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## Terms and Conditions of Delivery

### 1. General

The following Terms and Conditions shall apply to any and all offers made by us and orders placed with us. By making the order and receiving our order confirmation, our customers accept these Terms and Conditions as binding. We hereby explicitly object to any and all conflicting terms and conditions of our customers. Such conflicting terms and conditions shall not become part of the agreement. The legal relationships between us and our customers shall be solely governed by our written order confirmation or, as the case may be, an agreement entered into in writing, including these Terms and Conditions of Delivery, which contain the entire understanding between the contracting parties regarding the object of the agreement. Any oral promise made prior to the conclusion of the agreement shall not be legally binding, and any oral understanding between the contracting parties shall be substituted by the written order confirmation/the written agreement, unless any understanding provides that such understanding shall continue to be valid in a binding manner. Any amendment to, or modification of, the agreements entered into, including these Terms and Conditions of Delivery, shall only be valid if made in writing. No employee other than the managing directors or authorised signatories shall be authorised to enter into any deviating understanding.

### 2. Offers

Our offers shall generally be subject to confirmation. Deals or agreements shall only become binding for us upon our written confirmation. We may accept orders or contracts within fourteen days upon receipt. We explicitly reserve title and copyright to any cost estimate, draft, drawing, calculation etc. Such documents may neither be used nor duplicated nor made accessible to any third party without our consent and shall be returned to us upon request or in the event that no order is placed with us. The technical specifications and dimensions stated by us, including those contained in drawings, shall not be binding. They shall not be guaranteed characteristics, but rather descriptions or identifications of the delivery or service. The data contained in the drawings must be verified by Customer. We reserve the right to make minor changes to dimensions, design, anodizing colours or models, as well as the right to make improvements or use replacement materials. The weights stated are approximate.

### 3. Scope of Delivery/Service, Non-assignment Clause

The scope of delivery/service shall be governed by our written order confirmation. As regards the form of deviating agreements, Number 1 hereof shall apply. Any additional services, subsequent changes or amendments to the order as well as acceptance, packaging or shipment specifications that are notified to us after the conclusion of the agreement shall entitle us to a reasonable re-calculation.

Customer shall not be entitled to assign or transfer to any third party any claims against us or rights under the business relationship without our consent. The same shall apply to any claims or rights against us that arise directly by law.





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#### 4. Prices

The prices shall be in euro ex works Arnsberg and shall generally exclude packaging, insurance, freight, customs duties and any other costs, plus statutory value added tax as applicable from time to time. The foreign exchange rate risk shall be borne by Customer.

Up to a net value of goods of € 1,200.00 we shall deliver free domicile or, as the case may be, free German border, not unloaded, charging standard freight charges of €35.00. Deliveries of goods of a value of more than €1,200.00 shall be made free domicile, not unloaded, without any transportation or packaging charges. Any special delivery – such as transportation to the German islands in the North Sea or Baltic Sea – shall be invoiced separately. Sea freight and air freight pursuant to prior agreement.

Our prices shall be based on the wages and materials costs as applicable at the date of the conclusion of the agreement. Unless agreed otherwise, in the event of any increase in wages or salaries and/or in prices for raw materials or supplies, after a period of four months we shall be entitled to adjust the agreed price accordingly, provided that a period of more than four months lies between the date of the conclusion of the agreement and the agreed delivery date.

#### 5. Retention of title

Where Customer is entrepreneur and acts in performance of Customer's commercial or independent professional activity when concluding the agreement, the goods shall remain our property until complete payment of any and all claims from deliveries and services under the whole business relationship, including incidental claims, claims for damages and encashment of cheques or discharge of bills, has been made. In all other cases, the goods shall remain our property until complete payment of the purchase price has been made.

The retention of title shall also remain valid if any of our claims are included in a current invoice and the balance is drawn and accepted.

Customer shall be obliged to treat any delivered goods subject to retention of title with the prudence of a diligent businessman and to insure them against fire and loss in the amount of their full value. Customer shall store the goods that are subject to retention of title on our behalf free of charge. Customer hereby assigns to us any claims for compensation for any damages referred to above that Customer may assert against insurance companies or any other party obliged to compensate.

