

General Terms and Conditions of Assembly

I. Subject of the Contract, Scope, Offer

1. The present Terms and Conditions of Assembly of EVOGUARD GMBH shall apply exclusively; any conditions (as defined by § 305 of the German Civil Code, hereafter "BGB") presented by Customer which contradict or deviate from the present Terms and Conditions shall not be part of the contract.
2. The present Terms and Conditions of Assembly shall apply to all contractual performances of EVOGUARD GMBH, regarding and in connection with the installation, commissioning, acceptance (where required by law or contract), maintenance, servicing, repair and dismantling of machines and plants. In the present Terms and Conditions of Assembly these works are referred to without differentiation as assembly or assembly work(s).
3. Any individual agreements concluded between the parties hereto concerning the rights and duties of these parties shall take precedence over the present Terms and Conditions of Assembly.
4. All agreements entered into between EVOGUARD GMBH and Customer with regard to performance of the contract shall be made in writing.
5. The present Terms and Conditions of Assembly shall only apply in relation to merchants, legal entities subject to public law and trustees of public funds (as respectively defined by § 310 BGB).
6. The present Terms and Conditions of Assembly shall also apply to all future business transactions between EVOGUARD GMBH and Customer.
7. If an order qualifies as an offer (as defined by § 145 BGB), EVOGUARD GMBH may accept such offer within 4 weeks of its receipt.

II. Documents, Business Secrets, Preparatory Work

1. EVOGUARD GMBH shall retain all rights, in particular property rights and copyrights, in all cost estimates, calculations, plans, illustrations, drafts, preparatory work, drawings and other documents. Such works shall not be made accessible to third parties without the written consent of EVOGUARD GMBH. Any documents indicated as confidential by Customer shall not be made accessible to third parties by EVOGUARD GMBH without the written consent of Customer. Documents supplied by EVOGUARD GMBH shall be used solely to prepare for the conclusion of the contract, and thereafter for its execution. Any further use shall be prohibited.
2. Customer shall not disclose to third parties any business secrets of EVOGUARD GMBH or of its associated companies (as defined by § 15 of the German Law of Share Corporations), which Customer has received knowledge of. EVOGUARD GMBH shall not disclose to third parties any business secrets of Customer or its associated companies, which EVOGUARD GMBH has received knowledge of.
3. Both EVOGUARD GMBH and Customer shall use adequate means to ensure that their directors, officers and employees will also comply with the above obligations.

III. Time for Performance

1. The time agreed for performance shall commence upon dispatch of the order confirmation and clarification of all technical questions, provided that Customer has made available to EVOGUARD GMBH all plans, documents, approvals, releases and permits required, and any agreed advance payment has been received.
2. A default in performance due to force majeure shall not entitle Customer to a claim (in particular, a claim for a contractual penalty or damages) against EVOGUARD GMBH. Any unforeseeable event or an event, which - though foreseeable - is beyond the influence and control of EVOGUARD GMBH and the effects of which cannot be avoided by the exercise of reasonable care shall be considered an event of force majeure. Such events include but are not limited to delayed performance by subcontractors/suppliers, acts of war (whether declared or not), war-like conditions, riot, revolution, rebellion, military or civilian coups d'état, insurrection, turmoil, outrages, mobilisation, requisition, blockade, embargo, government order, sabotage, strikes, go-slow strikes, lockout, epidemic diseases, fire, floods, storm tides, typhoons or other poor weather conditions, lack of raw materials and supplies, shipwreck, insufficient loading capacity or port facilities, delays resulting from transportation, loading and discharge, non-availability of freight capacity, justifiable change/exchange of freight forwarder and/or carrier and/or ship owner and/or other commercial shipping company, accidents in transit, earthquakes, radioactive accidents, physical or man-made obstructions of any kind at the building site/production facility.
3. In all cases, where obstacles to performance - regardless of their nature - are not the responsibility of EVOGUARD GMBH, the latter shall be entitled to receive a reasonable extension of time for performance as well as additional payments to compensate for the additional works and/or costs.
4. Where Customer is in default with regard to acceptance or in violation of any other contractual obligation to cooperate, the risk of accidental loss, destruction or accidental deterioration of the machine or plant assembled by EVOGUARD GMBH shall pass to Customer at the latest at the time such default arises.
5. This agreement shall not preclude any further rights that EVOGUARD GMBH may have.
6. Compliance with the time for performance shall be subject to Customer duly fulfilling his contractual duties in a timely manner.
7. Partial deliveries by EVOGUARD GMBH may only be rejected where they impose on Customer in an unreasonable manner.

