

General Delivery and Payment Terms and Conditions for Concrete Pens

1. Preface

These terms and conditions concern all – including future – shipments that may be agreed upon with ad-media, irrespective as to whether these have been made by telephone, in writing, by email or via the internet site <http://www.concretepen-factory.com> (i.e. by means of telecommunication). Contrary or conflicting terms and conditions on the part of a customer can only be considered effective, if, and to the extent that, we recognize them in writing for each individual conclusion of a contract; silence on our part cannot be construed as a declaration of acceptance. Our offers are subject to change without notice. They represent an invitation to a customer to make us a contractual offer. We can accept the customer's contractual offer by either confirming it or by commencing with the execution of the contract. We will notify the customer at the latest within four weeks about whether we accept or reject the order. Should there be no confirmation or rejection of the order, then the invoice shall have the validity of an order confirmation. The content of the contract shall then be subject to our order confirmation. Our order confirmation shall be valid for each contract with reference to price, quantity, delivery time, delivery conditions, etc. Variation in shape, colour, weight and material, with reference to both the order confirmation and to any samples or prototypes handed out, may be made without notice and shall be considered part of the contract inasmuch as the customer, when placing his order, has not declared in writing his special interest of having his contract fulfilled without divergence. Any representation in print media or in the internet is only an approximation for technological reasons. The inevitable tolerances that occur in the initial natural constituents during the manufacture of the concrete pen make every pen unique and give it an individual look. Due to the inherent-properties of concrete, the following deviations in the appearance of the concrete surface must be tolerated in accordance with FDB Merkblatt No. 1 code of practice: mottling/marbling and colour deviations, pores, efflorescence and hairline cracks. Owing to the nature of the material, the structure and the colour of the pen may, moreover, change in the course of time. Our goods are envisaged for average private use; special conditions or improper uses shall not be the subject of the contract. Our contractual obligations shall be determined by the order and these conditions in a conclusive manner.

2. Customer's Right of Revocation

Should the customer be the end consumer, the following right of revocation shall apply:

The customer may revoke his contractual declaration in writing e.g. by letter, fax or email or by returning the shipment without specifying his reasons within four weeks calculated from our order confirmation or within two weeks from the time of delivery, which is accompanied by these instructions in written form, depending on what takes place first. Dispatching the notice of revocation, or the goods, on time shall be sufficient to comply with the revocation time limit. The notice of revocation or return shipment shall be addressed to: ad-media GmbH, Industriestrasse 180, 50999 Cologne, Germany, fax 02236 962396, email: info@ad-media.de. This right of revocation shall not exist for objects that have been produced according to customer specifications or that have been clearly tailored to the customer's personal requirements.

3. Consequences of Revocation

In the event of a valid revocation of this agreement, each party shall return to the other party all the services received (e.g. payments) and compensation for benefits received (if any) by the beneficiary (e.g. from their utilization) shall be made. Should the customer be wholly or partially unable to make restitution of the goods or if the same are in a deteriorated condition, then the customer shall pay compensation for the value lost in this case. This shall not apply if the deterioration of the goods can be ascribed solely to their examination – as might possibly be expected in a retail shop, for example. As a matter of course, the customer can avoid the obligation of compensation for value, if he does not handle the goods like their owner and refrains from everything that might impair their value. The goods shall be returned in adequate packaging. The customer shall bear the cost of the return shipment, if the objects delivered are in accordance with what was ordered, and if the price of the objects to be returned does not exceed the amount of € 40.00, or, in the case of a higher price at the time of revocation, the customer has not yet made his reciprocal payment or contractually agreed part payment. In other events, the return shipment shall be free of charge for the customer.

– End of the clarification of revocation rights for end consumers –

Customers, who are not end customers, shall have no right of revocation.

4. Delivery Time

Any delivery deadline agreed upon shall only be considered approximate (calendar week), unless the customer, when placing his order, has declared in writing his special interest for a delivery in time on a due date and that we have confirmed this particular date in writing as binding. Should an approximately determined delivery time (calendar week) be substantially exceeded (more than 15 calendar days), then the customer may set us in writing a reasonable subsequent deadline of at least ten calendar days. The same shall apply if a binding, confirmed delivery deadline (specific date) has been exceeded. After the expiry of the subsequent deadline, the customer shall be entitled to his statutory rights. If the customer is not an end consumer, then the customer shall only be entitled to assert a claim for compensation of damages, instead of performance of contract, if at least gross negligence can be demonstrated with reference to exceeding the deadline. Unforeseen occurrences or acts of God which are to be found outside our sphere of influence, such as natural phenomena, war, traffic or operational disruptions, strikes, lockouts, delays in delivery of raw materials or energy, governmental decrees, etc. shall have, accordingly, the effect of lengthening any deadlines. Should the disruption last longer than 3 months, then the rights of both parties shall be determined according to statutory regulations. Partial deliveries of the complete order may be made without notice. We reserve the right to issue intermediate invoices for any partial deliveries made. Should the customer specifically request partial deliveries, he shall be under obligation to meet any additional costs that may arise through this act. If the customer is not the end consumer, the following shall apply: if the customer terminates the contract for reasons that are deemed unacceptable by us, by mutual agreement or by act of law, we reserve the right of invoicing any expenses incurred through transport, storage and production. The amount of expense restitution shall be limited to 25% of the invoice amount order value. Any right for compensation for damages that may exist shall not be affected by this measure.