If the goods are intermixed or combined with other items, such intermixture or combination shall occur on our behalf without any obligation arising for us. Customer shall not acquire ownership in the new thing pursuant to Sections 947 et seq. of the BGB (*German Civil Code*) as a result of the combination, intermixture or processing. In the event of combination, intermixture or processing, Customer hereby assigns to us Customer's ownership or co-ownership rights to the intermixed stock or, as the case may be, the new items.

Customer may sell and process our property only during the ordinary course of business and only if Customer's financial position does not materially deteriorate. Upon placing the order, Customer shall assign to us any and all claims, including future claims, against third parties that may arise from the resale of the goods belonging to us. The same shall apply to any other claims that may arise in lieu of the goods subject to retention of title or that may otherwise arise with respect to the goods subject to retention of title, such as insurance claims or claims in tort in the event of loss or destruction.



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Upon our request, Customer shall be obliged to notify the third-party buyer of the assignment to us for the purpose of making payment to us. Customer shall be authorised to collect the claims assigned by way of collateral only in the ordinary course of business, such authorisation being revocable. The authorisation may only be revoked if Customer breaches any of Customer's contractual obligations, does not fulfill Customer's payment obligations towards us, is insolvent or over-indebted, a petition for the opening of insolvency proceedings over Customer's assets has been filed, in the event of a protested cheque or bill or if an attachment has been executed. Further, in any of the events set forth above, the right to resell or process the goods shall cease to exist. In the event of a revocation of the authorization to collect, Customer shall be obliged to notify us of the name or company name and address of Customer's customers or purchasers. Notwithstanding our right of revocation, Customer's authorisation to process the delivered goods, to resell and to collect the claims assigned by way of collateral shall cease to exist upon occurrence of Customer's insolvency or over-indebtedness or if Customer or any third party files a petition for the opening of insolvency proceedings over Customer's assets.

If Customer is in default with Customer's payment obligations, we shall be entitled to demand surrender of the goods subject to retention of title. The enforcement of the retention of title shall only be deemed as rescission of the agreement if explicitly declared by us in writing. We may realise by private sale the goods subject to retention of title that we have taken back.

We undertake upon request of the buyer to release the collaterals to which we are entitled by re-assignment to the extent that the value of our collaterals exceeds the claims to be secured by more than 20%. We may choose the collaterals to be released.

Customer may neither pledge nor transfer by way of collateral the delivered goods. Customer shall immediately notify us in writing of any third-party interference with the goods delivered subject to retention of title, providing the records required for an intervention. Intervention costs, including any costs of legal proceedings, shall be borne by Customer as between the Parties.

Customer shall generally be allowed to factor Customer's receivables. However, Customer shall notify us thereof. If Customer sold claims through real factoring, Customer shall assign to us the claim against the factor that arises in lieu of the sold claim and shall forward to us the proceeds from the sale pro rata to the value of our rights in the goods. Customer shall be obliged to disclose the assignment to the factor, if Customer is in default with paying an invoice for more than ten days or if Customer's financial position materially deteriorates.

To the extent a central claims settling agent that assumes the delcredere is used in the business relationship between ourselves and Customer, upon dispatch of the goods we transfer title to the central claims settling agent under the condition precedent that the purchase price is paid by the central claims settlement agent. Customer shall only be discharged upon payment by the central claims settlement agent.

## 6. Delivery term

The delivery period stated by us shall commence upon sending of the order confirmation, however not before Customer has provided the records, permits, releases to be obtained by Customer or any other performance to be rendered by Customer and not before receipt of an agreed down-payment.





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The delivery period is always set in a manner such that it can be met with probability in the event of a regular course of production. If we exceed the delivery term, Customer must set us a reasonable period of grace. Customer may not reject partial delivery provided that the delivered parts can be used by Customer in an expedient manner.

Delivery and assembly periods shall be reasonably prolonged if Customer requests any change to the technical design, in the event of force majeure or upon occurrence of unforeseen obstacles beyond our will and responsibility, regardless of whether such obstacles occur in our plant or at our suppliers (e.g. disruption of operations, strike, lock-out, scrap goods and delays in the delivery of material third-party parts and raw materials). To the extent such events materially change the commercial importance or the content of the performance or have a material impact on our operations, as well as in the event that the execution turns out to be impossible, the agreement shall be appropriately adjusted. To the extent such an adjustment is not economically reasonable, we shall be entitled to rescind the agreement in whole or in part, excluding any claims for damages of Customer.

