

# General Terms and Conditions of Nanogate AG for Delivery of Coating Materials



## **I. Scope/Applicability**

The following terms and conditions shall be interpreted in an exclusive sense. Contrary and/or contradictory terms and conditions of Recipient shall not bind Nanogate AG ("Nanogate") in any manner whatsoever, unless Nanogate has expressly accepted such terms and conditions in writing. General Terms and conditions of Recipient shall be not constitute part of the contract even if Nanogate does not expressly raise any objection.

## **II. Offer and Contract**

(1) Contracts and other agreements shall become binding only when they have been acknowledged in writing by NANOGATE. (2) Unless otherwise agreed, all diagrams and material presented in offers, brochures, price lists and feature lists including data sheets given to customers shall only constitute description of the contract product without any implied warranty whatsoever. NANOGATE reserves the right of ownership and copyright on all cost estimates, plans and other documents until placement of order; said materials may not be made accessible to third parties. (3) Required characteristics of delivered products shall be governed by written order confirmation issued by NANOGATE. In the case of time-limited offers made by NANOGATE and acceptance of the order within the stipulated period, required product characteristics shall be governed by the offer if order confirmation is not received in due time. Subsidiary agreements and modifications shall be applicable only if confirmed in writing by NANOGATE.

## **III. Delivery Schedules, Delay**

(1) Time of delivery shall be communicated to Recipient in writing. Risk shall be transferred to Recipient upon delivery of product at Recipient's premises. Partial deliveries shall be permissible. (2) Delivery period shall be reasonably extended in the event of delays for which NANOGATE cannot be held accountable especially resulting from strikes and *force majeure*. (3) In no case will any claims of Recipient be permissible for damages resulting from delayed delivery or compensation in lieu of delivery in the event of delayed deliveries, even after expiry of any fulfilment periods that NANOGATE may have been required to meet, except in cases where liability for intent, gross negligence or other reasons is mandatory. Recipient may withdraw from the present contract on legal grounds only in the event that responsibility for the delay lies with NANOGATE. The aforementioned provisions do not imply any reversal of the onus of proof upon Recipient. (4) If demanded by NANOGATE, Recipient must state within a reasonable period whether Recipient intends to terminate the contract due to delay in delivery or will insist upon delivery of the ordered goods.

## **IV. Ownership**

(1) All delivered goods shall remain in the ownership of NANOGATE until claims of NANOGATE towards the Recipient arising from the business relationship are settled in full. (2) Recipient shall notify NANOGATE without delay in the event of any attachment, confiscation, court orders or any other third party intervention. (3) Non-fulfilment of contractual duties by Recipient, especially default of payment shall entitle NANOGATE, upon expiry of an appointed period, to withdraw from the contract and reclaim delivered goods; said provision shall not affect legal provisions to waive the requirement to appoint a period. Recipient must return delivered goods.

## **V. Prices and Terms of Payment**

(1) Prices shall be stated in the confirmation of every order and shall apply exclusively to the place of delivery stated therein. All prices will be indicated exclusive of the applicable statutory Value Added Tax. (2) All payments shall be made in full without any deductions to the bank account indicated by NANOGATE. Delivered goods shall be payable immediately upon receipt of goods and invoice. (3) Partial deliveries and goods accepted in part shall be correspondingly paid in equivalent part. (4) In the event of default, NANOGATE shall be entitled to demand interest on outstanding payments amounting to eight per cent over the prevailing base lending rate from Recipient, being a non-end user as defined by § 13 BGB (*German Civil Code*). (5) Recipient shall not be entitled to adjust any claims against outstanding payments unless such claims have been established by a court of law or accepted by NANOGATE.