IV. Acceptance, Remuneration and Payment

1. Where acceptance is provided for by contract or by law, such acceptance shall be governed by the legal provisions applicable to acceptance in contracts for work.

2. EVOGUARD GMBH is entitled to receive payments on account of remuneration. These payments on account are due in intervals of two weeks. EVOGUARD GMBH may select longer intervals at its discretion. Settlement of the remuneration and payments on account will be carried out by EVOGUARD GMBH after completion of the assembly work or, if the assembly work is interrupted, upon interruption of said work. Unless otherwise agreed, payment is due net upon receipt of the invoice. Any advance payments made by Customer to fitters shall be notified to EVOGUARD GMBH without delay.
3. Customer shall bear all costs of required remedial actions which become necessary as a result of faulty or incomplete drawings or other documentation or instructions issued by Customer.
4. Unless otherwise agreed - proof of which shall be furnished by Customer - the remuneration for assembly works carried out by EVOGUARD GMBH shall be based on the number of working hours spent by the fitters of EVOGUARD GMBH on said works, whereby the remuneration for one working hour (hourly rate for assembly fitters) is graded according to the qualifications of the fitters (see 4.1.), the time of day and days of the week on which the assembly work is performed (see 4.2.) and the technical discipline (see 4.3.). Additionally, EVOGUARD GMBH is entitled to "subsistence allowances" (lump-sum compensation for food and accommodation expenses) and the reimbursement of travel expenses.
 - 4.1. In regard to the qualifications of fitters a distinction is made between mechanics, assembly foremen, assembly inspectors and travelling engineers/project managers.
 - 4.2. Normal daily working hours for fitters are from 7.00 a.m. to 4.00 p.m. from Monday to Friday; working hours over and above this are regarded as "overtime hours I" or "overtime hours II" or "night-time hours" or "Sunday and public holiday hours". "Overtime hours I" are working hours between 6.00 a.m. and 7.00 a.m. and working hours between 4.00 p.m. and 5.00 p.m. "Overtime hours II" are working hours between 5.00 p.m. and 8.00 p.m., and working hours on Saturdays. "Night-time hours" are working hours between 8.00 p.m. and 6.00 a.m. "Sunday and public holiday hours" are working hours on Sundays and on those public holidays in the State of Bavaria, Germany, for which statutory continued payment of wages applies. All references to time of day refer to local time at the place where the fitters are engaged.
 - 4.3. The technical disciplines in which assembly works are performed are categorised as mechanical, electrical and electrical.
5. The hourly rates for fitters and the subsistence allowances are based on the price list "Price Rates for Assembly".
6. If assembly works, including travel to and from the place of performance, take less than 6 hours, the subsistence allowance will be settled pro rata temporis.
7. Separate remuneration is due from Customer for the time spent on preparation and formalities in connection with the outgoing and returning trip; the journey itself as well as other journeys to which the fitters are entitled by law, labour-management agreements or collective bargaining agreements in Germany; daily travel between the fitters' accommodation and the assembly site if a single trip takes longer than 30 minutes and no acceptable accommodation is available closer to the assembly site; bridging of times in which work is prevented due to circumstances beyond the control of EVOGUARD GMBH; all these items being based on the assembly rates and subsistence allowances in their currently valid version. Outgoing and returning trips in the sense used above are journeys from Neutraubling to the assembly site and back again to Neutraubling.
8. Customer shall reimburse the costs incurred by EVOGUARD GMBH for making available any pieces of equipment and, where necessary, shall provide separate remuneration for the use of heavy tooling.
9. Foreign taxes and duties which arise for EVOGUARD GMBH on the invoice amount in the country of the assembly site shall be borne by Customer. Where possible and permitted by law, Customer shall pay said taxes and duties directly or else shall reimburse EVOGUARD GMBH upon first request.
10. If assembly is delayed due to violation of Customer's duty to cooperate and other duties (see clause VI) or for other reasons under the control of Customer or a third party engaged by Customer, but not under the control of EVOGUARD GMBH, Customer shall compensate EVOGUARD GMBH for:
 - 10.1. Waiting times and additional travel times, which shall then be remunerated on the basis of the hourly rates and subsistence allowances for fitters;
 - 10.2. Costs and additional working hours resulting from the delay, including the dismantling, safeguarding and erection of assembly equipment.
 - 10.3. Additional costs, particularly costs incurred by EVOGUARD GMBH where its equipment is held up at the assembly site longer than expected;
 - 10.4. Additional travel expenses for the fitters;
 - 10.5. Additional costs of financing and insurance;
 - 10.6. Other verified costs incurred by EVOGUARD GMBH.
11. Where several Customers are visited on one assembly tour, the subsistence allowances and travel expenses will be charged pro rata.
12. Voluntary payments made by Customer to the fitters without prior agreement with EVOGUARD GMBH need not be reimbursed by EVOGUARD GMBH.
13. The travel-related costs listed below shall be borne by Customer and will be charged by EVOGUARD GMBH as follows. Travel to a destination within Germany will be by company vehicle and charged at the flat mileage allowance then in force. This is set out in the price list "Price Rates for Assembly". For travel by train (Bundesbahn) the cost of a 2nd class ticket will be charged. Other costs, e.g. sleepers, ferries, tolls and telephone calls, will be charged to the extent actually incurred. For travel by plane the cost of the flight will be charged along with any costs for excess baggage, parking, taxis, rented cars, bus trips and telephone calls. Increased expenses for transporting baggage, parts and tooling will be charged separately.

