

General Terms and Conditions of Sale of Bayer MaterialScience GmbH



1. General Remarks, Scope of Application

- 1.1 The following General Terms and Conditions of Sale ("GTCS") shall apply to all sale relationships including services associated therewith (supply agreements) between Bayer MaterialScience GmbH ("BMS") as seller and its customer ("Purchaser") insofar as the Purchaser is a business owner, legal entity under public law or special fund organized under public law.
- 1.2 These GTCS in their respective version shall also serve as a framework agreement for future agreements on the sale and/or supply of goods or services ("Products") executed with the same Purchaser without BMS having to refer to them again in each individual case.
- 1.3 These GTCS shall apply exclusively. Any general terms of Purchaser which differ from, contradict or supplement these GTCS shall be considered a part of the parties' contract only if and insofar as BMS has explicitly agreed to their applicability on a case-by-case basis. This consent requirement shall apply in all cases, even if BMS supplies Purchaser in awareness of Purchaser's general terms without explicitly rejecting such deviating terms.
- 1.4 Material declarations and notices to be provided to BMS by Purchaser after conclusion of the contract (e.g., setting of deadlines, notification of defects, cancellation of contract or reduction of payments) must be in writing in order to be effective.
- 1.5 References to the applicability of legal provisions are for purposes of clarification only. Therefore, unless they are directly changed or explicitly excluded in these GTCS, legal provisions shall apply even in the absence of such clarification.

2. Offers, Contract Execution

- 2.1 BMS' offers are non-binding and subject to change unless they have expressly been labeled as binding with reasonable certainty or they contain a certain term for acceptance.
- 2.2 The ordering of Products by Purchaser shall constitute a binding offer to enter into a contract. Unless the order specifies differently, BMS shall have the right to accept this offer within three (3) weeks following its receipt.
- 2.3 The supply agreement including these GTCS shall only be considered as concluded when Purchaser provides its acceptance of the binding offer of BMS within the specified time limit, or when BMS accepts and provides written acknowledgement of its acceptance of the Purchaser's order within the time limit. BMS is not required to provide such written confirmation if it is not expected under the circumstances or if Purchaser waives it.
- 2.4 All aspects of the legal relationship between BMS and Purchaser shall be based upon the concluded contract as defined in Section 2.3, which fully contains all prior understandings between the parties concerning the subject matter of the supply agreement. Oral covenants of BMS prior to the execution of the contract shall not be considered as binding, and verbal agreements between the parties shall be replaced and superseded by the written contract unless their content implies explicitly and in each case that they were intended to continue as legally binding.
- 2.5. Product descriptions, documents and data (such as weights, dimensions, serviceability, tolerances or technical data) provided by BMS to Purchaser, including those in electronic format, shall not constitute guaranteed compositions of the Product. Customary deviations, deviations resulting from legal regulations, as well as other minor deviations, shall be permitted unless they interfere with the usability of the Product for the purpose as indicated in the contract.

3. Period and Delay of Delivery

- 3.1 Unless a fixed delivery date has been agreed to in an individual case or has been explicitly stated by BMS upon acceptance of an order, BMS will at all times endeavor to deliver as quickly as possible. If shipping was agreed, the delivery periods and dates shall refer to the date and time of handover to the shipper, carrier or other third party commissioned to provide transportation. This does not apply if BMS has entered into an obligation to deliver to the location of Purchaser (*Bringschuld*).
- 3.2 If BMS is unable to meet binding delivery dates for reasons beyond its responsibility, BMS will promptly inform Purchaser accordingly and at the same time indicate the new prospective delivery date.
- 3.3 The date of delivery shall be the day on which the Products leave BMS' plant or a warehouse or, if such date cannot be ascertained, the day on which the Products are placed at the disposal of Purchaser.
- 3.4 The occurrence of a default of delivery is governed by the applicable statutory law. In the case of delay, Purchaser shall set a reasonable grace period.

4. Delivery, Place of Performance, Shipping, Transfer of Risk, Default of Acceptance

- 4.1 Delivery shall be effected from the respective shipping point in accordance with the general commercial terms specified in the contract, the interpretation of which shall be governed by the INCOTERMS applicable on the date the contract is concluded. Unless expressly agreed otherwise, deliveries are made "EXW" (Ex Works).
- 4.2 Unless otherwise agreed, BMS shall be entitled to select the mode of shipment (especially with regard to carrier, route of shipment, packaging). Any additional costs incurred as a result of special shipping requests made by Purchaser shall be borne by Purchaser. Unless a carriage free delivery has been agreed, Purchaser shall also bear any increases in shipping rates, any additional costs resulting from re-routing a shipment, storage expenses, etc., occurring after the contract has been concluded.
- 4.3 The risk of accidental destruction, deterioration or loss of Products shall pass to Purchaser in accordance with the agreed INCOTERM.

