

BUSINESS GUIDELINE 3 GB

DELIVERY AND PAYMENT CONDITIONS

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Initial remarks and comments

Often it happens in commercial business dealings that the rights and duties of the parties concerned, contained in a delivery contract are drafted from the legal rules (or provisions). Moreover, speaking generally, the contract emerges as a compromise between the purchasing conditions of the buyer and the selling conditions of the supplier.

The following hints are not meant to replace the respective contract conditions of the parties but should be used as a check list and are meant to ease the elaboration of one's own conditions and the examination of the clients' conditions.

These hints take into consideration the peculiarities common to the pump industry.

1. Formulation of a contract

- 1.1 The formulation of a contract presupposes the acceptance of a tender. The seller should check whether or not the tender is still binding, both with regard to the specified time and to its contents (i.e. consider the client's obligation to order the goods within a specified time).

One should distinguish between a gratuitous quotation (made free of charge, which is the normal case) and a quotation involving a charge.

- 1.2 The seller's quotation and its acceptance by the buyer must not be based on commercial delivery or payment conditions which are contradictory. If this is not observed, the problem will arise as to which party's conditions govern the contract.
- 1.3 It must be clearly stated which rules, standards, guide-lines etc. apply in addition to the actual text of the contract, and in what sequence should they complement it. In which language is the text of the contract binding ?
- 1.4 Both parties of the contract must make it clear without equivocation who on either side is entitled to represent and conclude binding agreements; they must also check each other's financial standing so that, if the need arises, a writ of execution may be carried out against the defaulter, without delay.

2. Subject matter of the contract and place of performance

- 2.1 All services (or performances, or deliveries) offered by the supplier must be accurately described. Quote performance data.
- 2.2 Consider if the buyer is to cooperate by supplying labour and material.
- 2.3 Additional services (or performances) of both contract partners must be defined, according to their nature, scope and price, wherever applicable.
- 2.4 The locations for all services to be rendered, or work to be carried out, which need not necessarily be one and the same place (e.g. for performance in kind, performance in cash for payment of money) must be defined.

3. Documentation

- 3.1 It is necessary to check the documentation whether or not it may be passed to the client without alteration.
- 3.2 It is necessary to lay down rules for the property right applicable and the right of disposal to a third party, of documentation which has been handed over.
- 3.3 It is necessary to fix the number of documents and their cost.
- 3.4 In what language shall the documents be written ?

4. Packing and transport

- 4.1 The scope and nature of packing is to be laid down in advance, or alternatively to be assigned contractually to one of the contract partners. In the case where a delivery is made to the supplier, (indirect export) it is important to state what requirements packing lists must cover.
- 4.2 The price of packing is to be stated. It may be either included in the total price or charged for separately.
- 4.3 The transport route, means and liability should be laid down (e.g. by the use of INCOTERMS).
- 4.4 It must be stated who bears the costs of insurance for damage to packing and for damage in transit, also the extent of the insurance cover (both in length of time and in value) and whether there are any insurance loopholes in cases where there are different parties dealing with them.

5. Information included in documents

- 5.1 The terms for payment must state clearly what price is to be paid for what work done, or services carried out (e.g. „Pump XY delivery ex works including loading, without packing“). Give thought to taxes and insurances. In which currency is the payment to be made ?
- 5.2 Consider whether the price is fixed or variable subject to costprice adjustment ? In the latter case the price revision clause and its procedure have to be agreed.
- 5.3 Dates and amounts for progress payments must be stated.
 - Example 1:** 30% on receipt of order
30% on notification of readiness for despatch
30% within 30 days of date of invoice on despatch
10% within 6 months.
 - Example 2:** 15% on receipt of defined drawings
25% on receipt of materials in supplier's works or at the latest at 50% of the contract period
25% at 50% of manufacturing or at the latest at 75% of the contract period
35% on delivery to site
- 5.4 Consider the method of payment (e.g. by confirmed letter of credit, cheque or bill of exchange) taxes, commissions, discounts etc.

- 5.5 Provide rules concerning delay in payment (expiry of due date for payment, need for special request, interest on default).
- 5.6 Consider the withholding of payments and the setting off because of any counter-claims by the buyer, and their prohibition.