14. On assembly jobs in Germany and neighbouring countries, fitters are entitled to travel home after an assembly period of 2 weeks and at Easter, Whitsun and Christmas. On assembly jobs in the rest of Europe the same arrangement applies for an assembly period of 3 weeks. On assembly jobs in other parts of the world this arrangement applies for an assembly period of 6 weeks. The costs thus incurred shall be borne by Customer and be invoiced to him by EVOGUARD GMBH.
 15. To the extent that EVOGUARD GMBH is obliged by German regulations governing packaging to take back packaging used for transportation, Customer shall bear the costs of returning the used packaging and the reasonable costs for the reuse thereof. To the extent that the packaging taken back cannot be reused, Customer shall bear the costs of the material processing incurred by EVOGUARD GMBH. In addition, Customer shall pay any duties, clearance charges, taxes and other charges incurred as a result of taking back transport packaging.
 16. Containers used for transportation are not within the scope of this contract and are not considered packaging. They shall remain property of EVOGUARD GMBH. They shall be re-exported by Customer at his expense (shipping costs, duties, clearance charges, taxes and other charges) and risk, and sent back to EVOGUARD GMBH.
 17. Tools, excess material, welding supplies and other auxiliary equipment are not within the scope of this contract. They shall remain property of EVOGUARD GMBH. They shall be re-exported by Customer at his expense (shipping costs, duties, clearance charges, taxes and other charges) and risk, and sent back to EVOGUARD GMBH.
 18. The remuneration agreed upon shall be due in cash without any deduction.
 19. EVOGUARD GMBH shall be entitled to interest on payments due and in arrears to the extent provided by law. The assertion by EVOGUARD GMBH of further rights or damages shall not be affected hereby.
 20. Customer shall not be entitled to any rights of set-off or retention, unless his counter-claims have become legally effective (res judicata), are uncontested or have been acknowledged by EVOGUARD GMBH, and EVOGUARD GMBH was given at least one month's advance notice of such counter-claim.
 21. Where circumstances are brought to the attention of EVOGUARD GMBH after the conclusion of the contract, which cast doubt on the credit standing of Customer, notwithstanding the above or agreed conditions of payment EVOGUARD GMBH shall be entitled to security for payment in the form of a simple (i.e. not payable on first demand), irrevocable payment bond or bank guarantee of indefinite term, which shall be returned against payment of the remuneration owed.
 22. EVOGUARD GMBH shall be entitled to a reasonable increase in the agreed remuneration if there are cost increases after the conclusion of contract, in particular where this is due to collective labour agreements or increases in the cost of materials. Upon request, EVOGUARD GMBH shall furnish proof for such increases to Customer.
 23. EVOGUARD GMBH shall be entitled to a reasonable increase in the agreed remuneration if - after the conclusion of contract - Customer requests that the object of contract be modified, and additional expenses and efforts are required for such modifications. Upon request, EVOGUARD GMBH shall furnish proof of such additional expenses and efforts to Customer.
 24. Customer shall cause the agreed remuneration to be credited, at his own risk and expense, to one of the bank accounts indicated by EVOGUARD GMBH.
- V. Transport Risk and Retention of Ownership**
1. For damage in transit or a defect due to transportation affecting part of the assembly work performed by EVOGUARD GMBH the following shall apply: EVOGUARD GMBH shall assign its claims resulting therefrom, if any, against transport insurance(s) and carriers to Customer at the latter's request (any liability for the existence of such claims to be excluded); such assignment shall be concurrent with payment of the overall remuneration agreed and of all costs owed. Any further claims against EVOGUARD GMBH resulting from any damage in transit or a defect due to transportation shall be excluded.
 2. Any limitation periods under transport or maritime law, bar periods, exclusions of liability and limitations of liability, which apply in favour of (natural or legal) persons entrusted with the transportation/loading/unloading/storage of the machine or plant assembled by EVOGUARD GMBH in their relationship to EVOGUARD GMBH shall apply equally in favour of EVOGUARD GMBH in the contractual relationship between Customer and EVOGUARD GMBH.
 3. EVOGUARD GMBH shall retain ownership of items forming part of the assembly work performed by EVOGUARD GMBH until payment of all amounts owed by Customer has been received. The arrangements set out in clause VI "Retention of Ownership" of the General Terms and Conditions of Performance, Sale and Delivery of EVOGUARD GMBH shall apply in addition.
- VI. Duty to Cooperate, Other Duties of Customer**
1. The commissioning of machines, particularly the adjustment and fine tuning of units as well as instructing of operating personnel, shall principally be performed by travelling engineers of EVOGUARD GMBH.
 2. Where conveyor lines are connected to the units by Customer, the latter shall ensure that bottles (or other containers) are fed to and taken from the units correctly and without fault.
 3. Customer shall fulfil the following conditions, on time and at his own cost and risk, in order to ensure smooth operation of the contracted work:
 - 3.1. Customer shall provide EVOGUARD GMBH with the drawings and other documentation needed to carry out the contracted work.
 - 3.2. The fitters of EVOGUARD GMBH must be able to commence their work at the agreed time and to conduct their work during the hours which are regarded as normal working hours.