5. Force Majeure, Impediments

- 5.1 Force majeure of any kind, unforeseeable production, traffic or shipping disruptions, fire, explosion, natural disasters, flooding or low water levels, unforeseeable shortages of labor, energy, raw material and supplies, lockouts, war, political unrest, acts of terrorism, acts of government, incorrect or delayed delivery by suppliers or any other hindrances beyond BMS' control which diminish, delay or prevent production, shipment or availability of the Products or make it an unreasonable proposition, shall release BMS from its obligation to perform for the duration and to the extent of that such disruption or hindrance prevails.
- 5.2 In case of a partial or complete shortfall of its then existing sources of supply, BMS shall not be obliged to purchase or otherwise obtain alternative supplies from other suppliers. Instead, BMS shall have the right to allocate available quantities of Products under consideration of its own requirements and other internal as well as external supply obligations.
- 5.3 If a force majeure event lasts longer than six (6) weeks and if the disruption is more than insignificant, BMS shall be entitled to withdraw from the contract in whole or in part; any consideration already paid by the Purchaser will be refunded immediately after the

withdrawal. In case of temporary hindrances, any delivery or performance periods will be extended or postponed by the duration of the impediment plus a reasonable start-up period.

6. Prices and Calculation

- 6.1 BMS' prices, in effect at the time of delivery, plus statutory value added tax, shall apply.

7. Invoicing, Payments, Set-Off, Rights of Retention and of Refusal to Perform

- 7.1 The purchase price shall be due upon receipt of the invoice and, unless otherwise agreed or specified in the invoice, payable without discounts within eight (8) days from the date of the invoice. Invoices shall be deemed received at the most recent billing address provided by the Purchaser no later than three (3) days following the invoice date.
- 7.2 Value added tax must be added to any down- and pre-payments.
- 7.3 Payments shall not be deemed effected until the due amount has been definitively cleared into one of BMS' bank accounts.
- 7.4 BMS reserves the right to apply payments towards the oldest invoices first plus the late interest accumulated on those invoices and the costs of collection in the following order: costs, interest, principal.
- 7.5 Retention by Purchaser shall be excluded. Purchaser is only entitled to offset if its claims are undisputed or judicially established as final and absolute.

8. Retention of Title

- 8.1 Until receipt of full payment of all current and future receivables under the current business relationship between BMS and Purchaser including incidental receivables and claims for damages ("Secured Receivables") BMS reserves title in the Products sold ("Products under Title Retention").
- 8.2 Until the Secured Receivables are fully paid, Products under Title Retention may neither be pledged to third parties nor transferred as securities. Purchaser shall inform BMS immediately in writing in the event of third parties attempting to take possession of the Products under Title Retention.
- 8.3 If Products under Title Retention are intended for commercial resale by Purchaser, Purchaser is entitled to sell them to its customer as part of its ordinary course of business. With respect to such a resale, the Purchaser hereby assigns to BMS, and BMS hereby accepts, as security all of the future claims, including subsidiary claims, the Purchaser will have against its customer in consideration for the resale of the Products under Title Retention. BMS is entitled to collect the claims so assigned on its own behalf if the Purchaser is in default of meeting its payment obligation concerning the Products under Title Retention, if a petition for the initiation of insolvency proceedings has been filed or in case of another lack of the Purchaser's capacity of performance from which BMS can deduce a potential threat to the realization of its claims. In such events, BMS may request that Purchaser discloses to BMS the assigned debt claims and the respective debtors, provides all necessary information for debt claim recovery, hands over all documents pertaining and notifies the debtors (third parties) of the assignment.
- 8.4 If Products under Title Retention are not sold, Purchaser shall be obligated to safeguard the Products under Title Retention on behalf of BMS, to maintain and repair them as needed at its own expense, and to insure them against loss and damage at a level of coverage expected of a prudent businessman, for as long as title is retained. In the event Products under Title Retention are lost or damaged, Purchaser agrees to assign its insurance claims to BMS.
- 8.5 Any processing of the Products under Title Retention within the meaning of Section 950 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) shall be carried out on behalf of BMS; such processing shall not entitle Purchaser to any claims against BMS.
- 8.6 In the event of a combination or inseparable commingling, as defined by Sections 947 or 948 BGB, of the Products under Title Retention with other items not belonging to BMS in such a way that one of the other items becomes the principal item, the parties are deemed to have agreed that the Purchaser shall transfer to and maintain for BMS a co-ownership interest in the newly created item in proportion to the value of the Products under Title Retention relative to the value of the other combined or commingled items. The parties hereby consent now to the passing of title that would accompany such a combination or commingling.
- 8.7 If the collateral pledged to BMS as provided for in this Section 8 exceeds Purchaser's respective secured total liabilities towards BMS by more than 10%, BMS is required, at the request and discretion of the Purchaser, to release security up to the amount by which the threshold of 110% of the total secured liability has been exceeded.

