

# **General Terms and Conditions of Sale and Delivery of Baumschulen Dieter Lappen and Pflanzenhandel Lappen Inh. Christian Lappen e.K.**

## **§ 1 General - Area of validity**

1. These terms and conditions of sale and delivery form a part of all delivery contracts, agreements, and offers. They are considered approved by the time of order placement or acceptance of the delivery, at the latest.
2. Consumers in terms of these sales and delivery conditions are natural persons with whom a business relationship has been initiated without granting them a commercial or independent occupational function.  
Contractors in terms of these business conditions are natural persons, legal entities, or partnerships with legal capacity with whom a business relationship has been initiated and who act in order to carry out a commercial or independent occupational function. Customers in terms of these business conditions are both consumers and contractors.
3. We explicitly reject purchase or order conditions or other general business conditions that differ from our sales and delivery conditions, contradict them, or add to them; even if we are informed of these other conditions, they will not become part of the contract, unless we explicitly consent to their validity in writing.

## **§ 2 Conclusion of contract**

1. Our offers are subject to change.
2. By ordering an item, the customer bindingly declares that he wished to purchase the ordered item. We have the right to accept the contract offer in the order within two weeks of receipt. The acceptance can be declared either in writing or through delivery of the item to the customer.
3. The conclusion of contract will occur subject to correct and timely delivery by our suppliers. This only applies if we are not responsible for the failure to deliver, especially if a matching hedging transaction is concluded with our supplier. The customer will immediately be informed of the unavailability of the service; if payment has already been made, it will be reimbursed immediately.
4. If the consumer orders the item electronically, we will save the wording of the contract and send it to the customer by e-mail upon request, along with the present terms and conditions of sale and delivery.
5. If the buyer refuses to fulfil the contract, the seller can claim a lump sum amounting to 30% as compensation for fulfilment, without requiring verification. Greater compensation can be claimed with verification.

## **§ 3 Prices and payment terms**

1. All prices are valid at the point of sale, without packaging and transport, in Euros, plus the value added tax applicable at the time of delivery. When a new catalogue/price list is issued, the old prices are no longer valid.
2. Foreign currencies are converted into Euros at the official selling rate for the currency in question at the Deutsche Bundesbank on the day of billing, unless the bill is made out in this currency.
3. List prices do not apply for personal selection of plants on our premises.
4. We reserve the right to require advance payment for orders.
5. The customer agrees to pay the purchase price within 10 days from the billing date after receipt of the item. After the end of this period, the customer's payment will be in arrears. While in arrears, a consumer must pay an interest rate of 5% over the base rate on the debt. While in arrears, a contractor must pay an interest rate of 8% over the base rate on the debt. For a contractor, we reserve the right to prove and claim greater damage caused by delay.
6. A consumer only has a right to offset if his counterclaims were legally established or recognised by us. Assertion of a right of retention is only permitted in circumstances caused by the same delivery. In commercial law, the exercise of right to refuse services or a right of retention by our contractor customers is debarred.
7. Cheques and drafts are only accepted on account of performance and subject to encashment. Expenses and costs incurred by this are to be borne by the buyer.
8. If our customer's financial situation changes for the worse, we have the right to make the completion of our contractual services contingent on the advance payment of the agreed remuneration or a corresponding security. After an appropriate deadline is set, if our customers remain idle, we have the right to withdraw from the contract and request compensation for damages.

## **§ 4 Passing of risk, shipping, and packaging**

1. If the buyer is a contractor, the risks of accidental loss and accidental damages to the item are transferred to the buyer along with the handing over of the item; for a shipment, with the delivery of the item to the forwarder, the carrier, or other persons or establishments appointed to carry out the delivery.

