

# General Terms and Conditions

## for Deliveries

of

PROWITAL Dental Implants GmbH  
Wurmberger Str. 30 , D-75446 Wiernsheim

Version: February 2010

### Special notice to the contracting party:

With regard to implants, the Medical Devices Act and the related Ordinances and Directives have to be observed. According to the Ordinance on Medical Devices Vigilance (*Medizinprodukte-Sicherheitsplanverordnung, MPSV*)

(§ 3 (3) clause 2 MPSV), we also have to be notified of any incidence (malfunction, failure or change of characteristics or performance, or inappropriateness of labeling or the directions for use that has caused, may have caused or may cause, directly or indirectly, the death or the severe deterioration in the state of the health of a patient, a user or any other person), if the implants bought from us are resold. In case of the resale of the implants the contracting partner also has the duty to assist in corrective action, especially recalls. In that case the measures we recommend have to be applied. It must be assured that the distribution of the implants bought from us can be traced back any time. In particular, our product and serial/lot numbers must not be changed.

## 1. Scope

- 1.1 Our **GENERAL TERMS AND CONDITIONS** shall apply exclusively. In cases in which provisions are missing, the law shall apply. Any conflicting or additional terms and conditions of the contracting partner are rejected. Such terms and conditions, or parts thereof, shall only apply if we have accepted them expressly and in writing. Our **GENERAL TERMS AND CONDITIONS** also apply if our deliveries are made unconditionally in knowledge of conflicting or additional terms and conditions of the contracting partner.
- 1.2 Our **GENERAL TERMS AND CONDITIONS** only apply to entrepreneurs, legal entities under public law or public separate estates within the meaning of § 310 (1) BGB (German Civil Code).
- 1.3 Our **GENERAL TERMS AND CONDITIONS** also apply to future business transactions with the contracting partner.

## 2. Conclusion of contract, contents of contract

- 2.1 Our offers are without engagement.
- 2.2 We reserve all rights to all offers and contractual documents, especially illustrations, leaflets, catalogs, drafts, drawings, etc. as well as samples and models in so far as such rights are not granted to the contracting partner according to the purpose of the contract and/or on the basis of an explicit agreement. Offer documents have to be returned to us upon our request immediately if the order is not placed with us. The contracting partner shall not have any right of retention in this respect.
- 2.3 The composition and nature, especially the characteristics of state and condition, of the products to be delivered under the contract (contract products) appear from our contract documents.
- 2.4 We reserve the right to make the following changes to the contract products after signing the contract in so far as the contracting partner can reasonably be expected to tolerate the same:
  - product changes in the course of continuous product development and improvement
  - minor and immaterial deviations in color, form, design, weight and quantity
  - deviations usual in commercial practice.
- 2.5 We shall only be liable for damages pursuant to § 122 BGB in case of our own fault.

### 3. Prices, terms of payment

- 3.1 Failing special agreements, our prices are quoted ex factory exclusive of postage, cost of shipment, freight, packaging, and insurance. Value-added tax amounting to the statutory level will be charged in addition.
- 3.2 Payment shall be made within 30 days of the invoice date free our place of payment collection. A 3% discount will be granted only in case of immediate payment by authorized direct bank account debiting. The invoice will be issued as soon as the delivery has left our company.
- 3.3 If payment is not made within 30 days of the date of the invoice, the contracting partner shall be in default without any further action on our side. In that case the statutory provisions pertaining to the consequences of default in payment shall apply.
- 3.4 In case of deferral of payment, we shall be entitled to claim statutory default interest for the period of default.
- 3.5 The contracting partner shall have no right to offset such claims except in respect of counterclaims which are undisputed, recognized or absolutely and legally established. The contracting partner shall only have a right of retention in so far as his counterclaims are based on the same contract.

### 4. Packaging, delivery times, force majeure, delay in delivery, impossibility of delivery, insurance

- 4.1 Failing special agreements, delivery shall be made **ex works**. Transport and all other packaging in accordance with the Packaging Ordinance will not be taken back even if provided by us. The contracting partner shall be liable to dispose of the packaging at his own cost.
- 4.2 The delivery times indicated shall only be fixed dates if they have explicitly been specified as such.
- 4.3 Keeping delivery obligations, especially delivery dates, requires the timely and proper performance of the contracting partner's cooperation duties, if any.  
We reserve the right to put in a plea of non-performance of the contract.
- 4.4 Compliance with the delivery date is based on the time of delivery **ex works**.