The delivery term shall be met if, prior to its expiry, the object of the delivery has left the plant or readiness for shipment has been notified. In the event of a delivery delay for which Customer is responsible we shall be entitled to issue the invoice, which shall become due according to the agreed payment terms, at the confirmed delivery date or, as the case may be, upon readiness for shipment. We reserve the right to charge demurrage in the amount of 0.5% of the invoice amount for each month or part thereof, however no more than 5% of the invoice amount, unless we demonstrably incur higher costs due to external storage.

If Customer incurs any damage due to a delay for which we are responsible, Customer, upon demonstration of the damage incurred, shall be entitled to demand default compensation of no more than 5% of the value of the part of the complete delivery that as a result of the delay cannot be used in due time or as contractually agreed, excluding any further remedies.

## 7. Customer's right of rescission

In addition to the other cases set forth in these Terms and Conditions, Customer may rescind the agreement if the complete delivery becomes impossible prior to the transfer of risk. Customer may also rescind the agreement if the execution of any part of the delivery becomes impossible and the partial delivery or, as the case may be, partial performance demonstrably is of no interest to Customer. In all other cases, Customer may demand an appropriate reduction of the price. If a delivery date that by way of exception is binding is not met for reasons for which we are responsible, Customer may rescind the agreement, provided Customer has set in writing a reasonable period of grace, threatening rescission, and such period of grace unsuccessfully expired for reasons for which we are responsible. Any further remedies of Customer shall be excluded in the scope pursuant to Number 11 hereof. If neither contracting party is responsible for the impossibility, we shall be entitled to receive a part of the remuneration corresponding to the performance rendered.





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## 8. Custom-made products

Custom-made products according to specifications or drawings may not be cancelled, exchanged or taken back. In the event of a justified notice of defect, we shall only be obliged to rectify the defect, but not to deliver a replacement.

Where an acceptance has to take place, the delivery shall be deemed to be accepted, if:

- the delivery and, where appropriate, the assembly has been completed,
- we notified Customer thereof, referring to the deemed acceptance pursuant to this Number 8, and requested that Customer perform the acceptance,
- more than 12 work days have passed since delivery and assembly or Customer has put the facility into operation and in this case more than 6 work days have passed since delivery and assembly, and
- Customer has failed to perform the acceptance during this period in time for any reason other than a defect notified to us that renders impossible or materially impairs the use of the item.

If, after the conclusion of the agreement, it becomes apparent that our payment claim is endangered due to a lack of capability of Customer, we shall be entitled to immediately rescind the agreement in the event of agreements regarding the production of infungible things (custom-made products). The statutory provisions regarding the dispensability of fixing a period of time shall remain unaffected.

## 9. Transfer of risk and shipment

Every risk shall pass to Customer at the time the good leaves our plant or Customer is notified of the readiness for shipment, even where transportation is performed using our own means of transport, as well as in the event of delivery carriage paid, irrespective of whether we assumed any other performance (e.g. assembly) or a partial performance is rendered. If shipment or transfer of possession is delayed for any reason for which Customer is responsible, the risk shall pass to Customer as of the date on which readiness for shipment exists and is notified to Customer by us. Shipment shall be made for the account and at the risk of Customer, without any responsibility for the cheapest shipping method. Any objections or complaints regarding missing parts may only be taken into consideration if they are made immediately upon taking receipt of the shipment and in writing on the freight carrier's documents accompanying the goods. Packaging shall be charged at cost and cannot be returned.

## 10. Payment terms

The payment target shall be 30 days after the invoice date. Invoice amounts shall be paid without any deduction. The receipt by us shall be decisive for the date of payment. In the event of payment within 10 days after invoice date we grant a discount of 2%. The deduction of a discount from new invoices shall not be permitted as long as any older invoices have not been paid. Bills of exchange will only be accepted upon prior agreement. Bills of exchange and cheques will only be accepted for payment. Discount and out-of-pocket expenses shall be borne by Customer.





