

# STANDARD TERMS AND CONDITIONS



## 1. Preamble

These Standard Terms and Conditions for the sale of export goods shall exclusively apply, save as varied by express agreement accepted in writing by both parties.

The offer, order acknowledgement, order acceptance of sale of any products covered herein is conditioned upon the terms contained in this instrument. Any conditional or different terms proposed by the buyer are objected to and will not be binding upon Elliptec unless assented in writing by the seller.

These conditions shall govern any future individual contract of sale between Elliptec and the buyer to the exclusion of any other terms and conditions subject to which any such quotation is accepted or purported to be accepted, or any such order is made or purported to be made, by the buyer

Any typographical, clerical or other error or omission in any sales literature quotation, price list, acceptance of offer, invoice or other document of information issued by Elliptec shall be subject to correction without any liability on the part of the seller.

The provisions of these Standard Terms and Conditions extend to standard contract conditions which are used in a contract with a merchant in the course of business only.

## 2. Orders and Specifications

No order submitted by the buyer shall be deemed to be accepted by Elliptec unless and until confirmed in writing by Elliptec or Elliptec's representative within 21 day after submittal.

The quantity, quality and description of and any specification for the goods shall be those set out in Elliptec's quotation (if accepted by the buyer) or the buyer's order (if accepted by the seller). Any such specification, sales literature quotation etc shall be strictly confidential and must not be made available to third parties.

The buyer shall be responsible for Elliptec for ensuring the accuracy of the terms of any order submitted by the buyer, and for giving Elliptec any necessary information relating to the goods within a sufficient time do enable Elliptec to perform the contract in accordance with its terms.

If the goods are to be manufactured or any process is to be applied to the goods by Elliptec, in accordance with a specification submitted by the buyer, the buyer shall indemnify Elliptec against all loss, damages, costs and expenses awarded against or incurred by Elliptec in connection with any claim for infringement of any patent, copyright, design, trade mark or other industrial or intellectual rights of any other person which results from Elliptec's use of the buyer's specification.

Elliptec reserves the right to make any changes in the specification of the goods which are required to conform with any applicable statutory requirements or, where the goods are to be supplied to Elliptec's specification, which do not materially affect their quality or performance.

If standard products are subject of the order, the buyer may not cancel or reschedule an order partly or completely without penalty if the cancellation is less than 60 days before the confirmed shipping date.

If non standard products are subject of the order, the buyer may not cancel or reschedule an order partly or completely without penalty if the cancellation is less than 180 days before the confirmed shipping date.

## 3. Price of the Goods

The price of the goods shall be Elliptec's quoted price.

Elliptec reserves the right, by giving notice to the buyer at any time before delivery, to increase the price of the goods to reflect increase in the cost to Elliptec which is due to any factor beyond the control of Elliptec (such as foreign exchange fluctuation, currency regulation, alteration of duties, significant increase in the costs of materials or other costs of manufacture) or any change in delivery dates.

Except as otherwise stated under the terms of any quotation or in any price list of the seller, and unless otherwise agreed in writing between the buyer and the seller, all prices are given by Elliptec on an ex works basis, and where Elliptec agrees to deliver the goods otherwise than at Elliptec's premises, the buyer shall be liable to pay Elliptec's charges for transport, packaging and insurance.

The price is exclusive of any applicable value added tax, which the buyer shall be additionally liable to pay to the seller.

## 4. Terms of Payment

The buyer shall pay the price of the goods within 14 days of the date of Elliptec's invoice. Payment shall be effected by interbank payment transaction only; no cheque or bill of exchange will be considered as fulfilment of the payment obligation.

It may be agreed between the parties that the buyer has to deliver at his own expense to Elliptec a letter of credit issued by his bank (or any bank acceptable to the seller). In this individual case it is assumed that any letter of credit will be issued in accordance with the Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No.500.

If the buyer fails to make any payment on the due date then, without prejudice to any other right or remedy available to the seller, Elliptec shall at his discretion be entitled to;

- cancel the contract or suspend any further deliveries to the purchaser; or
- charge the buyer interest on the amount unpaid, at the rate of 7 per cent per annum above European Central Bank reference rate from then being valid, until payment in full is made. The buyer shall be entitled to prove that the delay of payment caused no or little damage only.