 - 3.3. The fitters of EVOGUARD GMBH must also be permitted to perform their work outside the hours regarded as normal working hours should this appear necessary to EVOGUARD GMBH and provided this is not expressly forbidden by Customer.
 - 3.4. Customer has to complete the preparatory work on time. In particular, Customer shall ensure that the foundations are adequate for the load.
 - 3.5. The fitters of EVOGUARD GMBH must have adequate and safe accommodation near the assembly site and receive healthy food and drink. They must have access to sanitary facilities and medical services of international standard.
 - 3.6. The access routes to the assembly site shall be suitable for the required transportation of items belonging to the assembly works, assembly tools, cranes and other lifting equipment. Further, said access routes shall be safe.
 - 3.7. All items to be made available by Customer shall be present at the assembly site when works commence.
 - 3.8. Customer shall make available to EVOGUARD GMBH, on time and free of charge, its own workshops and all cranes required at the assembly site, as well as lifting equipment and means of transport within the assembly site, auxiliary devices, machines, materials and operating materials (including petrol fuels, oils, greases and other materials, gas, water, electricity, steam, compressed air, heating, light, etc.), and Customer's measuring and testing instruments present at the assembly site. Availability shall also be assured outside of those hours regarded as normal working hours.
 - 3.9. An air-conditioned room with lighting, washing facilities and lockers shall be made available to the fitters during their breaks.
 - 3.10. The location where the machine or plant is to be set up shall be prepared so that the assembly and commissioning work can be carried out unhindered and the fitters are protected from unhealthy or hazardous working conditions.
 - 3.11. Electrical connections shall be made exclusively by an authorised electrician working on account of Customer.
 - 3.12. The sample materials (bottles or other containers, labels, glue etc.) needed for commissioning of machines shall be made available on time and in full by Customer in order that machines can be test-run with all delivered kits.
 - 3.13. When assembly work is completed, the operating personnel shall be available on time for instruction. The staff which will later be responsible for monitoring, operating and servicing the plant should be present – if at all possible – during the assembly work.
 - 3.14. Cleaning work shall be performed by Customer.
 - 3.15. Customer shall provide EVOGUARD GMBH with the necessary storage facilities at the assembly site to protect items belonging to the assembly works, assembly equipment and assembly tools, as well as the personal possessions of the fitters of EVOGUARD GMBH from theft or deterioration.
4. The fitters' working hours, performance and completion of works shall always be confirmed by Customer on the travel reports to be submitted by the fitters.
 5. Where performance of the contract requires public permits/authorisations/notices etc., the latter shall be obtained by Customer at its own expense and risk. Customer undertakes to obtain, on time and at its own expense and risk, all essential permits/authorisations/notices/visas etc. necessary for (a) the fitters to enter, reside in and leave the country, and (b) the (temporary) import and export of assembly equipment and the assembly tool, and (c) the import of items required for the assembly work. Duties, taxes and other levies payable in this connection, as well as fees, bonds, sureties and deposits etc. shall be borne by Customer directly or by reimbursing EVOGUARD GMBH on first request.
 6. Customer undertakes to give operating personnel careful instruction at its own expense concerning all safety regulations. Before assembly work commences, Customer shall inform the fitters of EVOGUARD GMBH of all pertinent safety regulations in force at the assembly site. The assembly work shall not be performed in an unhealthy or hazardous environment. All necessary safety and protection measures shall be taken before the assembly work commences and shall be maintained while the assembly work continues.
 7. Customer shall continuously monitor, at his own cost and risk, all legally prescribed values and limits and shall conduct the requisite control testing. Type and scope of all the testing procedures shall be documented by Customer.
- VII. Rights of Customer in Case of Defects**
1. EVOGUARD GMBH shall be liable to Customer for the assembly works being free of physical and legal defects at the time risk passes to Customer. Irrelevant deviations from qualities agreed upon shall not constitute defects.
 2. Nonetheless, EVOGUARD GMBH shall not be held liable for defects or damage arising from:
 - Defects resulting from constructions prescribed or specified by Customer, defects resulting from materials (including sample materials) prescribed, specified or supplied by Customer, or defect resulting from other input of Customer.
 - Defects or damage arising after the passing of risk due to faulty or negligent treatment, operating by untrained staff, excessive use, inappropriate exchange materials, faulty construction work, inappropriate site or such defects arising due to special external circumstances not envisioned by the contract, as well as non-repeatable software errors.
 - Where Customer or third parties apply unsuitable modifications or maintenance work, any liability of EVOGUARD GMBH for these modifications, work or their consequences shall be excluded.
 3. EVOGUARD GMBH shall not be liable for wearing parts (definition to follow), which are part of the assembly works. Wear is the progressive loss of material

