Terms and Conditions of Delivery and Service

of KULLEN–KOTI GmbH, Reutlingen

§ 1 Scope of application

1. These General Terms and Conditions of Delivery and Service apply to all our fields of activity, in particular to the delivery of goods or spare parts.
2. Solely these General Terms and Conditions of Delivery and Service apply in the context of our relationship with the Customer. They also apply to all future business and to all business communications with the Customer, for example for the purpose of commencing contract negotiations or the initiation of a contract, even if they are not explicitly agreed again and even if no explicit attention is drawn to them again. The validity of general ordering or purchasing conditions of the Customer is hereby expressly rejected.
3. Previous agreements and earlier versions of our General Terms and Conditions are rendered invalid by these General Terms and Conditions of Delivery and Service.
4. The acceptance of our services and deliveries by the Customer shall be deemed an acknowledgement of the validity of these General Terms and Conditions of Delivery and Service.

§ 2 Conclusion of the contract

1. Unless otherwise agreed, our quotations are subject to confirmation.
2. We are only bound by an order once it has been confirmed by us in writing through an order confirmation or when we commence execution of the order.

§ 3 Scope of the delivery and service, service periods:

1. Our written quotation, or as the case may be our order confirmation, dictates the scope of our delivery or service. Side agreements and amendments require our written confirmation. If our quotation or our order confirmation was based on information from the Customer (data, numbers, diagrams, drawings, information on weights and dimensions etc.), then our order confirmation is only binding if this information was correct. If, after conclusion of the contract, it turns out that the order cannot be executed in accordance with what has been specified by the Customer, then we are entitled to withdraw from the contract, if and insofar as the Customer is not prepared to accept the replacement solution proposed by us and, if applicable, to bear any additional actual costs arising.
2. For all deliveries and services, we are entitled to a reasonable extent to render partial services. Furthermore, we are entitled to use subcontractors to fulfil our contractual obligations.
3. As soon as we become aware that the Customer is at risk of being unable to meet their payment obligations, we are entitled to make deliveries of goods or render services only in return for advance payment or a security. This does not affect our right to withdraw from individual contracts already concluded if and insofar as the Customer does not make an advance payment or provide a security within an appropriate grace period.
4. Delivery and service periods and deadlines always represent our best endeavours, but these are generally non-binding. Commencement of the delivery period and adherence to delivery deadlines presupposes that the Customer fulfils its obligations to cooperate by the deadline and in the proper manner, that it supplies all documents to be provided, and that it makes any agreed advance payments.
5. The information attached to our quotations and order confirmations, e.g. drawings, information on weight, dimensions and capacities, constitutes – unless explicitly indicated as being binding – only approximate values. We reserve all rights to cost estimates, drawings and other quotation documents. They may only be made accessible to third parties with our consent.
6. In the event of force majeure or other circumstances beyond our control and of an exceptional nature, we shall not be in default. In this case we are also entitled to withdraw from the contract if we are already in default. In particular, we shall not be in default regarding delayed deliveries if these have been caused by an incorrect or late delivery from our suppliers for which we are not responsible. In the case of hindrances of a temporary duration, the delivery or service periods shall be extended, or the delivery or service deadlines shall be postponed by the period of hindrance plus an appropriate restart period.
7. If we are contractually obliged to render advance services or make advance deliveries, we can refuse to meet our service obligations if, after conclusion of the contract, it becomes apparent that our right to counter-performance is being jeopardized by an inability by the Customer to meet its payment obligations. In particular, this is the case when the counter-performance to which we are entitled is jeopardized owing to poor financial circumstances of the Customer or if there is a risk of other hindrances to performance e.g. from export or important bans, from war events, insolvency of suppliers or the absence of required staff due to illness.
8. Transport insurance for the goods to be shipped shall only be taken out if this is expressly requested. The transport insurance will then be taken out in the Customer's name and at the Customer's expense.
9. Transfer of ownership and transfer of the purchased article must take place. No obligation to fit, install or configure the purchased item exists unless this has been expressly agreed.

§ 4 Transfer of risk

The risk of destruction or deterioration of the goods is transferred to the Customer at the point of handover of the goods for shipping; this also applies when partial deliveries are being made. If the dispatch is delayed for reasons for which the Customer is responsible, then the risk will transfer to the Customer as soon as notification is provided that the goods are ready for dispatch.