9. Quality of Products, Technical Advice

- 9.1 Unless otherwise agreed, the quality of the Products shall be exclusively determined in BMS' Product descriptions, specifications and labels. Identified uses for the Products pursuant to the European REACH Regulation shall neither constitute an agreement on the corresponding contractual quality of the Products nor the designated use under the contract.
- 9.2 Any technical advice rendered by BMS – whether verbal, in writing or by way of tests – is given to the best of BMS' knowledge but without any warranty; this also applies where proprietary rights of third parties could be involved. It does not release the Purchaser from its obligation to test the Products supplied by BMS as to their suitability for the intended processes and purposes. The application, use and processing of the Products are beyond the control of BMS and therefore the Purchaser bears the entire corresponding responsibility.
- 9.3 Properties of specimens and samples shall be binding only insofar as they have been explicitly agreed to define the qualities of the Products.

10. Period of Notice for Defects

Purchaser must notify BMS in writing (written form), giving an exact description of the defect; for obvious defects, such notification must take place immediately after delivery and, for defects that can be discovered when the Products are properly inspected, no later than two (2) weeks following receipt of the Products. In case of hidden defects, Section 377 (3) of the German Commercial Code (*Handelsgesetzbuch*; HGB) applies; here too, the written form and an exact description of the defect are required for the notification. If Purchaser fails to notify BMS of a defect within the specified time limit, the delivered Products shall be deemed accepted.

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11. Claims of Purchaser Due to Defects

11.1 If the Products supplied are defective and Purchaser has fulfilled its duties in accordance with Section 10, Purchaser is entitled to exercise the following rights:

(i) In the first instance, BMS - at its sole discretion - shall be entitled to either cure the defect or to supply Purchaser with non-defective Products (supplementary performance). Purchaser must allow BMS the time and opportunity required for the supplementary performance owed and, in particular, return the Products concerned for testing purposes. Purchaser shall bear the costs necessary for testing and supplementary performance, in particular for shipping and transport infrastructure as well as for labor and materials, if (a) Purchaser's request to have defective Products remedied proves to be unjustified or (b) the Products were later moved to a location other than Purchaser's place of business, unless this move coincides with the proper intended use. In case of replacement, Purchaser must return the defective Products to BMS upon request.

(ii) BMS reserves the right to two (2) attempts of supplementary performance. If supplementary performance fails or is unreasonable for BMS, Purchaser may either withdraw from the contract or demand a reduction of the purchase price. However, in case of an immaterial defect, Purchaser shall have no right of withdrawal.

(iii) The provisions of Section 12 shall apply to all claims of Purchaser for damages or reimbursement of unavailing expenditures.

11.2 In case Purchaser's claim against BMS is a matter of recourse following a successful action against Purchaser under the statutory provisions of the sale of consumer goods, claims for recourse based on the statutory provisions concerning the sale of consumer goods shall remain unaffected. Any claims for damages shall be subject to the provisions of Section 12.

11.3 Purchaser must inform BMS without delay of each and every case of recourse within the supply chain. Statutory recourse claims of Purchaser against BMS shall only exist insofar as Purchaser and its customers have not concluded any kind of agreement which exceeds the statutory warranty claims. Section 12 shall apply accordingly.

11.4 If BMS has maliciously concealed the defect or assumed a warranty for the properties of the purchased Products, Purchaser's rights concerning defects are governed by the statutory provisions.

12. Exclusions and Limitations of Liability

12.1 Irrespective of the legal basis, BMS shall not be liable for loss or damage (including expenses) suffered by the Purchaser as a result of (i) BMS' slight negligence or the slight negligence of its legal representatives, employees, workers, agents and vicarious agents and (ii) gross negligence of its non-executive employees or ordinary agents. This exclusion shall not apply to claims relating to a breach of material contractual obligations, the fulfillment of which is essential to the proper implementation of the contract and whose fulfillment the Purchaser may therefore normally rely on (cardinal duties).

