If the goods are not accepted within the agreed period, we shall be at liberty to deliver the finished goods without further notice or to store them at the contracting party's expense, if necessary, with a third party. We shall also be entitled to set a grace period for our contracting party to take delivery in conjunction with the warning that we refuse to take the goods if the grace period expires without result. If the grace period elapses without result, we shall be entitled to announce our intention to terminate our supply obligation, to withdraw from the contract and to demand compensation instead of the payment due, however the latter shall only apply to the part of the agreement not yet performed by us.

2.

If our contracting party fails to complete an assignment of goods incumbent on him within one month of the expiry of the agreed deadline for such assignment, or, in the absence of such a deadline, within one month of our request for such assignment, we shall be entitled to assign the goods at our discretion and

deliver same. We shall also be entitled to set our contracting party a grace period for assignment in conjunction with the warning that we refuse to take the goods if the grace period expires without result. If the grace period elapses without result, we shall be entitled on the basis of the above announcement to terminate our supply obligation, to withdraw from the contract or to demand compensation instead of the payment due, however the latter shall be restricted to the part of the agreement not yet performed by us.

§ 10 – Delay in acceptance by our contracting party

1.

If our contracting party is in default with the acceptance of our deliveries or services either in whole or in part then our claim for payment of the corresponding delivery or service shall be due and payable immediately. In addition, after the unsuccessful expiry of a reasonable grace period set by us combined with the threat that we shall refuse the acceptance of our delivery or service by the contracting party following the expiry of the deadline, we shall be entitled either to withdraw from the contract or to demand damages instead of the payment due, however the latter shall only apply to the part of the agreement not yet performed by us.
In the event of a delay in acceptance by our contracting party, our statutory rights shall remain unaffected.

2.

Our contracting party shall reimburse us our storage costs, warehouse rent and insurance costs for goods which are due for acceptance but have not been accepted. However, we shall be under no obligation to insure stored goods..

3.

If delivery is delayed at the request of our contracting party or if he is in default of acceptance, we shall be entitled, after expiry of one month since notification was sent that the goods were ready for delivery, to charge storage fees in the amount of 0.2 % of the invoice amount for each started month of the delay, up to a maximum of 5 % of the invoice amount. However, we reserve the right to assert claims for higher damages if actually incurred, e.g. in the case of storage with third parties.

§ 11 – Condition of goods, additional services or service shortfalls

1.

Our details regarding the object of service and the intended use, regarding dimensions, weights, useful value or other properties, be they contained in brochures, price lists, descriptions, illustrations, drawings, sketches, directories or other files, merely represent approximate values which are customary for the industry. They serve solely to describe our products and shall have binding effect if this is expressly confirmed by us.

2.

We reserve the right to deviate in terms of condition, dimension, weight and other properties, insofar as the delivered objects are not substantially impaired as a result with regard to their usability and insofar as the deviations are not deemed unreasonable for our contracting party for other reasons either.

§ 12 – Liability for defects and compensation

1.

In the case of purchase agreements and work supply contracts, our contracting party shall investigate the goods immediately on arrival insofar as it is expedient to do so during the normal course of business and notify us without delay of any defects discovered. If our contracting party fails to file such notification, the goods shall be deemed accepted except in the case of a defect that was not detectable during the inspection. If the defect is detected later on, our contracting party shall submit appropriate notification immediately following its discovery.
This notification shall be submitted in writing. If our contracting party fails to issue proper and timely notification, he shall no longer be entitled to assert any claims resulting from the defect to be reported, unless we have acted fraudulently.

2.

In the case of purchase agreements and work supply contracts, our contracting party shall facilitate the investigation and verification of claims arising from material defects by making available to us, on request and at short notice, sufficient quantities of the parts he believes to be defective, in order that the nature and scope of the defect may be tested by us or by third parties. In this case, we shall bear the costs of delivery should the defect be verified to the extent about which a complaint is made.

3.