5. Delivery

If the customer is not the end consumer, shipment shall be made at the customer's own expense and risk. The latter shall also apply if the expense of shipment is borne by us. If the goods are ready for shipment and their transportation is delayed for reasons which lie outside our jurisdiction, the risk is transferred to the customer on the day when transport readiness is notified, in other events upon the goods being handed over to the carrier. The customer shall bear any risk of transportation. If the customer is the end consumer, then the risk is transferred to the customer when the goods are delivered to him. Should the delivery not come under his jurisdiction for reasons within the customer's own responsibility, he shall be under obligation to meet all additional costs that may arise for us on account of this; this shall also include storage costs. In this case, the risk is transferred to the customer with the abortive attempt at delivery. As Concrete Pens are produced ex works, any customs costs that might occur will have to be covered by the respective customer.

6. Remuneration and Payment Terms

Our prices do not include packaging, shipment and insurance. Our invoices are due without deductions on receipt by the customer and payment shall be made at the latest by the 15th calendar day after the due date. This shall also apply if a price reduction (trade discount agreement) has been agreed upon for shorter payment deadlines and this shorter deadline has not been kept. If the customer is not the end consumer, then he will have defaulted by exceeding the terms of payment; no reminder shall be required in this case. From the occurrence of default, the interest on arrears will amount to 8% above the current base rate and at least 12% of the invoice amount for customers who are not end consumers; in the event that the statutory interest rate should be under this minimum rate, the customer shall have the right to provide us evidence of the amount of a lesser rate of interest. Other claims shall not be affected by the right to claim for interest on arrears. If no other contradictory agreements have been made, then we reserve the right to dispatch with payment in advance or cash on delivery. The customer can only offset the amount with counterclaims deemed to be undisputed or valid; in other events counterclaims shall be excluded. If the customer is not the end consumer, he shall only then be authorized to execute the right of retention on account of other claims as such for supplementary performance if his counterclaims have been deemed valid or undisputed. His right of retention on account of a claim for supplementary performance shall be limited to the simple value of the supplementary performance. Inasmuch as bills of exchange, drafts or cheques have been presented, these shall be accepted on condition of performance. Bank, discount and recovery charges shall be borne by the customer in the case of discounting a draft. Should the customer's economic conditions worsen or his legal circumstances be altered, we reserve the right of revoking any payment agreements and terms for further goods supplied, to require the return of any draft presented to the bank, and to demand immediate cash payment or payment in advance. For all outstanding deliveries, besides discontinuance of the agreed terms of payment, we further reserve the right of demanding immediate cash payment before shipment of the goods and the performance of earlier deliveries of goods. We shall be entitled to the same rights if the customer is more than 14 days in arrears with a payment due.

7. Retention of Title

Our shipments shall remain our property (goods subject to retention of title) up to the performance of each one of our claims (no matter what cause in law and in particular current account claims) even if payment has been performed for specially designated claims. If the customer is not the end consumer, he shall keep the goods subject to the retention of title with the care of an orderly tradesman and shall insure them on our request. The customer shall be under the obligation of notifying us of each relocation of the goods subject to retention of title without delay in writing. He may only dispose or make use of these goods subject to retention of title in his normal business operations at his customary business conditions and only so long he is not in default. In this case, the customer has already relinquished to us his claims from the resale or use of the goods subject to retention of title. We accept this assignment. The customer shall be under the obligation to safeguard our rights in reselling the goods subject to retention of title on credit. The customer shall not be permitted to pawn or pledge as security the goods subject to retention of title. In case of restraint or other third party access to the goods subject to retention of title or those claims relinquished in advance, the customer shall refute the restraint or access of the third party by giving notice of the property subject to retention of title. The customer shall inform us without delay (without culpable hesitation) of this occurrence by sending us the necessary documents – in particular with distraints, the copy of the dstraint transcript – so that we may instigate third party proceedings. Inasmuch as the third person is not in a position to recompense us for the judicial or extra-judicial expenses of asserting our rights, the customer shall be liable for any loss. Should the customer contravene the above mentioned obligations or fall into arrears of payment or become insolvent, we reserve the right to demand, at the customer's expense, the immediate surrender of the goods which are our property and/or the prompt procurement of these assets without setting any subsequent deadline. After the recovery of these goods subject to retention of title, we reserve the right to dispose of the same without restraint and to offset the proceeds against the customer's liabilities. In this dstraint or recovery of goods subject to retention of title, no declaration of withdrawal from the contract may be imputed, unless this is expressly stated. If the value of the securities appointed by us exceeds our total account balance by more than 20%, then we will be under the obligation of releasing securities of our choice upon receiving the customer's written request.