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In the event of a payment default, interest in the amount of 8 percentage points above the base rate as applicable from time to time or the default damage exceeding such amount will be charged if Customer is entrepreneur and acts in performance of Customer's commercial or independent professional activity when concluding the agreement. In all other cases, the interest rate shall be 5 percentage points above the respective base rate. However, Customer shall be entitled to demonstrate that we did not incur any damage or that our damage is substantially smaller than the lump-sum. Prior to full and complete payment of due invoice amounts, including any default interest, we shall not be obliged to make any further delivery, without Customer being able to give notice of default as a result thereof. We shall be entitled to refuse performance if, due to any circumstance that occurred after the date of the conclusion of the agreement, we reasonably fear that we will not receive Customer's counter-performance completely and in due time, unless Customer performs in advance or provides sufficient security. This shall apply in particular if, after the date of the conclusion of the agreement, our credit insurer refused to insure the price for the delivery object for reasons regarding Customer's credit-worthiness.

Customer may not offset, or withhold payment for, any counter-claims that have not been acknowledged or established with final force and effect. If Customer is entrepreneur and acts in performance of Customer's commercial or independent professional activity when concluding the agreement, Customer's notice of defect shall have no impact on either the payment obligation or the due date. If Customer is entrepreneur and acts in performance of Customer's commercial or independent professional activity when concluding the agreement, Customer additionally waives the right to refuse performance and the right of retention, unless we or our legal representatives or vicarious agents committed any material breach of contract, or the counter-claims of Customer on which the right to refuse performance or the right of retention is based are uncontested, have been established with final force and effect or are ready for adjudication. Every deferment of payment granted by us, including, without limitation, any deferment for payment implicitly granted through the acceptance of bills of exchange, may be revoked by us at any time. Our representatives are not authorized to collect payment on our behalf.

In the event of a return of goods due to a false order or a return of goods without reason (with the exception of false deliveries on the part of the plant), we shall be entitled to charge a processing fee in the amount of 10% of the net value of the goods.

Any rebate that may have been granted shall cease to exist in the event of judicial or extra-judicial settlement proceedings, insolvency or default in payment (Section 286 of the BGB) and in the event of a judicial collection of payment.

## 11. Warranty

Complaints and notices of defect shall only be taken into consideration if we are made aware of them in writing within 3 work days after receipt of the goods. Otherwise, the delivery object shall be deemed as approved. Hidden defects shall be notified in writing immediately after they become apparent. Section 377 of the HGB (*German Commercial Code*) shall apply. Irrespective of the above-mentioned duties to inspect and notify, Customer shall notify us in writing of obvious defects also within 3 work days upon receipt of the goods. Further processing and fitting of goods delivered shall always be deemed as a waiver of defects, provided that the defect was apparent.

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For deliveries of new products, the warranty period shall be limited to 12 months after delivery or acceptance and the warranty claim shall be limited to supplementary performance. For used items, warranty claims for material defects shall become barred after 6 months. The type of supplementary performance – rectification of the defects that Customer notified in due time, free of charge, within a reasonable period of time, or replacement delivery free from defects – shall be determined by us. We shall be entitled to refuse supplementary performance if it involves unreasonable costs for us. In this case, a reduction of the agreed price may be demanded instead of supplementary performance. After several failed rectifications or replacement deliveries, Customer may also demand either a reduction of the price or a rescission of the agreement. The warranty shall only include defects that demonstrably are the consequence of a circumstance that has occurred prior to the transfer of risk, including, without limitation, defective construction, low-quality material or defective workmanship. The foregoing shall apply unless the transaction is a purchase of consumables within the meaning of the law. The warranty for defects shall not apply to any defect that was caused by unsuitable or improper use, false operation, natural wear and tear, unsuitable resources, improper treatment and maintenance, etc., or to any defect that was caused by wrong assembly or start-up by Customer or any third party.

Our liability for material third-party products within our delivery shall be limited to the assignment of any warranty claims that we may have against our suppliers. Any warranty claims against us for any such defect shall only exist under the further conditions and pursuant to these Terms and Conditions of Delivery if judicial enforcement of the claims referred to above against the manufacturer or supplier has been unsuccessful. Unless provided otherwise in Number 7 above, any further remedies of Customer exceeding the above-mentioned warranty claims, including, without limitation, claims due to personal injury, damage to any property that is not the object of the agreement, loss of profit, consequential costs, etc., shall be excluded. Such exclusion of liability shall apply, without limitation, to any and all claims for damages, provided that such claims are not based on willful misconduct or gross negligence (gross fault) by us, our legal representatives or vicarious agents.