§ 5 Prices

1. Unless something to the contrary has been agreed, our prices are net prices and in the case of deliveries are always "ex works" (EXW Incoterms 2010) from our head office in Reutlingen. They therefore do not include costs of packaging, freight, postage, insurance or any other shipping costs. In the case of services, the prices refer to rendering of the service at the agreed place of performance. When invoicing, VAT at the statutory applicable level is added to the prices.
2. In the event that a delivery period of over four months between the date of order confirmation and rendering of the service is agreed, we are entitled to pass onto the Customer accordingly any increased costs that have arisen for us in the meantime due to price increases. The same applies if a service period of less than four months was agreed, but the service cannot be performed by us until after four months following confirmation of the order for reasons for which the Customer is responsible.

§ 6 Payment terms

1. If nothing else has been contractually agreed, then in the case of deliveries to a Customer based in the Federal Republic of Germany, our claim for payment shall become due – without any discount – 30 days after receipt of the delivery or after our service has been fully rendered.

2. For deliveries to Customers based outside Germany, the Customer is required to pay in advance, unless something has been agreed to the contrary. The amount to be paid becomes due 10 days after notification of readiness for dispatch.
3. If we make our deliveries or render services in definable, separate parts, then we are entitled to invoice for an appropriate part of the payment for each separate part.
4. Unless expressly agreed, the Customer is not entitled to make any deductions.
5. If the Customer is in default with payments, then it is required to compensate us for the resulting delay damages, in particular interest at the level of 9 percentage points above the base interest rate. If the Customer is in default for more than 14 days with payment of an amount or partial amount due, if the Customer infringes the obligations arising from a reservation of title, or if the counter-performance to which we are entitled is jeopardized owing to poor financial circumstances of the Customer, then all of the remaining outstanding accounts receivable will become due immediately.
6. Payment with bills of exchange or acceptances is only permitted if this has been expressly agreed, and even then only applies on account of payment.
7. Offsetting against our claims for payment is only permitted with claims that are undisputed or have been established as legally valid. The same applies to the exercise of a right of retention. The Customer is otherwise only authorised to exert a right of retention if it is based on the same contractual relationship.
8. Assignment by the Customer of claims against us requires our prior permission; we shall only refuse this for an important reason.

§ 7 Reservation of title

1. Until payment has been made in full of all our current and future claims resulting from the concluded contract and an ongoing business relationship (secured claims), delivered goods remain our property.
2. Until the secured claims have been paid in full, the goods subject to reservation of title may neither be pledged to third parties nor assigned by way of security. The Customer must notify us immediately in writing if and insofar as third parties are accessing the goods belonging to us.
3. If the Customer's behaviour is in breach of the contract, in particular if it does not pay the purchase price due, we are entitled, in accordance with the statutory regulations, to withdraw from the contract or/and demand surrender of the goods on the basis of the reservation of title. Demanding the surrender of the goods does not at the same time mean a declaration of withdrawal from the contract; rather, we are entitled to demand surrender of the goods and reserve the right to withdrawal. If the Customer does not pay the purchase price due, we may only assert these rights if we have previously given the Customer an appropriate deadline for payment and this has elapsed without success, or if such a deadline setting is unnecessary in accordance with the statutory regulations.
4. The Customer is authorised to sell on or process the goods subject to reservation of title in the normal course of business. In this case, the following provisions additionally apply.

4.1. The reservation of title extends to the products resulting from the processing, mixing or combination of our goods at their full value, with us being deemed the manufacturer. If in the case of processing, mixing or combination with goods of third parties the latter retain ownership rights, then we shall acquire co-ownership in proportion to the invoice values of the processed, mixed or combined goods. Otherwise, the same applies to the resulting product as for the goods delivered under retention of title.

4.2. The Customer hereby assigns to us, by way of security, the claims against third parties arising from the resale of the goods or the product; it does so in full or in a sum corresponding to our co-ownership share in accordance with the above paragraph. We accept the assignment. The duties of the Customer named in the above clause 4.1 apply also in consideration of the assigned claims.

4.3. The Customer remains authorised, alongside us, to collect the claim. We undertake not to collect the claim as long as the Customer meets its payment obligations towards us, is not in default, no application has been filed for the opening of insolvency proceedings and there are no other deficiencies in its performance capacity. If this is the case, however, we can demand that the Customer make known to us the assigned claims and the respective debtors, furnish all particulars required for the collection, hand out the associated documents and notify the debtors (third parties) of the assignment.

4.4. If the realisable value of the securities exceeds our claims by more than 10 %, we shall release securities at our discretion at the Customer's request.