12.2 Insofar as BMS is liable on the merits for damages pursuant to Section 12.1, its liability for all damages and reimbursements, whether contractual, non-contractual or otherwise and regardless of their legal nature, shall be limited in terms of amount to foreseeable damages typical for the respective contract.

12.3 The above exclusions and limitations of liability shall not apply to claims relating to death, personal injury and impaired health or for claims under the German Product Liability Act. Mandatory provisions of law shall therefore remain unaffected.

12.4 BMS cannot be held responsible for loss or damage attributable to any of the circumstances identified in Section 5 of these GTCS.

12.5 BMS shall not be liable for loss or damage in case of impossibility or delay in the performance of its supply obligations if the impossibility or the delay is due to orderly compliance of regulatory and legal obligations in connection with the European REACH Regulation being triggered by the Purchaser.

12.6 Any exclusion or limitation of liability in favor of BMS provided under this Section 12 shall also inure to the benefit of the legal representatives, employees, workers, agents and vicarious agents of BMS arising out of the same cause of action.

13. Guarantee

Any agreement on a guarantee must be in writing and shall be effective only if it describes in sufficient detail the substance of the guarantee as well as its duration and the territory in which it applies.

14. Limitation Periods

14.1 Claims for defects asserted on the basis of Section 438 (1) No. 3 BGB shall be time-barred one (1) year from the beginning of the statutory limitation period. Claims for defects asserted on the basis of Section 438 (1) No. 2 BGB shall expire two (2) years from the beginning of the statutory limitation period.

14.2 The regular limitation period (Section 195 BGB) for other contractual and non-contractual claims against BMS shall be two (2) years from the beginning of the statutory limitation period.

14.3 Mandatory limitation periods of law shall remain unaffected. Therefore, the reduced limitation periods described above shall not apply to claims based on the acceptance of a guarantee, claims based on willful misconduct or gross negligence, claims under the German Product Liability Act, recourse claims based on the regulations on the sale of consumer goods, claims relating to death, personal injury or impaired health, or to claims relating to breaches of cardinal duties as defined in Section 12.

14.4 If in an individual case the application of the statutory limitation regulations would lead to an earlier limitation of Purchaser's claims against BMS than would be the case according to the preceding provisions, the statutory limitation period shall apply.

14.5 Any reduced limitation period provided under this Section 14 for claims against BMS shall also apply to any claims by Purchaser against the legal representatives, employees, workers, agents and vicarious agents of BMS arising out of the same cause of action.

15. Trademarks

15.1 The offer or supply of substitute goods to third parties instead of the Products of BMS while referring to the BMS Products, or the association in price lists and similar business documents of product names of BMS (whether trademarked or not) with the word "substitute" or similar words that convey the same meaning or

juxtaposition of BMS product names with the names of substitute goods, is prohibited.

15.2 It is also not permitted, when using BMS Products for manufacturing purposes or in processing, to use product names of BMS, especially its trademarks, as a named component on such goods or their packaging or in related printed and advertising materials without the prior written consent of BMS. The supply of Products under a trademark shall not be construed as an agreement on the use of this trademark for the goods manufactured from it.

16. REACH Regulation

If Purchaser communicates to BMS a use under Article 37.2 of the Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorization and Restriction of Chemicals ("REACH Regulation") which makes an update of the registration or of the chemical safety report necessary, or initiates any other obligation under the REACH Regulation, BMS shall receive from Purchaser a reimbursement of all verifiable expenses incurred. BMS shall not be liable for any delay in delivery caused by the announcement of that use and the compliance by BMS with the respective obligations under the REACH Regulation. If BMS, for reasons of protection of human health or the environment, is unable to include the use as an identified use and if Purchaser nonetheless intends to use the Products in the way advised against by BMS, then BMS shall have the right to withdraw from the contract.

17. Governing Law, Jurisdiction

17.1 These GTCS and all legal relationships between BMS and Purchaser shall be governed by the laws of the Federal Republic of Germany, excluding the United Nations Convention on Contracts for the International Sale of Goods (CISG). However, prerequisites and effects of the retention of title pursuant to Section 8 are subject to the laws of the respective location of the Product if and insofar the choice of governing law in favor of German law is not permitted or invalid.

17.2 The venue for all disputes, including international ones, arising directly or indirectly out of or in connection with this contractual relationship shall be Darmstadt, Germany. However, BMS is also entitled to take legal action at the general venue of the Purchaser.



Bayer MaterialScience

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