2. If the buyer is a consumer, the risks of accidental loss or accidental damages to the sold item are only transferred when the item is handed over to the buyer, even in case of shipment.
3. The hand-over remains the same if the buyer is behind schedule receiving the item.
4. Transport insurance will only be taken out upon the express wish and at the cost of our customers.
5. We reserve the right to compute non-returnable packaging at cost price. Disposal of the non-returnable packaging is the customer's responsibility in all cases. Returnable packaging (e.g. iron-barred boxes, tree pallets) remain our property and must be returned at the customer's expense.
6. Packing and transportation costs as well as freight charges may be charged subsequently.
7. Delivery can only take place on streets capable of bearing freight vehicles. Deliveries will only be made to one unloading point.
8. If the freight vehicle is stationary on site for more than 2 hours (3 hours for a fully laden vehicle), an additional 45,- Euros plus value-added tax will be charged for every hour commenced.

## **§ 5 Supplying obligations**

1. In case of catastrophes caused by weather, like e.g. drought, frost or hail, or other unforeseen faultless circumstances like e.g. epidemics, strikes, lock-outs, disruptions of operations of any kind, war, war-like events, changes in currency or official intervention, the delivery period is extended by the period of the interruption. If the given circumstances make delivery impossible, we are released from the obligation to deliver. In these cases, the customer cannot claim compensation for damages.
2. We only consider fixed delivery dates binding with explicit and written confirmation. Otherwise, delivery dates are non-binding.
3. Our right to partial deliveries is explicitly reserved.
4. Partial call orders by the customer require an express agreement.
5. Failure to adhere to our payment conditions from other deliveries grants us a right of retention.

## **§ 6 Measures and samples**

1. All measures are approximate. Variations on the order of  $\pm 10\%$  are permitted.
2. Samples only display the average quality. Not all plants will be like the sample.

## **§ 7 Retention of title**

1. For contracts with consumers, we retain the title to the item until complete payment of the purchase price. For contracts with contractors, we retain the title to the item until all claims from an on-going business relationship, including collateral claims, have been settled. The retention of title exists even if individual claims are incorporated into a running account and a balance is struck and recognised.
2. Our ownership of the item is not lost if contractors, as buyers, settle or plant the delivered plants on their own or another's property until resale. The item should be stored, settled, or planted separately from other plants and should be marked so as to make it clear that it originates with us. The customer is obligated to treat the item with care, free of charge. In particular, this includes correct storage, planting, fertilisation, and irrigation.
3. The customer is obligated to inform us immediately if a third party has access to the item, such as in the case of garnishment, or if the item has possibly been damaged or destroyed, and must provide us with the name and address of the garnisher. The customer must immediately notify us of a change in ownership of the item or a change of address.
4. We have the right to withdraw from the contract and demand return of the item if the customer acts contrary to contract, especially if payments are in arrears or an obligation as per Numbers 2 and 3 is infringed upon.
5. The contractor has the right to re-sell the item in the normal course of business. The contractor hereby assigns any claims to which the buyer is entitled from the resale to us, including all ancillary rights and possible payment balance requests. We accept the assignation. After the assignation, the contractor is empowered to collect receivables. We reserve the right to collect these receivables ourselves if the contractor does not properly fulfil his payment obligations and defaults on a payment.
6. The handling and treatment of the item by the contractor always takes place in our name and on our behalf. If there is a mix-up with goods not belonging to us, we will acquire co-ownership of the mixed goods in the proportion of the value of the goods delivered to us to the other goods.

## **§ 8 Warranty and guarantee**

1. There is no warranty for the growth of the plants. If the customer expressly requests a growth warranty, a special sum can be charged for this. A guaranteed growth warranty extends for the duration of one year after delivery and requires that the customer handles the plant in the correct manner for its species. In particular, this includes the

correct depth of planting, fertilisation, and irrigation. Cases of force majeure, especially drought, frost, pest infestation, etc., are not included in the warranty. The growth warranty is not a warranty in the legal sense.

2. A guarantee of varietal identity is offered only upon express request. For fruit trees, the guarantee of authenticity of the fruit varieties and the requested documents are offered until the end of the fifth year from the day of delivery. The guarantee for berry plants, roses, and other trees extends only until the end of the second year from the day of delivery. No guarantee of varietal identity is offered for offspring.