on the surface of a solid body, due to mechanical causes, i.e. contact with and movement relative to that of a solid, liquid or gaseous opposing body. A wearing part is one used in places which unavoidably experience wear from operations, in order to protect other operating parts from wear, and which by design is intended for replacement.

4. Where a defect in the assembly works gives rise - while taking in account clauses 1 through 3, above - to the respective remedial rights of Customer, Customer shall, at first, only be entitled to demand remedial performance with regard to the defects within a reasonable time. The costs necessary for the purpose of remedial performance shall be borne by EVOGUARD GMBH. Replaced parts shall become property of EVOGUARD GMBH.
5. When requested to do so by EVOGUARD GMBH and at the latter's expense, Customer shall send the defective parts in question to EVOGUARD GMBH for repair or replacement, unless the defect requires repair at the place of installation.
In such case, EVOGUARD GMBH's obligation to provide remedial performance with regard to the defective part shall be deemed to have been completely fulfilled if EVOGUARD GMBH returns the duly repaired part or sends a corresponding replacement part to Customer.
Where costs have increased due to the object of the assembly having been brought to a site other than Customer's place of business, contrary to the usage originally specified, claims of Customer for such additional costs, that are made necessary by the remedial performance, in particular costs due to transportation and infrastructure, labour and material, shall be excluded.
6. Where the defective part of the assembly works is a product delivered or any other service rendered by a third party, liability of EVOGUARD GMBH shall initially be limited to an assignment of the liability claims which EVOGUARD GMBH is entitled to against such third party. Only once legal action has been taken against such third party by Customer shall EVOGUARD GMBH's own liability be revived.
7. Customer shall examine the assembly works performed by EVOGUARD GMBH directly upon receipt thereof and notify EVOGUARD GMBH of any recognisable defects without delay. This obligation of providing notice immediately shall also apply where a defect emerges later. The fact that EVOGUARD GMBH is certified as conforming to ISO 9001 shall not serve to release Customer from its duty to examine and give notice of defects according to § 377 of the German Commercial Code (HGB). Where Customer omits such notice, the assembly work shall be deemed to have been approved regardless of any defect.
8. Where Customer does not accept the remedial performance offered by EVOGUARD GMBH pursuant to the contract, upon fruitless expiry of an extension of time allotted EVOGUARD GMBH shall be released from liability for the claimed defect.
9. Where remedial performance has failed, Customer shall be entitled - subject to the conditions contractually agreed upon, including those provided for by the present Terms and Conditions of Assembly - to make any other claims based on the defect. In particular, failure of remedial performance shall be established, where EVOGUARD GMBH has allowed a reasonable extension of time allotted by Customer to pass fruitlessly, or has unduly delayed or refused remedial performance, or where a reasonable number of attempts at remedial performance have been unsuccessful.
10. EVOGUARD GMBH may refuse correction of a defect, where Customer does not make payment as agreed upon.
Customer shall only be entitled to retain payment for cause, where the notice of defect is justified beyond all doubt. This right of retention shall be limited in its amount to four times the cost necessary to correct the defect. Where Customer makes a claim based on a defect, and it is subsequently shown, in particular by means of an appropriate inspection by EVOGUARD GMBH, that the claim based on defect made by Customer is unwarranted for factual or legal reasons, EVOGUARD GMBH shall be entitled to reasonable payment and reimbursement of all expenses for services, particularly those rendered in relation to the inspection.
11. All claims for damages shall be subject to the limitations, modifications and exclusions provided by the following Article VIII, as set out below.