5. The Customer must take care of the goods subject to retention of title. If requested to do so by us, the Customer must adequately insure the goods subject to retention of title at its own cost against damage from fire, water and theft to cover their replacement value. If maintenance and service costs become necessary, the Customer must carry out these promptly at its own expense.
6. Insofar as the validity of this retention of title is dependent on its registration, e.g. in public registers in the Customer's country, we are entitled and authorised by the Customer to carry out this registration at the Customer's expense. The Customer is obliged to fulfil all its obligations to cooperate that are necessary for this registration and to do so free of charge.

§ 8 Customer's duty to cooperate

1. The Customer is required to support us to a reasonable, customary extent.
2. The Customer must supply us with materials, information and data which we need for rendering our services. Data and data carriers must be free from technical defects. If special legal or company security provisions apply at the Customer's company, then the Customer must draw our attention to these prior to us rendering our service.

§ 9 Liability for defects and general liability

1. The limitation period for claims arising from defects in our deliveries or services is one year from the beginning of the statutory limitation period. After this year has expired we may, in particular, also refuse supplementary performance, without this generating, for the Customer, claims against us for price reduction, withdrawal from the contract or damage compensation. This shortening of the limitation period does not apply to any damage compensation claims other than those due to refused supplementary performance, and generally not to claims where there is fraudulent concealment of the defect.
2. Claims on the part of the Customer for supplementary performance due to defects in the service to be provided or delivery to be made by us exist in accordance with the following provisions:

2.1 If the delivered item is defective, we can first choose whether we carry out supplementary performance through removal of the defect (subsequent improvement) or through the delivery of a defect-free item (replacement delivery). The right to refuse the selected type of supplementary performance in accordance with the legal requirements remains unaffected.

2.2 We are entitled to make the owed supplementary performance dependent on the Customer paying the purchase price due. However, the Customer is entitled to retain part of the purchase price that is appropriately proportional to the defect.

2.3 The Customer must give us the required time and opportunity for the owed supplementary performance, in particular handing over the goods that are the subject of a complaint for inspection purposes. In the event of a replacement delivery, the Customer must return the defective item to us in accordance with the legal requirements.

2.4 The expenses required for the purposes of inspection and supplementary performance, in particular transport, travel expenses, labour and material costs, shall be borne by us if a defect is actually present. The expenses involved in subsequent improvement or supplementary performance arising through the fact that the purchased item has, after delivery, been taken to a location other than the place of residence or commercial premises of the Customer, shall be borne by the Customer. If a Customer demand to rectify a defect proves to be without justification, we can demand the reimbursement by the Customer of costs arising from this.

3. If the Customer is a businessman within the meaning of the German Commercial Code, the following additionally applies:
The defect claims of the Customer, in particular the claims for supplementary performance, withdrawal from the contract, price reduction and damage compensation, presuppose that the Customer has fulfilled its statutory obligations relating to inspection and notification of defects (§§ 377, 381 German Commercial Code). If a defect becomes apparent during the inspection or later, then the vendor must be notified of this immediately in writing. The notification is considered to have been made immediately if it is given within fourteen days of the defect being discovered; here timely dispatch of the notification is sufficient for keeping the deadline. Irrespective of this obligation to inspect and provide notification of defects, the Customer is required to report obvious deficiencies (including incorrect deliveries or underdeliveries) within fourteen days of delivery; here too, timely dispatch of the notification is sufficient for keeping the deadline. If the Customer fails to carry out a proper inspection and/or provide proper notification of defects, then our liability is excluded for the defect that has not been reported. This does not apply if we have fraudulently concealed the error.
A businessman is any entrepreneur who is registered in the commercial register or who runs a commercial enterprise and requires a commercially organised business operation.

4. The Customer may only demand compensation:

4.1 for damage which is due to
- an intentional or grossly negligent breach of duty on our part or
- an intentional or grossly negligent infringement by one of our legal representatives, senior executives or vicarious agents
- duties which are not key contractual duties (cardinal duties) and not main or ancillary duties in connection with defects relating to our deliveries or services.

4.2 for damage due to the intentional or negligent breach of key contractual duties (cardinal duties) on our part, by one of our legal representatives, senior executives or vicarious agents.

Key contractual duties (cardinal duties) within the meaning of the above subsections 4.1 and 4.2 are duties whose fulfilment actually enables the proper fulfilment of the contract and on the observance of which the Customer regularly relies.