## 5. Delivery

Delivery of the goods shall be made by the buyer collecting the goods at Elliptec's premises at any time after Elliptec has notified the buyer that the goods are ready for collection or, if some other place for delivery is agreed by the seller, by the seller delivering the goods to that place.

Elliptec reserves the right to deliver up to 3 % more or 3 % less than the quantity ordered without any adjustment in the price, and the quantity so delivered shall be deemed to be in the quantity ordered.

If a fixed time for delivery is provided for in the contract, and Elliptec fails to deliver within such time or any extension thereof of granted, the buyer shall be entitled on giving to Elliptec within a reasonable time notice in writing, to claim a reduction of 1 % per week of the price payable under the contract, unless it can be reasonably concluded from the circumstances of the particular case that the buyer has suffered no loss.

This limit shall not apply if the business had to be settled on a fixed date or if the delay was caused negligently or intentionally by the seller, his agents or representatives or if there is any further breach of any essential contractual obligation.

If for any reason whatever Elliptec fails within such time of effect delivery, the buyer shall be entitled by notice in writing to Elliptec to fix a deadline after the expiry of which the buyer shall be entitled to terminate the contract. He may also recover from Elliptec any loss suffered by the buyer by reason of the failure of the seller. Damages may only be claimed for by the buyer if Elliptec (or his representatives) intentionally or negligently failed to fulfil the contract. Elliptec shall nevertheless be held responsible for not fulfilling any further essential contractual obligation.

If the buyer fails to accept delivery on due date, he shall nevertheless make any payment conditional on delivery as if the goods had been delivered. Elliptec shall arrange for the storage of the goods at the risk and cost of the buyer. If required by Elliptec shall insure the goods at the cost of the buyer.

## 6. Transfer of Risks

Risk of damage to or loss of the goods shall pass to the buyer as follows:

- in the case of goods to be delivered otherwise than at Elliptec's premises, at the time of delivery or, if the buyer wrongfully fails to take delivery of the goods the time when Elliptec has tendered delivery of the goods;
- in the case of goods to be delivered at Elliptec's premises ("ex works", Incoterms 2000) at that time when Elliptec notifies the buyer that the goods are available for collection.

## 7. Retention of Title

Notwithstanding delivery and the passing of risk in the goods, or any other provision of these conditions, the property in the goods shall not pass to the buyer until Elliptec has received payment in full of the price of the goods and all other goods agreed to be sold by Elliptec to the buyer for which payment is then due.

Elliptec shall have absolute authority to retake, sell or otherwise deal with or dispose of all or any part of the goods in which title remains vested in the seller.

Until such time as the property in the goods passes to the buyer, the buyer shall hold the goods as Elliptec's fiduciary agent, and shall keep the goods properly stored, protected and insured.

Until that time the buyer shall be entitled to resell or use the goods in the ordinary course of its business, but shall account to Elliptec for the proceeds of sale or otherwise of the goods including insurance proceeds, and shall keep all such proceeds separate from any moneys or properties of the buyer and third parties.

If the goods are processed or reshaped by the buyer and if processing is done with goods that seller has no property in, seller shall become co-owner of the goods. The same shall apply if Elliptec's goods are completely reshaped and mixed with other goods.

If third parties take up steps to pledge to otherwise dispose of the goods, the buyer shall immediately notify Elliptec in order to enable Elliptec to seek a court injunction in accordance with § 771 of the German Code of Civil Procedure. If the buyer fails to do so in due time he will be held liable for any damages caused.

Elliptec shall on demand of the buyer release any part of the collateral if the value of the collateral held in favour of Elliptec exceeds the value of the claims being secured. It is to Elliptec's decision to release those parts of the collateral suitable for him.

## 8. Warranties and Exclusion Clauses

The buyer shall examine the goods as required by German Law (§§ 377, 378 of the German Commercial Code) and in doing so check every delivery in any respect.