Claims for damages due to impossibility of performance, default, breach of obligation, culpa in contrahendo or in tort shall be excluded unless they are based on willful misconduct or gross negligence by us or any of our senior employees. In the event of a merely negligent breach of obligation by us or our vicarious agents, our liability shall be limited to the typical foreseeable damage. In this case, our obligation to compensate for property damage or personal injury shall be limited to an amount of € 2,556,460.00 per occurrence (corresponding to the current insured sum of our third-party insurance), even in the event of a breach of material contractual obligations. In this respect, we shall be entitled to primarily fulfill our obligation to compensate by assigning our claims under the third-party insurance. The above limitations of liability shall not apply to any damage resulting from death or personal injury caused by any negligent breach of obligation by us or any willful or negligent breach of obligation by any of our legal representatives or vicarious agents. The exclusion of liability shall also not apply to the extent that liability for personal injury or for damage to privately used property is mandatory pursuant to the provisions of the Liability for Defective Products Act from 15 December 1989 as valid from time to time. Any goods to which Customer has objected may only be returned to us upon agreement. Title to defective items for which we compensate shall pass onto us.





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## 12. Place of performance and jurisdiction

The place of performance for any and all rights and obligations arising under the business transactions shall be Arnsberg. The contractual relationship shall be governed by the law of the Federal Republic of Germany. The Uniform Law on the Formation of Contracts for the International Sale of Goods shall not apply. Place of jurisdiction for the business relationship with registered merchants shall be Arnsberg.

## 13. Other

Should any one or more of the above provisions be or become invalid, the validity of the remaining provisions and of the entire legal transaction shall not be affected. To the extent that the agreement or these Terms and Conditions of Delivery contain any gap, such gap shall be deemed to be filled by such legally valid provision that the contracting parties would have agreed pursuant to the economic objectives of the agreement and the purpose of these Terms and Conditions of Delivery if they had been aware of the gap. The rights of Customer under the agreement shall not be transferable.

For the purpose of deciding on the creation, execution or termination of the contractual relationship, we collect or use probability values, in the calculation of which, among other things address data, are included.

## Additional Terms and Conditions

**For the delivery and assembly of cooking and smoking units, boiling kettles, steam chambers, smoke generators, smoke treatment units, air-conditioned ripening and post-ripening units and other units. In the event of delivery of such units, our General Terms and Conditions of Delivery shall apply, together with the following additions:**

## 14. Delivery and assembly

If assembly is required, Customer shall bear any and all associated costs. If the units are installed by our assembly technicians, prior to assembly all construction work must have progressed to such an extent that assembly can be performed without any hindrance. Customer must have installed any and all feed lines up to the unit pursuant to our specifications. The connections themselves must be made during the assembly by Customer. At the assembly date, Customer must make the requested workmen available on call. During construction work, all regulations regarding the construction of combustion facilities are to be complied with. Electrical connections shall be made pursuant to the regulations of the VDE (*Association for Electrical, Electronic and Information Technologies*).

An agreed fixed assembly price shall only apply for a one-time deployment of an assembly technician under the condition that the assembly may be performed immediately upon arrival of the assembly technician and without interruption.





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If the assembly or the start-up is delayed due to circumstances at the building site for which we are not at fault, Customer shall additionally bear all costs for waiting times and additional required travel of our assembly fitters. The assembly and production dates stated by us shall be deemed to have been agreed as approximate.

With respect to assembly, service and repair work, our special conditions for the execution of assemblies and repairs shall additionally apply and prevail.

### 15. Liability for defects

Any and all damage caused by defective construction work, deficient chimney facilities, chemical or electrical influence, irregular energy supply, excessive strain and insufficient resources for which we are not responsible shall be excluded from the warranty. Any modification or remedial action of any nature whatsoever without our consent, or the installation of parts originating from any third party shall exclude any liability on our part. Warranty shall consist at our discretion of repair or replacement of the useless parts. After several failed rectifications or replacement deliveries, Customer may demand either a reduction of the price or a rescission of the agreement. If assembly or repair work is the object of the agreement, only reduction of the price may be demanded. Customer shall give us the required time and opportunity to perform any modification that we deem necessary or to deliver replacement parts. As regards the start-up and instruction of staff, we shall not assume any liability for indirect damage of any kind. Additionally, the warranty provisions of our General Terms and Conditions of Delivery and Payment (Number 11) shall apply.

**BAYHA & STRACKBEIN GMBH**

**Arnsberg, March 2010**