4.3 We are additionally liable for damage resulting from the negligent or intentional breach of duties in connection with defects relating to our delivery or performance (duties of supplementary performance or ancillary duties) and

4.4 for damage which falls under the scope of protection of a guarantee (assurance) expressly issued by us or a guarantee of quality or shelf life.

5. In the event of an ordinarily negligent breach of a key contractual obligation, the level of liability is limited to the damage which, when the contract is concluded, we can typically expect if proper care is taken.

6. Damage compensation claims of the Customer in the event of an ordinarily negligent breach of a key contractual duty shall expire one year after the beginning of the statutory period of limitation. Exceptions to this are damages arising from injury to life, limb or health.

7. Damage compensation claims against us arising from mandatory legal liability, for example in accordance with the German Product Liability Act, and from injury to life, limb or health, remain unaffected by the above provisions of this § 9 and exist to the extent permitted by law within the statutory time limits.

8. If, for the initiation or fulfilment of the contractual obligation between the parties, third parties are engaged or involved, then the guarantee and liability limits outlined above also apply in respect of the third parties.

9. The rights of the Customer in accordance with the paragraphs 478 and 479 BGB [German Civil Code] are, in the event that a claim is made against the Customer or its Customers further along a supply chain, unaffected by the provisions in this § 9.

§ 10 Special arrangements relating to the delivery of software

1. Delivery
The delivery of software, including of program corrections, is made in the form of the object code on a commercially available data carrier or alternatively online or as a download from the homepage at www.avat.de. User documentation is included in the delivery. Unless something different has been agreed between the parties, the user documentation may at our discretion be provided either as a user manual or supplied on a data carrier. There is no requirement to provide the source code of the software.

2. Rights of use to the software

2.1 The relevant licence conditions of the software apply to the granting of rights of use to the software.

2.2 If nothing is agreed to the contrary, the Customer shall receive a simple right of use to the delivered software that is unrestricted in time. The right of use entitles the user, in the absence of other agreements, to use the software on a single PC (single-user licence).

2.3 Further rights, in particular concerning duplication beyond the extent required for use in accordance with the contract, shall not be granted. With the exception of the right to correct errors, the Customer is not permitted to make changes to the software. The Customer's right to correct errors only applies if we have previously refused to correct the error or the error correction has previously failed. The production of a backup of the software by the Customer and duplication within the scope of normal data backup to safeguard the intended operation of the software is permitted.
Decompilation of the software in accordance with the provisions of § 69e UrhG is permitted.

2.4 The Customer shall, when program corrections are delivered, be granted those rights of use to which it is entitled in the case of the original program version.

3. Guarantee
Concerning the right to supplementary performance, the following additionally applies in the case of delivery of software:

3.1. We have the right to carry out subsequent improvement at the Customer's premises. We also fulfil our subsequent improvement obligation by providing updates, equipped with an automatic installation routine, for download from our website and offering the Customer support by telephone with resolving any installation problems that may occur.

3.2. If we are not in a position to remove the defect or make a defect-free subsequent delivery, then we shall show the Customer possibilities for workarounds. If these can be reasonably be expected of the Customer, then the workaround options shall be considered supplementary performance. Workarounds are temporary ways of bypassing an error or fault without interfering with the source code.

3.3. If required, in the case of subsequent improvement the user documentation is also adapted accordingly.

§ 11 Miscellaneous: Place of fulfilment, place of jurisdiction, applicable law, data processing, language of the contract, severability clause

1. The place of fulfilment is Reutlingen.
2. Sole place of jurisdiction for all disputes arising between the parties from the contractual relationship is […], insofar as the Customer is a businessman, legal entity under public law or a special fund under public law or the Customer does not have a general place of jurisdiction in the Federal Republic of Germany or moves its place of jurisdiction abroad. By way of an exception to this, we are also entitled to make a claim against the Customer in its general place of jurisdiction.
   A businessman is any entrepreneur who is registered in the commercial register or who runs a commercial enterprise and requires a commercially organised business operation. The Customer's general place of jurisdiction is abroad if its registered office is abroad.
3. The Customer is aware that data from the business transactions, including personal data, has to be stored and – where necessary for business purposes – processed and passed to third parties. The Customer agrees to this data collection and processing.
4. The language of the contract is German. If the parties additionally use another language, the German wording in accordance with the agreement takes priority.
5. Should a provision in these General Conditions of Delivery and Payment or a provision in the context of other agreements be or become invalid, this shall not affect the validity of all other provisions or agreements.
6. The contractual and other legal relationships with our Customers are governed by German law, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).