## **VI. Material Defects**

(1) 'Material Defect' shall mean any discrepancy in material characteristics of delivered goods agreed between NANOGATE and Recipient. (2) Nanogate shall replace deliveries and goods free of cost, re-manufacture or re-deliver goods at its discretion if goods delivered by Nanogate are found to be defective within the period of limitation insofar as the reasons for the defect were extant at the time of transfer of risk. (3) Claims for material defects shall expire in twelve months, except where § 479 paragraph 1 BGB stipulates longer periods or in the case of fraudulent concealment of any defect. (4) Recipient shall notify NANOGATE of any material defect without delay. The material defect shall be described conclusively. Should the alleged defect prove to be unfounded or unsubstantiated following subsequent investigation, NANOGATE shall be entitled to demand compensation from Recipient for incurred expenses. (5) If a material defect is deemed to exist, NANOGATE shall in all cases be granted an opportunity to redress the defect with a reasonable appointed period. Should efforts to redress the material defect fail, Recipient may – irrespective of claims for damages as provided for under Section VII – withdraw from the contract or reduce payment. (6) No claim for material defect shall be made for insignificant variance from contractually agreed material characteristics, for insignificant reduction to usability or for damages resulting after the transfer of risk from incorrect or negligent handling or damages resulting from extraordinary external influences for which no provisions have been made in the present contract. If Recipient or third parties have modified the coating composition or otherwise tampered with the coating, then no claims for material defects or their consequences shall be permissible. (7) Recipient shall not be entitled to make any other claims based on material defect against NANOGATE or its agents except in accordance with the provisions in Section VI.

## **VII. Other Claims**

Other compensation claims of Recipient shall be excluded regardless of legal grounds especially breach of duty and unauthorised activity, except where liability is mandatory e.g. in accordance with the German Product Liability Act, in cases of intent, gross negligence, injury to life, body or health, non-fulfilment of explicit contractual assurances or breach of significant contractual duties. Significant contractual duties are such duties whose fulfilment enables proper performance of the contract and on compliance of which contracting parties may rely. However, liability for breach of significant contractual duties shall be limited to damage that is typically associated with the contract and is foreseeable, provided there is no wilful intent or gross negligence or there is liability for loss of life, physical injury or injury to health or there is liability under a contractual assurance of non-existence of a specific material defect. The aforementioned provisions do not constitute a reversal of the burden of proof on Recipient.

## **VIII. Liability**

(1) Unless otherwise agreed, deliveries made by NANOGATE shall fully comply with commercial protective rights and third-party copyrights (hereinafter: IP Rights) in the destination country. In the event that any third party raises valid claims against Recipient for violation of IP Rights arising from the use of contractually delivered goods, NANOGATE assumes liability within the period stipulated under Section VI. No. 3 as follows: a) NANOGATE will, at its discretion, bear the costs to acquire appropriate licenses for using the delivered goods, or amend delivered goods so that no IP Right is violated or replace the delivered goods in question. If NANOGATE is unable to do either of the above under suitable conditions, Recipient shall be entitled to withdraw from the contract or reduce payments. b) Liability of NANOGATE for damages shall be governed by Section VII. c) Aforementioned liability of NANOGATE shall be applicable only provided that Recipient informs NANOGATE in writing about third-party claims without any delay, Recipient does not accept any violation of IP Rights and that all options for legal defence and settlement are available to NANOGATE. In the event that Recipient ceases to use delivered goods in order to limit damages or on significant grounds, Recipient must communicate to the third party that cessation of use does not imply acknowledgement of any violation of IP Rights. (2) Recipient shall not be entitled to make any claims insofar as responsibility for IP violation lies with Recipient. (3) Recipient shall furthermore not be entitled to make any claims insofar as violation of IP Rights results from Recipient's special requirements, from an application unforeseen by NANOGATE or from the fact that delivered goods are modified by Recipient or are used in conjunction with other products not delivered by NANOGATE (4) If any legal provisions are found to be deficient, the provisions under Section V shall be applied as appropriate. (5) Recipient shall not be entitled to make any other claims based on defect of title against NANOGATE or its agents except in accordance with the provisions in Section VIII.

## **IX. Place of Fulfilment, Jurisdiction, Applicable Law**

(1) The exclusive place of jurisdiction and fulfilment for deliveries and payments including legal actions on cheques and bills of exchange as well as all disputes between the parties to the present contract shall be Saarbrücken. (2) All legal relationships between the contracting parties shall be exclusively governed by the law of Federal Republic of Germany.

Saarbrücken, dated 10.9.2002

Courtesy translation from the German original.