In the case of purchase agreements, claims by our contracting party regarding the freedom of defects of the service as well as claims resulting from the warranty due to defects in the objects delivered by us shall lapse on expiry of one year after delivery of said objects. However the statutory deadline shall continue to apply to the claim for damages and reimbursement of expenses according to §§ 437 Sub-clause 3, 478, 634 Sub-clause 4 of the German Civil Code (BGB) if it concerns damages arising from injury to the life, body health or freedom of our contracting party or damages, which are due to a wilful or grossly negligent breach of duty by us or by one of our vicarious agents. The legal statute of limitations shall also apply if we have maliciously failed to disclose the defect. In the cases of §§ 478, 479 of the German Civil Code (BGB), the regulations contained therein shall continue to apply, however the afore-mentioned sentences 1, 2 and 3 shall then also apply to the claim for damages.

4.

Our contracting party's rights in relation to defects in the delivered goods or services provided shall be governed by the legal regulations with the precondition that our contracting party shall be obliged to grant us an adequate period of grace for final performance of at least 8 weeks; our contracting party shall, however, be entitled to set a shorter grace period in individual cases where a grace period of at least 8 weeks is unacceptable to him.
If only a part of the goods delivered by us is defective, the right of our contracting party to demand rescission of the contract or damages instead of service shall be confined to the defective part of the delivery, unless this restriction is impossible or deemed unreasonable for our contracting party.

Claims for damages by our contracting party due to defects in the delivery or service shall be limited to the extent which can be derived from Sub-clause 5 below.

5.

Our liability for damages arising from the injury to the life, body or health of our contracting party, which are due to a culpable breach of duty, is neither excluded nor limited.

We shall only be liable for other damages of our contracting party if they are caused by a wilful or grossly negligent breach of duty by us, by one of our legal representatives or by our vicarious agents.

In all other cases, claims for compensation by our contracting party due to breach of duty, wrongful act or all other legal grounds shall be excluded.

The above-mentioned liability restrictions shall not apply in the absence of agreed properties and conditions, if and to the extent that the aim of the agreement was to protect our contracting party against damages that were not incurred by delivered object or the service itself.

Insofar as our liability is excluded or limited, this shall also apply to the personal liability of our employees, workers and vicarious agents.

The above liability exclusions shall also apply in any case to follow-up damages.

However, the above-mentioned liability exclusions shall not apply to claims under the terms of the Product Liability Act.

§ 13 – Reservation of title

1.

Until the satisfaction of all present and future claims to which we are entitled against our contracting party, our contracting party shall grant us the following collateral, which we shall release upon request at our discretion, provided that their nominal value exceeds our claims in the long-term by more than 20 %:

a) Delivered goods shall remain our property.

b) Processing or conversion shall also be carried out for us as producer, however without imposing any obligation on our part. If the goods delivered by us are processed with other objects which do not belong to us, then we shall acquire co-ownership of the new object at a ratio of the invoice value of the goods delivered by us to the invoice value of the other used goods at the time of the processing.

If our goods are combined or mixed with other movable objects to form a single uniform object and if the other object is to be deemed as the main object, then our contracting party shall assign co-ownership to us on a pro-rata basis insofar as this main object belongs to him.
A hand-over which may be necessary in order to acquire ownership or co-ownership by us shall be replaced by the agreement hereby reached that our contracting party shall keep the object in safekeeping for us as a borrower or, if he does not own the object himself, shall replace the hand-over hereby by assigning the claim for hand-over against the owner to us.

c) Objects, to which we are entitled to (co-) ownership in accordance with the above-mentioned regulations shall hereinafter be described as reserved goods.

2.

Our contracting party shall be entitled to sell, combine with objects of other parties, process or mix the reserved goods in proper business transactions. The contracting party hereby assigns the claims arising from the sale, combination, processing or mixing to us either in whole or in part in the ratio to which we are entitled co-ownership of the sold or processed object. With the inclusion of such claims in the current invoices, this assignment also covers all balance claims. The assignment is carried out with the ranking before other rights.

We authorize, subject to revocation, our contracting party to collect the assigned claims. The contracting party shall remit the collected amounts to us immediately insofar and as soon as our claims are due and payable. Insofar as our claims are not yet due and payable, the collected amounts shall be entered separately and lodged to a separate account (escrow account) by the contracting party.
Our authorization to collect the claims ourselves shall remain unaffected. However, we undertake not to collect the claims as long as our contracting party satisfies his payment obligations from the collected proceeds, is not in default of payment and, in particular, no application has been filed for the initiation of insolvency proceedings or his payments have not been suspended. At our request, our contracting party is obliged to inform us of the assigned claims and their debtor, to supply us with the relevant documentation and provide us all with all necessary details for the collection. If we are entitled to collect the claims, our contracting party is also obliged to inform the debtors of the assignment, whereby we are entitled to do so ourselves.