#### 4.5 **Delay in delivery for which we are not responsible:**

- 4.5.1 We are not responsible for delays in delivery as a result of the following obstacles, unless, by way of exception, we assumed a procurement risk or a guarantee in respect of the delivery date/deadline; the same applies if such obstacles occur on the side of our suppliers or their sub-suppliers:  
Force majeure and obstacles to delivery,
  - which occur after signing the contract or, not through our fault, become known to us only after signing the contract, and
  - in respect of which we can prove that despite proper care such obstacles could not be foreseen or prevented by us and that in so far we cannot be held responsible for having accepted them or failed to take precautionary and averting action.The conditions mentioned above, i.e. occurrence or disclosure only after signing the contract, not through our fault, non-predictability and unavoidable which we are able to prove, especially include the following:  
Justified labor disputes (strike and lock-out); interruption of operations, shortage of raw materials, deficiency of operating supplies and auxiliary materials.
- 4.5.2 The contracting partner shall have no right to claim damages in case of delays in delivery within the meaning of section 4.5.1. above.
- 4.5.3 In case of a definite delivery obstacle within the meaning of section 4.5.1, either party shall have the right to terminate the contract immediately by withdrawal pursuant to the legal regulations.
- 4.5.4 In case of a temporary delivery obstacle within the meaning of section 4.5.1, we shall have the right to postpone deliveries for the duration of the obstacle and to add a reasonable start-up period. If we prove to the contracting partner unreasonable obstruction of delivery, we shall have the right to withdraw from the contract. The contracting partner shall only be entitled to withdraw from the contract under the circumstance specified in section 4.7 below.

#### **4.6 Delay in delivery for which we are responsible:**

We shall be liable for delays in delivery according to the legal provisions except as provided in section 8 below.

#### **4.7 Partner's right to withdraw from the contract in case of delayed delivery**

If we can prove that we are not responsible for the delay in delivery, the contracting partner shall only have the right to withdraw from the contract

- if in the contract he has made delivery in due time a condition for his continued interest in performance (fixed-delivery transaction), or
- if he can prove that due to the delayed delivery his interest in performance has ceased or that he cannot reasonably be expected to maintain the contractual relationship.

For all other cases § 323 (4-6) BGB shall be applicable. The legal consequences of the withdrawal from the contract are subject to the legal provisions (§§ 326 in conjunction with 346 et seq. BGB); any performance not owed by the contracting partner may be reclaimed by him.

4.8 Partial deliveries shall be permissible as long as the contracting partner can be reasonably expected to accept such deliveries.

4.9 We will insure the contract products from passing of risk against losses caused by theft, fracture, fire, water and transport damage and other insurable damage at the contracting partner's expense.

If, as a result of product innovations, we are no longer able to deliver a product, we shall have the right to offer an alternative product to the orderer. If the orderer accepts the alternative product, he shall pay or we shall refund the price difference, whichever applies. If the orderer does not accept the alternative product, we shall have the right to withdraw from the contract. Any payment on the purchase price already made shall be refunded by us. The orderer shall not have any further rights going beyond that.

### **5. Negligent violation of the duty to cooperate, passing of the risk**

5.1 If the contracting partner violates his duty to cooperate, in particular his duty to accept, pick up or call off our deliveries, we shall have the right to claim reimbursement of any loss we may have as a result, including possible additional expenses. We reserve the right to raise further claims.

5.2 In case of delayed acceptance, collection or calling of our deliveries by the contracting partner, the risk of accidental perishing or accidental deterioration shall pass to the contracting partner at the point in time at which such duties were to be fulfilled under the contract..

### **6. Specifications, liability for defects**

6.1 Our specifications lay down the nature and characteristics of our deliveries in a detailed and definitive way. Unless otherwise expressly stated, the specifications of our deliveries are covered by agreements on state and condition and not by guarantees or warranties. In case of doubt, any representations made by us in connection with this contract shall not be understood to contain any guarantees or warranties in the sense of strict liability or acceptance of any special responsibility. In case of doubt, only explicit representations we have made in writing in respect of granting guarantees or warranties shall be valid.