8. Guarantee and Liability

We provide a guarantee in accordance with statutory requirements. Claims for defects shall come under the statute of limitations after one year, if the customer is not the end consumer, inasmuch as the liability is not related to death, bodily injury or impairment of health. If the customer is not the end consumer, he shall be under the obligation to inspect the goods without delay (§ 377 HGB). Recognizable defects shall be notified in writing within 7 calendar days of the receipt of the goods, hidden defects without delay after being discovered. If the customer is not the end consumer, in the event of defective performance he shall only be entitled to a supplementary performance claim (elimination of the defect within a reasonable time limit or a subsequent delivery free from defects). If the customer is not the end consumer, he shall only be entitled to other statutory rights (cancellation, compensation for damages or reimbursement of expenses) if the subsequent performance is abortive or unacceptable.

The same shall apply if we refuse supplementary performance in earnest and for good, unless we refuse because the supplementary performance would involve excessive expense for us. A supplementary performance can only be deemed abortive if we have undertaken two attempts at supplementary performance without success. If the buyer does not expressly state in his letter of complaint what type of supplementary performance he desires, then we may choose such performance according to our own discretion. Our guarantee shall not cover material defects or damage that have occurred through natural wear, excessive stress, humidity, or through unsuitable or improper use after the risk has been transferred to the customer. Cancellation on grounds of performance not specified in the contract shall be excluded, if the neglect of obligation is only minor or if the customer is alone or mainly responsible for the circumstances which might entitle him to a cancellation. We shall only be liable for profits forfeited and other financial losses if the customer can claim compensation for damages instead of claiming for complete performance. Apart from essential contractual obligations, we shall only be liable for intent and gross negligence, inasmuch as the liability is not related to death, bodily injury or impairment of health. Our liability shall be limited to typically foreseeable damage. We do not issue our own guarantee; our commercial representatives do not have the right to issue guarantees in our name. Should it become evident upon examination of the defect that we have no legal obligations in this matter (unjustified notice of defect), we may invoice the customer for the expense of the examination. This is herewith set at a flat-rate of € 50.00, if we cannot give evidence of higher, or the customer of lower, actual expenses that have arisen. We shall be entitled to a lien on the object until these expenses have been met.

9. Industrial Property Rights, Licences

The articles, images, configurations, etc. that we supply are protected by copyright, patent or design patent. The customer shall not be permitted to dispose of these goods further. He shall be forbidden to copy such articles, images, configurations or to reproduce the same in any form whatsoever. Should the customer contravene this prohibition - if he is not an end consumer - then he shall pay a penalty for breach of contract which can be set at our own and good discretion or, in the event of a dispute, shall be reassessed by the competent court of justice. At the same time, we reserve the right to discontinue the business relationship and to enforce further sanctions, in particular the right of disclosure and compensation for damages. Inasmuch as nothing else has been expressly stipulated, the customer agrees that representations of individual custom-made concrete pens can be used by ad-media for advertising purposes in print media or in the internet.

10. Data Protection

Data submitted to ad-media relating to persons and to or via the internet site www.concretepenfactory.com will be stored. This storage is intended exclusively for communicating with our customers and processing orders. By ordering, the customer agrees to his data being stored. He further agrees to his data being forwarded in the event of an infringement of the contract on the part of the customer to such businesses and persons that we might engage for enforcing our claims. Otherwise, data will only be provided for third persons on occasions when we are unavoidably constrained by law.

11. Final Provisions

Additional agreements, exceptions, alterations, or amendments of this contract including these conditions shall require written confirmation for any validity. The same shall apply for an understanding to alter these conditions. German law shall apply exclusively with the exclusion of the regulations for the international sale of goods. Should the terms of this contract be wholly or partially ineffective in law or not practicable or should later lose their effectiveness or practicability, then the validity of the other terms of the contract shall not be affected by this. The same shall apply if it transpires that the contract has loopholes. In the place of the ineffective or impracticable terms or for filling any such loophole, a reasonable regulation shall be made to bear which comes closest to what the parties have intended or would have intended according to the spirit and purpose of the contract, inasmuch as they might have taken this regulation into consideration on concluding the contract or at a later point of acceptance as a condition for that point. The place of fulfillment for all performances shall be Cologne, Federal Republic of Germany.

The sole court of jurisdiction for all disputes arising from the contract (including those such as summary proceedings based on a bill of exchange or draft and in dunning proceedings) shall also be Cologne, inasmuch as the customer is a businessman, a special fund under public law or a legal entity under public law. If the customer is not a businessman, the court of jurisdiction in Cologne shall be considered agreed upon nonetheless, in the event that the customer, at the time of lodging his case, does not possess a court of jurisdiction in Germany or is domiciled and / or has his normal place of residence outside Germany or has moved it there or his domicile or normal place of residence is unknown.

12. Supplier Information



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