In the event of payment suspension, the application for or initiation of insolvency proceedings, the rights of our contracting partner for resale, processing, combination, mixing and the authorization to collect the assigned claims also without our revocation shall lapse.

3.

Our contracting party shall immediately notify us of the access of third parties to the reserved goods and the assigned claims. Possible costs of intervention or their defence shall be borne by our contracting party.

4.

Our contracting party shall be obliged to treat reserved goods with due care and attention and, in

particular, to arrange at his own expense adequate insurance cover for these at the new value against fire, water and theft damage.

5.

If our contracting partner acts in breach of the agreement – in particular, concerning default of payment – we shall be entitled to take the reserved goods back at our contracting party's expense or to demand assignment of hand-over claims of our contracting partner against third parties without any obligation on our part to declare our withdrawal from the contract either in advance or at the same time. In particular, taking back or attachment of the reserved goods by us shall not be construed as a cancellation of the agreement unless we have expressly declared this in writing.

6.

Should our reservation of title lose its validity in case of delivery overseas or for other reasons, or should we lose ownership of the reserved goods for reasons of any kind, our contracting party shall be obliged to grant us another security for the reserved goods or another collateral for our claim immediately, which is effective according to the law applicable at the location, at which the goods are to remain as intended and which shall as far as possible correspond to the reservation of title according to German law.

§ 14 – Ownership of documents, confidentiality

1.

We retain unrestricted ownership rights of cost estimates, calculations, designs, drawings, moulds, samples, models, copies, tools, simulations and other documents or data that the customer has received directly from us or, at our instigation, from third parties. A right to retention of our contracting party to such objects shall be excluded.

2.

The contracting parties mutually commit themselves to treat all commercial and technical details of which they have become aware as a result of the cooperation and which are not in the public domain in the same way as their own business secrets and to maintain absolute secrecy about these with respect to third parties. This requirement shall also apply for the time after completion of the respective order until such time as these details are generally known.

The contracting parties may only advertise their business

relationship with the prior written consent of the respective other party. For each case of culpable violation of the above-mentioned obligations, the contracting parties mutually promise each other a contractual penalty in the amount of € 20,000.00 for each individual case.

§ 15 – Property rights

1.

If the goods are to be produced according to drawings, samples or other specifications of our contracting partner, our contracting party shall be responsible for ensuring that no rights of third parties, in particular patents, utility patents, other property rights and copyrights are infringed. Our contracting party shall indemnify us against claims by third parties arising from the possible infringement of such rights. Furthermore, our contracting party shall assume all costs incurred by us in the event that we are forced to defend ourselves if third parties assert the infringement of such rights.

2.

Should results, solutions or technologies emerge during the course of our development work which are patentable in any manner, we shall retain the sole ownership of the resulting property rights, copyrights and usage rights as well as all further intellectual property rights and we reserve the right to register the relevant property rights on our own behalf and in our own name.

§ 16 – Place of performance, place of jurisdiction, applicable law

1.

The place of performance and exclusive place of jurisdiction for deliveries, services and payments including suits relating to cheques and bills of exchange, as well as all disputes ensuing between the parties is Remscheid. However, we shall be entitled to sue our contracting party at any other court of jurisdiction under the terms of §§ 12 ff. ZPO [Code of Civil Procedure].

2.

The business relationship between us and our contracting party shall be regulated exclusively according to the law which is applicable in the Federal Republic of Germany, to the exclusion of the international law governing the sale of goods and, in particular, the United Nations Convention on Contracts for the International Sale of Goods and other international agreements concerning the standardisation of the law governing the sale of goods.

§ 17 – Severability clause, partial invalidity

Should one of the above-mentioned provisions prove to be partially legally ineffective, the separable content of the provision shall in case of doubt be considered legally effective.

Should one of the above-mentioned provisions prove ineffective in the event of a change in jurisdiction, its legislative content shall continue to apply. In the event of a change in jurisdiction, the non-mandatory provisions of the law shall take the place of the provision or part thereof which has become invalid.