6.2 The contracting partner shall have no right to any claim if the deviation of our products from the agreed condition is immaterial.

6.3 The rights of the contracting partner resulting from our liability for defects are subject to the requirement that he inspects the products within a reasonable time after delivery with regard to quantity, identity and integrity and especially with regard to any damage of the packaging visible externally, and that he notifies us of any complaints within the period mentioned above. If the contracting partner identifies any damage

or defect at a later time, he shall also notify us within a reasonable period. After having received a complaint, we will immediately inform the contracting partner whether the rejected products are to be returned to us or whether he shall wait until we collect them at his premises or inspect them on site. If we request that the products be returned, the contracting partner shall return them by the same mode of dispatch by which we had sent them.

- 6.4 If a defect is found we shall be free to decide whether we remedy the defect by repair or replacement. If one or both is/are impossible or disproportionate in relation to the defect, we shall have the right to refuse remedy. We shall also be entitled to refuse to remedy the defect as long as the contracting partner does not meet his payment obligations to an extent corresponding to the defect-free part of the delivery. Replaced parts will become our property.
- 6.5 In case of impossibility or failure to remedy the defect, or if we, through our fault, unreasonably postpone or seriously or definitely refuse to remedy the defect, or if the contracting partner cannot reasonably be expected to accept remedy of the defect, the partner shall be entitled at his own option to either adequately reduce the purchase price (purchase price reduction) or terminate the contract (termination).
- 6.6 If the contract does not contain any provisions, or any deviating provisions, concerning the conditions and consequences of remedying the defects, reducing the purchase price or terminating the contract, the statutory regulations on these rights shall apply.
- 6.7 The contracting partner's claims for damages and reimbursement of expenses which are related to defects shall be subject to the regulations below in sections 6.7.1 to 6.8 inclusive, irrespective of the legal nature of the claim – including in particular claims resulting from defects and violation of duty as well as tortious acts.
- 6.7.1 According to the statutory regulations, we are liable for damage/loss
- if caused deliberately
  - in case of gross negligence of legal representatives or employees at executive level
  - in case of violation of material contractual obligations, also gross negligence of vicarious agents
  - in case of culpable physical injury and hazards to life and health
  - in case of defects and other circumstances fraudulently concealed, or
  - in case of defects despite a guarantee for the absence of such, or in so far as a guarantee for the product's condition or any other guarantee has been granted.
- 6.7.2 According to the statutory regulations, we are also liable for minor negligent violation of material contractual obligations by our legal representatives, employees at executive level and vicarious agents, whereby liability is limited to losses that are typically associated with this type of contract and may be reasonably foreseen.
- 6.7.3 The liability pursuant to the Product Liability Act remains unaffected.
- 6.7.4 Unless section 6.7 above contains deviating regulations, any further claims shall be excluded.
- 6.8 **The statutory regulations concerning burden of proof shall remain unaffected by the above provisions in section 6.7.**

## 7. Liability for collateral duties

If, through our fault, the fault of our legal representatives or vicarious agents, the item delivered cannot be used by the contracting partner in accordance with the contract due to omitted or incorrect implementation of proposals and advice provided before the contract was signed and of other collateral contractual duties (in particular instructions for handling and maintenance of the item delivered), the provisions in sections 6.7 and 6.8 above shall apply respectively, and any further claims of the contracting partner shall be excluded.

## **8. Total liability, termination of the contract by the contracting partner**

- 8.1 The following provisions shall apply to claims of the contracting partner beyond those resulting from liability for material defects. None of our statutory or contractual rights and claims shall be excluded or restricted.
- 8.2 Liability for damages shall be subject to section 6.7 above correspondingly. Any further liability for damages shall be excluded irrespective of the legal nature of the claim asserted. This especially applies to claims for damages in addition to performance and damages in lieu of performance due to breach of duties and to claims for compensation of material losses resulting from tortious acts pursuant to § 823 BGB.
- 8.3 The limitation according to section 8.2 shall also apply in so far as the contracting partner requires reimbursement of expenses.
- 8.4 Any fault of our legal representatives and vicarious agents shall be attributed to us.
- 8.5 The statutory regulations in respect of the burden of proof shall remain unaffected.
- 8.6 To the extent liability claims against us are excluded or limited, this shall also apply with regard to the personal liability for damages of our employees, workers, staff members, representatives and vicarious agents.
- 8.7 Within the scope of the statutory regulations, the contracting partner shall only have the right to withdraw from the contract if we are responsible for the violation of contractual duties. In cases pursuant to section 6.5 (failed remedy of a defect, etc.), and in case of impossibility, the statutory regulations shall apply exclusively.  
The right of the contracting partner to withdraw from the contract in case of our delayed delivery, shall be subject to the provisions in sections 4.5.3., 4.5.4. and 4.7 above. In case of violation of duties, the contracting partner must declare within a reasonable period upon our request whether he will withdraw from the contract due to the violation of duties or whether he insists on delivery.