6. Time of delivery

- 6.1 Various points in time (or dates) may be accepted as the start of the delivery time (e.g. it may coincide with the formation of contract, or with the issue of some special authorizations or on receipt of the down payment). It is important to state in the conditions that the delivery time starts running only when the buyer has fulfilled up to that date all the (mutually) agreed contractual obligations.
- 6.2 The length of the delivery time should be laid down, it shall be deemed to be adhered to if prior to its expiry the object to be delivered has left the works or its readiness for despatch has been advised.
- 6.3 Next, it must be stated under what conditions late delivery occurs. A period of grace of reasonable length should be provided in the conditions. Furthermore it is necessary to determine what kind of circumstances (defined as clearly as is possible) give valid excuse for delayed delivery (clauses of relief: e.g. „force majeure“, labour troubles or strikes, unavoidable (official) measures by the administrative authority). It is important to allocate responsibility for proving that such circumstances do in fact exist.
- 6.4 Generally speaking, a delay in delivery results in a claim for damages. At the same time the buyer must prove the accuracy of loss or damage and its extent. A limitation of damages is very important. Alternatively, it may be a question of liquidated damages for breach of contract (in some countries this may be called a penalty). The advantage for the buyer in this case lies in the fact that he needs only to prove the delay, but not the resulting damage.

Also in this case it is very important that the extent of this claim should be limited (either in absolute figures or relative to the value of the delivery, also part-deliveries can be allowed). In case of late delivery the buyer may also be entitled to rescind the contract; this should be restricted in so far as is possible.

- 6.5 The condition of delayed acceptance (of the goods) by the buyer must also be provided for, especially with respect to the passing of the risk, the storage costs and the right to dispose of the goods elsewhere. The duty of the buyer to accept part-deliveries must be laid down.

7. Passing of risk

- 7.1 In international trade the passing of risk is mostly ruled by the INCOTERMS (delivery cif, fob etc.). These terms, however, are not obligatory and may be modified.
- 7.2 Bear in mind that the INCOTERMS are meant only for goods, not for services. When external services occur in connection with the goods (e.g. in the case of erection) suitable clauses should be included.

8. Lien on goods delivered

- 8.1 It is often a problem providing security for contracts with a foreign partner which is acceptable to their legal system (condition of sales, chattel mortgage, lien etc.) even where one's own national law is applicable as these legal instruments are not always recognized abroad.
- 8.2 It is necessary to examine carefully any stipulation of foreign security interests in contracts irrespective of whether one's own law or foreign law is applicable, as their pre-conditions are generally speaking, difficult to determine.
- 8.3 Therefore it is preferable to arrange security through a bank or insurance company rather than by attempting security based on the delivered goods.

9. Hand over and acceptance

- 9.1 The handling over of the delivered goods must be agreed both in time and in place. Methods to be agreed in advance (e.g. notifying of/by the buyer, against receipt or certificate of delivery of the goods in working order).
- 9.2 The acceptance procedure (i.e. approval of the goods delivered) must be laid down in detail, if special tests are required. It is important to specify the time and place, (either before or after transportation, at the manufacturer's plant or on site). The rules applied to the acceptance test should be noted.
- 9.3 The legal consequences of the taking over are to be clearly defined (e.g. the effects of the passing of risk).

10. Warranty

- 10.1 The basis of the warranty has to be determined (e.g. on the ground of the pump's failure caused by faults in design, material or workmanship, or on the ground that the performance of the pump is seriously affected, or departure from the promised specification of the pump). Is the warranty meant also to cover ancillary products, or would it be confined to passing on the claims against the suppliers.
- 10.2 The scope of the warranty claims is important. A distinction should be made between the repair/rectification and replacement. If possible, the supplier should have the right of choice. Removed or dismantled parts should be placed at the supplier's disposal.
- 10.3 Non-liability clauses in favour of the supplier must be balanced. If the repair which has been carried out has not been successful, the rights of the buyer must be respected.

There can be several limitation of the claim for warranty (examples: natural wear and tear, unsuitable running or installation conditions, improper servicing or storage, alterations or unauthorized changes by the buyer or by third parties). Consequential damage should not be included.

- 10.4 The division of the costs between the parties has to be defined (e.g. the costs of the repair itself, of dismantling and of reassembling and of the transportation of parts to be replaced).

- 10.5 The procedure for making a claim (immediate notification by the buyer) and the timing of the warranty claim must be laid down. If possible the warranty should start with delivery or at least with the date of start up. A clearly defined warranty period from the agreed starting date (s.a. 12 months) will avoid unforeseen claims for damages after the end of the warranty period. Statutory limitations should be considered.
- 10.6 Warranty for goods and services, following any repairs or replacements must be defined (generally speaking this warranty should not extend beyond the main warranty).