VIII. Limitation or Exclusion of Liability of EVOGUARD GMBH

1. Customer shall carefully observe both the instructions for use and the operating instructions, as well as the safety information provided by EVOGUARD GMBH. In particular, Customer shall comply with the instructions of EVOGUARD GMBH on how the object of assembly is to be used without risk, which precautions are to be taken regularly and individually, and which types of errors in usage are to be avoided. If Customer breaches this duty, EVOGUARD GMBH shall not be liable for any damage resulting therefrom.
2. Limitation of liability of EVOGUARD GMBH for damage, both direct and consequential, resulting from defects:
EVOGUARD GMBH shall neither be liable for any direct damage resulting from defects (including damage consisting of lost profits) nor for consequential damage resulting from defects, regardless of legal reason. This exclusion of liability shall not apply to claims by Customer for damage based on gross fault (intent/gross negligence).
3. Limitation of liability of EVOGUARD GMBH for ordinary (as opposed to gross) negligence:
Any claims of Customer, regardless of legal reason, for damages not based on gross fault (intent/gross negligence) on the part of EVOGUARD GMBH shall be excluded, unless the damage is due to the presence of a defect or the breach of material contractual duties (so-called "cardinal duties"), the fulfilment of which is a prerequisite to the proper execution of the contract.

4. Limitation of liability of EVOGUARD GMBH for not typically foreseeable damage:

Unless any claims for damages by Customer are already excluded due to the limitations of liability of EVOGUARD GMBH for direct and consequential damage (clause 2) and for ordinary negligence (clause 3), where such claims - regardless of legal reason - are not based on gross fault (intent/gross negligence) on the part of EVOGUARD GMBH, such claims shall be limited in their amount to compensation for such damage which EVOGUARD GMBH, taking into consideration the circumstances that EVOGUARD GMBH knew or should have known at the time of conclusion of the contract, should have been able to foresee as a possible consequence of a breach of duty or a breach of contract (typically foreseeable damage).