## **9. Statute of limitations**

- 9.1 The limitation period for any claims and rights resulting from defective deliveries, irrespective of the legal ground, shall be one year, except as provided in section 9.3 below.
- 9.2 The limitation period according to section 9.1 shall also apply to all claims for damages against us.
- 9.3 The limitation period according to section 9.1 shall not apply to cases stipulated in sections 6.7.1, 6.7.2 and 6.7.3. In that respect the statutory limitation periods shall apply.  
The limitation period for any recourse following delivery pursuant to §§ 478, 479 BGB shall also remain unaffected.
- 9.4 Unless otherwise expressly agreed, the statutory regulations regarding commencement of the limitation period, suspension of the running of the statute of limitations, and the interruption and recommencement of the limitation period shall remain unaffected.
- 9.5 The claim for purchase price reduction and the right to terminate the contract shall be excluded in so far as the claim for remedy is statute-barred. In that case the contracting partner, however, shall have the right to refuse payment to the extent to which he would be entitled to do so in case of withdrawal or purchase price reduction.

## **10. Assignment of claims by the contracting partner**

Claims against us in connection with the deliveries we have to make may only be assigned with our prior written approval.

## **11. Transactions based on sample consignments/product selection**

- 11.1 Our **GENERAL TERMS AND CONDITIONS** shall also apply to transactions based on product samples sent for inspection/selection except for the special provisions in sections 11.2 to 11.6 below.

- 11.2 Product samples (implants) submitted to the contracting partner for inspection/selection upon his request shall, at the latest, be considered as definitely bought if and in so far as they are not returned to us within a period explicitly agreed or, if no such period has been agreed, within a period of 14 days.  
Product samples for inspection/selection returned to us before the end of the selection period shall also be considered as bought by the contracting partner if they do not arrive at our premises in the original sterile packaging, intact and with undamaged packaging.  
If the product samples sent for inspection/selection are used by the contracting partner before the end of the selection period, they shall be considered as definitely bought by the contracting partner at the time of their use.  
Bought inspection/selection products will be invoiced by us according to section 3.2 above.
- 11.3 The product samples sent for inspection/selection will be insured by us up to the passing of risk to the contracting partner pursuant to section 11.5 below, but not beyond the end of the selection period.
- 11.4 Product samples sent for inspection/selection and returned to us will only be insured by us if the contracting partner returns the product to us within the selection period and if he returns them by the same mode of dispatch by which we had sent them.
- 11.5 At the moment when the contracting partner has finally bought the selection products, all risks, including those of perishing and loss not due to anybody's fault, shall pass to the contracting partner at the latest.
- 11.6 The provisions relating to reservation of title in section 12 below of our **GENERAL TERMS AND CONDITIONS** shall apply to product samples sent for inspection/selection.

## 12. Use of components not being part of the prowital system

PROWITAL does not provide any warranty in cases in which prowital products are used in combination with components not made by PROWITAL and not authorized by PROWITAL.