Buyer shall notify Elliptec of any visible defects, quantity shortage or incorrect product shipments within seven (7) days of receipt of shipment. Failure to notify Elliptec in writing of any visible defects in the products within such a period shall be deemed as unrestricted acceptance.

Elliptec warrants that all items delivered under this agreement will be free from defects in material and workmanship, conform to applicable specifications, and, to the extent that detailed designs have not been furnished by the buyer, will be free from design defects and suitable for the purposes intended by the buyer.

Elliptec shall not be liable for the Goods being fit for a particular purpose unless otherwise agreed upon, to which the buyer intends to put them.

The above warranty is given by Elliptec subject to the following conditions:

- Elliptec shall not be liable in respect of any defect in the goods arising from any design or specification supplied by the buyer;
- Elliptec shall not be liable under the above warranty if the total price for the goods has not been paid by the due date for payment;
- the above warranty does not extend to parts, materials or equipment manufactured by or on behalf of the buyer unless such warranty is given by the manufacturer to the seller.

This warranty does not cover defects in or damage to the products which are due to improper installation or maintenance, misuse, neglect or any cause other than ordinary commercial application.

# STANDARD TERMS AND CONDITIONS



Any claim by the buyer which is based on any defect in the quality or condition of the goods or their failure to correspond with specification shall be notified to Elliptec within six months from the date of delivery.

The buyer is entitled to demand the delivery of any substitute goods, or repair or a reduction of the purchase price as set forth with the terms of each individual contract of sale.

Where any valid claim in respect of any goods which is based on any defect in the quality or condition of the goods or their failure to meet specification is notified to Elliptec in accordance with these conditions, Elliptec shall be entitled at Elliptec's sole discretion to either replace the goods free of charge or repair the goods. If Elliptec is neither ready nor able to either repair or replace the goods the buyer shall be entitled at the buyer's sole discretion to claim for a reduction of price or the cancellation of the contract.

The undertaking to replace or repair products which are defective in material or workmanship shall be the full extent of Elliptec's liability in respect of the sale and constitutes the sole remedy of the buyer for any breach of the above mentioned warranties.

Elliptec shall not be liable to the buyer under or in connection with the order for any loss of income, loss of actual or anticipated profits, loss of business, loss of contracts, loss of goodwill or reputation, loss of anticipated savings, loss of damage to or corruption of data or for any indirect or consequential loss or damage of any kind, in each case howsoever arising, whether such loss or damage was foreseeable or in the contemplation of the parties and whether arising in or for breach of contract, tort (including negligence), breach of statutory duty, indemnity or otherwise.

Any discharge from liability will be void if a defect results from a negligent or intentional breach of contract on the part of Elliptec. The same applies if Elliptec may be held responsible for the breach of any further essential contractual obligation.

Nothing in this terms shall also exclude or in any way limit the liability of Elliptec for fraud, death or personal injury caused by its negligence or any liability to the extent the same may not be excluded or limited as a matter of law.

## 9. Special conditions for software

### § 1

(1) Elliptec warrants under the regulations of the German purchase law that the software has the condition the parties agreed on and that the use of the software to the contractual scope is free of any third parties' rights. All defects due to damage, misconnection or mishandling by the purchaser are excluded from the warranty.

(2) Within the scope of the warranty Elliptec renders a subsequent delivery in the first instance in the case of a defect. In order to do so, Elliptec will – by its own choice – either render new, faultless software or remedy the defect; it is also a removal of defects if Elliptec shows the buyer a possibility to avoid the effects of the defect. Elliptec has the right to refuse the subsequent delivery if the buyer has not yet paid an adequate partial amount of the remuneration.

(3) If two attempts of subsequent improvement fail, the buyer has the right to withdraw from the contract or to reduce the purchase price. This does not apply if the fault is irrelevant. Elliptec's duty to pay for compensation for damages or for expenses is determined by § 2. After the time laid down in sentence 1 of this section has lapsed Elliptec can demand from the buyer that he executes his rights within a period of two weeks. Once this period lapsed the option to chose between the withdrawal and the reduction of the price devolves on Elliptec.