5. Limitation of liability of EVOGUARD GMBH for improper performance:
Unless a claim by Customer has already been excluded due to the limitations of liability in favour of EVOGUARD GMBH with regard to direct or consequential damages (clause 2) and for ordinary negligence (clause 3), where - as a result of improper performance - Customer asserts a claim for either damages due to breach of duty or damages in lieu of performance against EVOGUARD GMBH, and where such claim is not based on gross fault (intent/gross negligence), this claim for damages shall be limited - beyond the limitation of liability of EVOGUARD GMBH for the typically foreseeable damage (clause 4) - to a maximum amount of 10% of the contractual remuneration. Improper performance shall be deemed to exist where obstacles arise during the contractual relationship, which impede or prevent proper fulfilment of contractual duties or where one party to the contract causes injury to the other party.

6. Limitation of liability of EVOGUARD GMBH for damage caused by delay:

The above limitations of liability in favour of EVOGUARD GMBH with regard to direct and consequential damages (clause 2), ordinary negligence (clause 3), not typically foreseeable damage (clause 4) and improper performance (clause 5) shall also apply to claims for damages of Customer against EVOGUARD GMBH with regard to damage caused by delay, unless such damage is based on gross fault (intent/gross negligence). In excess of the foregoing, in all cases of delayed assembly, including claims both for damages by Customer due to delay of assembly as well as damages in lieu of assembly, and even in cases where time for assembly may have been extended for EVOGUARD GMBH and has expired, damages shall be limited in their amount to 0.5% per fully completed week of delay - to a maximum of 5% - based on the price of that portion of the works, which could not commence operations expeditiously due to such delay.

7. Limitation of liability of EVOGUARD GMBH for persons employed in performing an obligation:

Except where - due to gross fault (intent/gross negligence) of persons employed in performing an obligation - such contractual duties were breached, the fulfilment of which was prerequisite to the proper execution of the contract, any liability for persons employed in performing an obligation (§ 278 BGB), regardless of legal reason, shall be excluded. In no event shall the liability of EVOGUARD GMBH for a person employed in performing an obligation exceed the liability of EVOGUARD GMBH for its own fault as provided for in the above limitations of liability. According to § 278 BGB, a person employed in performing an obligation is a natural person or legal entity whose services the obligor makes use of in order to perform its obligations.

8. Customer's right to rescind the contract due to non-performance or performance not in conformity with the contract shall be excluded. This shall not apply, where EVOGUARD GMBH has intentionally or grossly negligently failed to perform in conformity with the contract.

9. The above limitations of liability (Art. VIII.1 through VIII.8) shall apply neither to claims made pursuant to ss.1 (and following) of the Product Liability Law, nor to claims based on defects withheld in order to deceive, nor to claims based on the grant of a guarantee regarding a quality, nor to claims based on injury to life, body or health of Customer, his officers and employees, nor to claims based on an obstacle to performance in existence at the time of conclusion of contract, which EVOGUARD GMBH had knowledge of at that time, or is at fault for lacking of such knowledge. The above provisions shall not entail a shift in the burden of proof to Customer's disadvantage.

10. In cases where the freight forwarder is arranged for by the Customer, EVOGUARD GMBH will not be held liable for any costs incurred as a result of additional security checks or time delays occasioned by the requirements of the German Aviation Security Act and the EU regulations (EC) No. 300/2008; (EC) No. 185/2010; (EC) No. 173/2012; (EC) No. 272/2009 or any other current national or international statutory provisions. The Customer agrees, on EVOGUARD GMBH'S first demand, to indemnify and hold EVOGUARD GMBH harmless from any costs or damages to the extent that such costs or damages are incurred as a result said of additional security checks as well as any ensuing time delays.

IX. Limitation Period

1. Where claims arising due to defects would - by default - be subject to a statutory limitation period of 2 years (e.g. § 634a s. 1 no. 1 BGB), such limitation period shall be shortened to 1 year. Where Customer has claims due to defects which arise from the grant of a guarantee regarding a quality, these claims shall be excluded from such shortening of the limitation period. For all other claims, the statutory limitation periods shall apply.
2. The limitation period shall commence upon completion of the assembly.
3. Where Customer's acceptance is in delay, the limitation period shall commence upon the occurrence of delay in acceptance.