11. Any other liability

- 11.1 It is necessary to make provision for liability arising from any other services (technical faults, proposals and revisions) where these have not already been excluded.
- 11.2 Claims in tort against the parties.

12. Industrial property rights

- 12.1 State whether the pump, or the process for which the pump is used, is legally protected by patents.
- 12.2 Pay attention to patent rights or other industrial property rights of third parties which may cover the pump.

13. The beginning and the end of the contract

- 13.1 The beginning of the contract should be tied to some unequivocal criteria (e.g. definite terms or dates, signing of documents, issue/obtaining provision of required authorization documents).

It is possible also to link the beginning of the contract with a down payment.

- 13.2 When the contract is prematurely terminated, it is necessary to distinguish between cancellation and termination. Cancellation terminates the contract *ex tunc*, i.e. with effect that each party has to place the party as far as possible into the position in which that party would be if the contract had never been concluded. Termination in the contract is a definite point in time after notice has been given (*ex nunc*). One must also differentiate between cancellation or termination by either the buyer or the supplier. In each case the following items are to be considered: Prerequisites (e.g. for cancellation: the impossibility of performance by the seller; for termination: constant breaches of the contract in spite of warning). Periods for declaration of intention (e.g. fixing of a certain period of time after becoming aware of the occurrence underlying the declaration of intention; or „without delay“, „immediately“). Each party has to return to the other what he has received (e.g. down payments in the case of cancellation, or advance payments for services which will not be carried out, in the case of termination). Exclude all claims for damages by the buyer.
- 13.3 The invalidity of certain parts of the contract should not necessarily invalidate the whole contract.

14. Alteration and interruption of the contract

- 14.1 Any effective contract change presupposes that the original contract has been clearly defined.
- 14.2 It must be laid down whether a suspension of contract may be declared unilaterally, or will it be necessary to do it only by mutual agreement. It is also important to define exactly the end of the contract (i.e. when does the interruption of a contract become the end of the contract?). If it is decided that the contract is to run on, it must be made clear whether the conditions agreed in the original contract should remain in force, or is a new contract necessary (and if so, under what conditions?). It is also necessary to lay down rules concerning the period of notice in the case of interruptions of the contract.

15. Settlement of disputes

- 15.1 It must be clearly stated whether an ordinary court of law shall be competent. The place of jurisdiction and the applicable law must be agreed (do not necessarily choose your own law, because of problems relating to the enforcement of judgements).
- 15.2 If no ordinary court of law is to be used in the dispute, it will be necessary to provide for arbitration. It is important to stipulate the arbitration rules which will apply. Stipulate also the applicable law, where an „ad hoc“-arbitration clause is chosen; it is necessary also to lay down provisions regarding the designation of the arbitrator and to define the applicable law.

16. Contents of delivery and payment conditions of European countries

The following national and international delivery and payment conditions are being applied by the various member countries at the time of publication:

1. A - Austria: Allgemeine Lieferbedingungen des Fachverbandes der Maschinen- und Stahlbauindustrie Österreichs
 - CH - Switzerland: Allgemeine Lieferbedingungen set up by Verein Schweizerischer Maschinen-Industrieller (VSM)
 - D - Federal Republic of Germany: Allgemeine Bedingungen für Lieferungen von Maschinen für Inlandsgeschäfte recommended by Verband Deutscher Maschinen und Anlagenbau e.V. (VDMA).
 - DK - Denmark, N - Norway, S - Sweden, SF - Finnland: ALLMÄNNNA LEVERANS-BESTÄMMELSER Standardized contract conditions for deliveries within and between these countries
 - F - France: Conditions Particulieres de Vente en France pour le Secteur Prive – Federation des Industries Mecaniques et Transformatrices de Metraux
 - GB - Great Britain: BEAMA Standard Conditions/UK Contract Conditions-I. Mech. E. Model A
 - I - Italy: Standardized national delivery and payment conditions not available
 - NL - Netherlands: FME (FEDERATIE ETAALEN ELECTROTECHNISCHE INDUSTRIE) – Lieferbedingungen
2. At ORGALIME further exist delivery and payment conditions („S2000“) and in short time for supply and erection conditions („SE01“).