## 13. Reservation of title

- 13.1 We reserve the title to the contract products ("reserved products") until receipt of full payment arising from the business relationship with the contracting partner. The reservation of title also shall extend to the confirmed balance resulting from receivables due from the contracting partner booked on current account (current account reservation).
- 13.2 The contracting partner shall have the right to continue to use the reserved products (implantation in the patient and/or resale) within the framework of his practice / company), but already now shall assign to us all claims against his customers or against third parties accruing to him from further use of the products, such assignment equaling the level of the final amount of our claim invoiced to him (including value-added tax). The contracting partner shall be authorized to collect the assigned accounts receivable also after their assignment. Subject to the insolvency law regulations, our right to collect such accounts ourselves shall remain unaffected, but we agree to abstain from the collection of such accounts as long as the contracting partner meets his contractual obligations, especially his payment obligations, does not fail to pay on due date, has not filed any request to open insolvency proceedings and has not suspended payments. Transfer by way of security or pledge is not covered by the contracting partner's right to continue the use of the reserved products.
- 13.3 If we are not obligated to abstain from collecting the accounts receivable ourselves according to section 12.2 above, we shall be entitled to revoke the right of further use and to take back the reserved products, subject to the insolvency law regulations. Taking back the reserved products means withdrawal from the contract.  
Subject to the insolvency law regulations, we shall be entitled to adequate realization of the reserved products taken back for the reasons mentioned above after giving a prior warning and setting a time limit. The realization proceeds shall be offset against the liabilities of the contracting partner after deduction of adequate realization expenses.  
Under the conditions giving us the right to revoke the contracting partner's authorization to make further use of the products, we may also revoke the collecting power and request the contracting partner to disclose to us the assigned claims and the respective debtors, provide all information required for the collec-

tion, submit to us all records required for this purpose, and inform the debtors (third parties) about the assignment.

- 13.4 In case of damage or loss of the reserved products or change in ownership or address, the contracting partner shall inform us in writing immediately. The same applies in case of seizure of property or other interventions by third parties, so that we can take legal action pursuant to § 771 ZPO (German Code of Civil Procedure). In so far as the third party is not in a position to reimburse our costs of an in-court and out-of-court action pursuant to § 771 ZPO, the contracting partner shall be liable for our loss. If the reserved products are released without legal proceedings, the costs incurred in this connection may also be charged to the contracting partner, as well as the costs of recapturing the pledged reserved products.
- 13.5 If our reserved products are in a territory governed by a foreign law under which the reservation of title or the assignment are not valid, it is understood that the products shall be secured according to the provisions on reservation of title and assignment applicable under that law.  
If the creation of such rights requires the cooperation of the contracting partner, he shall be obligated upon our request to take all measures that are needed to create and uphold such rights.
- 13.6 The contracting partner shall be responsible for adequate and careful storage of the reserved products to ensure that they are kept in their original sterile packaging and undamaged until they are used. The contracting partner shall be responsible to cover the reserved products by adequate replacement value insurance against theft, robbery, burglary and loss caused by fire or water. Such insurance shall be taken out at his expense for our benefit. The contracting partner shall already now assign to us all insurance claims resulting from such insurance policies in connection with the reserved products. We accept the assignment. Beyond that, we reserve the right of assertion of our claims to performance and compensation.
- 13.7 We agree to release collateral provided us upon the request of the contracting partner in so far as the realizable value of such collateral exceeds the claims to be secured by more than 10 %. It is up to us to decide which collateral items will be released.

#### 14. Notification in writing

If these **GENERAL TERMS AND CONDITIONS** require that notifications be made in writing, the text form according to § 126 b) BGB shall be binding meaning that the notification may be made by post or fax, but may also take the form of a statement created on the computer and sent as an email.

#### 15. Place of performance, legal venue, applicable law, intra-EU acquisition, severability clause

- 15.1 Failing special agreements, the place of performance shall without exception be our principal place of business.
- 15.2 If the contracting partner is a businessman within the meaning of the Commercial Code, a legal person under public law or a public separate estate, the place of jurisdiction regarding all obligations from and in connection with the contractual relationship, including disputes related to bills of exchange and checks, shall be our principal place of business or, at our discretion, the place of business of the contracting partner. The agreement on the legal venue shall also apply if the contracting partner's place of business is abroad.
- 15.3 All rights and responsibilities from and in connection with the contractual relationship shall be exclusively governed by the laws of the Federal Republic of Germany without consideration to the conflict of laws provisions; the UN Sales Convention (CISG: United Nations Convention on Contracts for the International Sale of Goods, of April 11, 1980) shall not be applicable.
- 15.4 Should any provision of these **GENERAL TERMS AND CONDITIONS** or any provision of any other agreement between us and the contracting partner be or become invalid, this shall not affect the validity of all other provisions or agreements.

The German-language version of these General Terms and Conditions shall be binding.