(4) Other breaches of duties by Elliptec can only constitute a buyer's right if the buyer informed Elliptec about the breach in written form and gives Elliptec additional time to take remedial action. This does not apply if remedial action does not come into consideration. § 2 applies as far as compensation for damages and expenses is concerned.

(5) All warranty claims and other rights against Elliptec are subject to a limitation period of one year. This period begins to run when the software is delivered/made available. If a fault results from intention or gross negligence by Elliptec or from fraudulent concealment of a defect, if a personal injury occurs, if there is a defect of title under § 438 Abs. 1 Nr. 1a BGB, if warranties under § 444 BGB are neglected or if a claim under the German "Produkthaftungsgesetz" (Product Liability Act) arises, this one-year-limitation period is replaced by the statutory period of limitation.

### § 2

(1) In all cases of contractual or non contractual liability Elliptec pays compensation only within the following limitations:

(a) In case of intention and in case that the software lacks a quality Elliptec has guaranteed to the buyer in the full amount;

(b) in case of gross negligence only to the amount of damages that could be foreseen and that was supposed to be prevented by the duty that was neglected;

(c) in other cases: only if an essential contractual obligation is neglected and hereby the purpose of the contract is put in danger; the amount of the compensation is limited to the damage as it was foreseeable. The liability is limited to 5.000,00 € per occurrence of damage;

(d) above this: If Elliptec is insured against the damages that occurred to the amount of the insurance coverage and subject to the condition that the insurance sum was paid.

(2) The limitation on liability under section (1) does not affect the liability for personal injuries or for claims under the Product Liability Act.

(3) Elliptec may claim a contributory negligence.

(4) Concerning the limitation period § 1 section (5) shall apply analogously; as to claims under section (1) (a) and section (2) the statutory limitation period is applicable. The statutory period of limitation according to sentence 1 of this section runs from the point in time § 199 Abs. 1 BGB provides; the claim becomes statute-barred at the latest under § 199 Abs. 3, 4 BGB.

### § 3

Elliptec's liability for any damages is completely excluded, if

- the User has obtained the Software by Elliptec free of charge and/or
- the Software has been modified by the client or by a third person on the client's instance and/or
- the Software has been implemented in other Software-Systems by the client or by a third person on the client's instance.

This exclusion of liability does not apply in cases of intent or gross negligence by Elliptec or concerning claims on grounds of a physical, fatal or other kind of injury.

## 10. Miscellaneous Clauses

Elliptec reserves the right to improve or modify any of the products without prior notice, provided that such improvement or modification shall not affect the form and function of the product. Elliptec's products are not authorized for use in critical components in life support devices or systems without written approval from Elliptec.

This agreement supersedes and invalidates all other commitment and warranties relating to the subject matter hereof which may have been made by the parties either orally or in writing prior the date hereof, and which shall become null and void from the date of the agreement is signed.

This agreement shall not be assigned or transferred by either party except with the written consent of the other each party shall be responsible for all its legal, accountancy or other costs and expenses incurred in the performance of its obligation hereunder.

Any notices hereunder have to be send to

Elliptec Resonant Actuator AG  
Sales and Marketing Officer  
Meinhardstr. 3  
44379 Dortmund, Germany

## 11. Force Majeure

Elliptec shall not be liable to the buyer for any failure to perform or delay in performance required under this terms due to acts of law, including governmental bodies acting pursuant to law, acts of strikes, lockouts or other labor disturbances, acts of the public enemy, wars, insurrections, riots, lightning, fires, floods, civil disturbances, explosions, breakage or accidents to machinery, or any other cause, whether of the kind enumerated above or otherwise, not reasonably within the control of the party claiming inability to perform.

## 12. Choice of Law; Place of Jurisdiction

This agreement shall be governed by and construed in accordance with German law excepting the rules of the German International Private Law (EGBGB). The UN Convention for the International Sale of Goods (CISG) is not applicable. Each party agrees to submit to the jurisdiction of the courts having jurisdiction for the seller.

Elliptec shall have the right to bring a claim before a court at the buyer's principal place of business or at his discretion before any other court being competent according to any national or international law.

Dortmund, Germany, June 2007  
Elliptec Resonant Actuator AG