X. Software

To the extent that EVOGUARD GMBH provides Customer with software, the following shall apply:

1. EVOGUARD GMBH shall grant Customer a simple right of use pursuant to § 31 s. 2 of the Copyright Law (UrhRG) regarding the software provided. § 31 s. 2 of the Copyright Law reads: "The simple right of use entitles the holder thereof to make use of the work besides the author/originator or other persons entitled in the manner allowed to him." Customer shall only be granted a right of use. At all times, EVOGUARD GMBH shall remain the sole owner/holder of all rights over immaterial property regarding the software.
2. Customer shall only be entitled to use the software provided in connection with the plant or machine assembled by EVOGUARD GMBH.
3. Customer shall not be entitled to receive the source program/source codes.
4. Customer shall be entitled to make use of the software provided for an unlimited period of time for the entire operational life span of the plant or machine assembled by EVOGUARD GMBH.
5. Customer shall not be entitled to assign its right of use to third parties, in particular Customer shall not be entitled to sell, rent, sub-license or make available the software and the associated documentation to third parties by any other means. Where Customer assigns its complete business enterprise to a third party, Customer shall be entitled to assign its own right of use to such third party. Where Customer sells the complete works to a third party in the normal course of business and such third party is not a competitor of EVOGUARD GMBH, upon request EVOGUARD GMBH shall consent to an assignment of the right of use granted to Customer, unless EVOGUARD GMBH presents reasons for the fact that such action will create the risk of providing competitors of EVOGUARD GMBH with secret knowledge (trade/business secrets) of EVOGUARD GMBH.
6. The right of use of Customer shall be non-exclusive. EVOGUARD GMBH shall be entitled to grant any form of right of use regarding the software provided to any number of other customers.
7. With the exception of staff members, Customer shall not make the software supplied available or accessible to any third party, neither temporarily nor free of charge.
8. Customer shall not change in any manner whatsoever any markings, copyright or ownership notices applied to the software provided.
9. Customer shall not create copies of the supplied software, except that one backup copy may be created by a person entitled to use the program, where this is necessary to secure the future use thereof. The backup copy shall not be used concurrently with the original software.
10. Customer shall not be entitled to photocopy, place on microfilm, electronically duplicate or otherwise copy, whether wholly or partially, the documentation associated with the software.
11. Any disassembly, reverse engineering or decompilation of the software shall be prohibited, and Customer shall neither arrange for nor permit the above to be done, except in accordance with the conditions of § 69e of the Copyright Law (UrhRG).
12. EVOGUARD GMBH shall be entitled to all proprietary rights, copyrights and other industrial property rights to the software, updates and documentation. The same shall apply to any modifications and translations/compilations of the programs.
13. EVOGUARD GMBH is entitled to carry out, at its own expense, any alterations to the software installed at Customer's premises which may be necessary due to the assertion of proprietary rights by third parties. Customer can not derive any rights from this.

XI. Jurisdiction, Applicable Law, Place of Performance

1. Where Customer is a fully qualified merchant registered in a German Commercial Register, a legal entity subject to domestic public law or a trustee of public funds (as respectively defined by § 310 BGB), the registered place of business of EVOGUARD GMBH shall be place of jurisdiction for any disputes arising from or in connection with the contractual relationship. In legal proceedings brought against EVOGUARD GMBH by Customer with no domestic place of jurisdiction, the exclusive place of jurisdiction shall also be the registered place of business of EVOGUARD GMBH. In legal proceedings brought by EVOGUARD GMBH against Customer with no domestic place of jurisdiction, the registered place of business of EVOGUARD GMBH shall be a further place of jurisdiction, in addition to the places of jurisdiction provided by law. Any arbitration agreements concluded between the parties shall take precedence.
2. The laws of the Federal Republic of Germany shall apply exclusively both with regard to the applicability of the present Terms and Conditions of Assembly of EVOGUARD GMBH and to all legal relationships of the contractual parties and their legal successors/assigns, that result from the contract and/or any possible ancillary or subsequent transactions. The present choice of law clause as well as the above covenant on jurisdiction shall also be governed by the laws of the Federal Republic of Germany.
The application of the U.N. Law on the Sale of Goods (Convention of the United Nations dated April 11, 1980 relating to contracts on the international sale of goods) shall not be excluded by virtue of the above choice of law.
3. The registered office of EVOGUARD GMBH shall be the place of performance.

Origin of goods: 0 = Third country products 1 = EU origin 2 = EFTA origin