# Application notes for the terms and conditions

## 1. Domestic German transport

According to German law, it is sufficient if you refer to the terms and conditions in connection with the conclusion of the contract and if the other party has the opportunity to take note of them. It is necessary, but sufficient, that there is an explicit and understandable reference to the terms and conditions available on the Internet or from you. The reference can be made both during the contract negotiations and at the conclusion of the contract, but not only on the invoice.

In the context of permanent business relationships, general terms and conditions can become part of the contract by repeatedly referring to them in invoices (if necessary, taking into account the overall circumstances, for example not if the reference is on the delivery note or on the back of the invoice). In this case, a need for knowledge on the part of the contractual partner is equivalent to knowledge.

Commercial confirmation letters also constitute an inclusion of general terms and conditions due to their rights-generating effect, with the consequence that in the event of a reference to general terms and conditions in such a letter, they become part of the contract – provided that there is no objection – even if they were not the subject of the contract negotiations or were not attached to the confirmation letter. This is only to be assessed differently if it is a "significant deviation" from what was agreed orally.

If the other party also uses validity, exclusivity and defence clauses, the congruence principle applies. The respective T&Cs shall only apply to the extent that they coincide. For the contradictory parts that go beyond this, there is a disagreement pursuant to §§ 154, 155 BGB, which does not affect the validity of the contract, but merely leads to the dispositive statutory provisions applying instead of the conflicting clauses.

However, the agreement of a simple retention of title is not prevented in the event of a conflict between the purchase and sale GTC. According to the case law of the Federal Court of Justice, it is still possible to agree on a simple retention of title, provided that your order confirmation clearly refers to the intended retention of title security. Under this condition, the customer is aware of the sales terms and conditions containing a reservation of title, or at least this knowledge can be reasonably expected of him. If the retention of title clause is only noted on the invoice or delivery note, this is initially irrelevant because it is late.

## 2. International transport

In the case of foreign business partners, you must refer to the terms and conditions in the language of the negotiation. Furthermore, the general terms and conditions must actually be handed over or at least the applicability of German law must be agreed. The best way to provide proof is to provide a short confirmation in a lean framework agreement. On this occasion, you can also negotiate an efficient limitation of liability that cannot be effectively agreed in general terms and conditions.

## 3. Ownership

Retention of title is not recognised in all countries. According to the conflict-of-law rule of the lex rei sitae, the question of the validity of a reservation of title is always determined by the law of the country in which the object of sale is located.

No retention of title is possible, for example, in Algeria, Argentina, Latvia, Norway, Puerto Rico, Saudi Arabia, Uruguay and the USA. In some states of the USA, a substitute institution has been created with the "security interest", which, however, requires registration by the competent authorities in order to be effective (Art. 9 UCC).

A simple retention of title is probably possible in Albania, Australia, Austria, Belgium, Brazil, Bulgaria, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Guatemala, Honduras, Hong Kong, India, Indonesia, (presumably Iran, Iraq), Iceland, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Lithuania, Luxembourg, Malaysia, Malta, Macedonia, Morocco, Mexico, New Zealand, Nigeria, Pakistan, Panama, Philippines, Poland, Portugal, South Korea, Romania, Russian Federation, Sweden, Switzerland, Singapore, Serbia, Slovak Republic, Slovenia, South Africa, Thailand, Czech Republic, Turkey, Ukraine, Hungary, Venezuela and Venezuela. However, even if the foreign legal system recognises retention of title, very high requirements and formal requirements may apply, which make practical application hardly practicable.

A standardised retention of title in the general terms and conditions usually only applies as long as the goods are still in Germany. Since retention of title is only suitable as an instrument of international payment security in a specific case if it is designed in such a way that it also meets the formal requirements for validity under the law of the country of destination of the goods, we have completely deleted the provisions on retention of title in the English version of the GTC.

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It is advisable to include a clear and clearly recognizable reference to the retention of title in the order confirmation.

Example of wording for retention of title in the order confirmation:

„ Bis zur vollständigen/endgültigen Bezahlung bleibt die Ware unser Eigentum“ / „Wir behalten uns das Recht vor, die Ware bis zur vollständigen Bezahlung als unser Eigentum zu betrachten“

„The goods remain our property until full/final payment has been made” / “We reserve the right to consider the goods as our property until full payment hast been made”

In addition, the other requirements for validity under the law of the country of destination of the goods must be met.

Alternatively, advance payment could be agreed upon in an individual contract or the security could be agreed by means of a confirmed irrevocable letter of credit or bank guarantee.

## 4. Competing T&Cs

In the case of a "battle of forms" in Germany, the contradictory clauses are ignored ("knock-out rule") (see 1.). In their place, the general statutory regulations apply.

In Poland, Switzerland and Austria, the legal situation is quite similar.

In the USA, the law (the Uniform Commercial Code) leads to similar results as the "knock-out rule". However, if the reciprocal services are rendered, this defect is remedied and the contract is considered to have been concluded. The last terms and conditions that have not been contradicted by the opposing party (so-called last-shot rule) then apply.

In the rest of the international space, the so-called "last-shot rule" or "theory of the last word" prevails by far. After that, the general terms and conditions of the contractual partner who last referred to them apply. This applies in particular to England, as well as to the Arab countries and the countries of the Middle East.

In the Netherlands, the legislator has stipulated that the general terms and conditions of the party that is the first to include general terms and conditions in the contract (so-called "first-shot rule") generally apply, unless the addressee expressly objects.

## 5. Adjustment of the advance payment in accordance with Section V.3. GTC

Previously, the GTC regulated the payment of the purchase price in the amount of 1/3 upon order confirmation, 1/3 upon notification of readiness for shipment and 1/3 after transfer of risk. We have now reduced the amount of the advance payment to 20%, as the Federal Court of Justice has ruled that an advance performance obligation of the customer can be validly agreed in general terms and conditions, insofar as these are justified for an objective reason. The BGH considers advance payments of 20% to be permissible in principle without further requirements. According to case law, in the case of further down payment obligations, further justification is required so that the general terms and conditions do not constitute an unreasonable disadvantage.

A general obligation of the buyer to perform in advance within the framework of the general terms and conditions is usually inadmissible. With regard to § 309 no. 2 lit. a BGB, the due date of the purchase price was to be made dependent not only on receipt of the invoice but also on the delivery of the goods. In business transactions, it is not objectionable if you deviate from this regulation in individual cases, especially if the creditworthiness of the buyer justifies it. We therefore recommend that you make an individual agreement with the buyer in advance of the order confirmation.

Balzheim in October 2024