For refinement bases and seedlings, we offer a guarantee of the authenticity of the species delivered only through the end of one year from the day of delivery.

3. If the buyer is a contractor, we offer a guarantee for defects in the item of either rectification of the defects or a replacement delivery, by our choice.
4. If the buyer is a consumer, he has the choice of whether supplementary performance shall be carried out through rectification of defects or by a replacement delivery. We have the right, however, to reject the selected method of supplementary performance, if it is only possible at disproportionate cost and if the other method of supplementary performance has no considerable disadvantage for the consumer.
5. If the supplementary performance fails, the customer can request, as he chooses, decrease of the fee (reduction) or cancellation of the contract (withdrawal). For a minor infringement of contract, especially for only minor defects, the customer does not have a right to withdraw.
6. Contractors must immediately examine the item delivered by us and promptly inform us of defects in writing; otherwise, the assertion of a warranty claim is barred. The contractor assumes the burden of proof for all claim criteria, especially for the defect itself, for the time of discovery of the defect, and for the punctuality of the notification of defects.

Consumers must also notify us immediately in writing after discovery of a defect. If the consumer fails to notify us, all warranty claims expire two weeks after discovery of the defect. The consumer assumes the burden of proof for the time of discovery of the defect. The consumer also assumes the burden of proof if he was induced to purchase the item by false advertising information. If a living plant is the purchase item and the plant dies, is infested with pests, or otherwise develops a disease, the consumer assumes the burden of proof that this did not occur due to improper treatment of the plant after its delivery.

7. If the customer chooses to withdraw from the contract due to a defect of title or a material defect after a failed supplementary performance, he then has no claim to compensation for damages due to the defect. If, after a failed supplementary performance, the customer chooses compensation for damages, the item will stay with the customer, if this is acceptable to him. The claim to damages is limited to the difference between the purchase price and the value of the defective item. This does not apply if we deliberately caused the infringement of contract.
8. For contractors, the warranty period lasts for a year after delivery of the item. For consumers, the limitation period lasts for two years after delivery of the item. This does not apply if the customer did not immediately inform us of the defect (Number 6 of this clause).
9. The purchase of species of roses protected by patent and plant variety laws, as well as of those whose names are protected by trademark law, obligates the contractor, as buyer, to resell the species only with the original labels which were delivered together with the plants, as well as to refrain from using the acquired rose plants or parts of them for breeding and from selling such rose plants abroad. In cases of resale the contractor, as buyer, is obligated to impose these measures on his buyers as well.

## **§ 9 Limitation of liability**

1. For breaches of duty due to minor negligence, our liability is limited to the average direct damage predictable for the type of item and standard for the contract. This also applies for breaches of duty due to minor negligence caused by our legal representatives or assistants. We are not liable to contractors for infringements of inessential contract duties due to minor negligence.
2. The aforementioned limitations of liability do not affect the customer's claims from product liability. In addition, the limitations of liability do not apply to the customer's claims due to bodily injury, damage to health, or loss of life of the customer for which we are responsible.
3. The customer's claims to compensation for damage due to a defect expire after one year after delivery of the item. This does not apply if we are to be accused of gross negligence or if we have caused bodily injury, damage to health, or loss of life of the customer.

## **§ 10 Final clauses**

1. The laws of the Federal Republic of Germany are valid. The provisions of the UN Convention on Contracts for the International Sale of Goods do not apply.
2. If the customer is a dealer, a corporate body under public law, or a special fund under public law, the only court of jurisdiction for all disputes from this contract is the seller's regional court (AG Nettetal, LG Krefeld). The same applies if the customer does not have a general court of jurisdiction in Germany, or his address or habitual residence is not known at the time the action is filed.

3. If individual clauses of the contract with the customer, including these general business conditions, are or become entirely or partially invalid, the validity of the other clauses is not affected. The completely or partially invalid rule will be replaced by a rule whose economic effect comes as close as possible to that of the invalid one.

Nettetal, September 2008