

# Conditions of Business

Waren-Verein der  
Hamburger Börse e.V.

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In case of any doubt the German Version is authoritative.



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# **Part One**

## **General Provisions**

### **Section 1 Applicability**

(1) These Conditions of Business apply exclusively for contracts between entrepreneurs within the meaning of § 14 German Civil Code (*Bürgerliches Gesetzbuch*, "BGB").<sup>1</sup>

(2) The provisions of Part One apply to all transactions insofar as no special regulations for specific types of business transactions are contained in Part Two.

### **Section 2 Applicability of German Law**

The laws currently in force in the Federal Republic of Germany are applicable so as to supplement these provisions.

The United Nations Convention on Contracts for the International Sale of Goods, dated 11 April 1980 does not apply.

### **Section 2a Agreement on Incoterms**

To the extent the parties refer in their contract to a provision in the Incoterms, this refers to the current version of the Incoterms at the time the contract was concluded unless provided otherwise.

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<sup>1</sup> See page 50

### **Section 3 Business Days**

Business days as defined in these Conditions of Business are the weekdays from Monday to Friday insofar as these do not fall on 24th or 31st of December and are not officially recognised holidays at the place of performance or the place where the contractual declaration is made.

### **Section 4 Calculation of and Adherence to Stipulations as to Time**

(1) Stipulated periods of time which are calculated on the basis of business days or other days or longer periods end at 4 p.m. on their last day. Should the last day of such a stipulated period fall on a non-business day the next business day is to be regarded as the last day. If the commencement of such a stipulated period is determined by the occurrence of some event, the day on which the event occurs is not to be included in the calculation of the period of time. If the event occurs on a non-business day or after 4 p.m. on a business day, it is deemed to have occurred on the next business day. If a period of time is set in motion by a declaration, the communication thereof is the determining event.

(2) A stipulated time for making a declaration is adhered to only if the declaration reaches the addressee within the time stipulated. This applies also to a complaint that the commodities do not correspond to the contract description if the time for lodging a complaint is measured in days.

(3) The provisions of para. 1 sentences 1 and 2 do not apply to the calculation and observance of periods for shipment or dispatch or collection.

**Section 5**  
**Formation of the Contract,**  
**Obligations and Rights of the Intermediaries**

(1) Brokers and agents who take a part in the negotiation or conclusion of a contract are under a duty to use the utmost care on behalf of both contracting parties. All declarations by one party relating to the conclusion of the contract, especially objections by one party to the contents of a contract-note, a confirmation of sale or other written acknowledgement, shall be passed on immediately by the broker or agent to the other party by the fastest possible means.

(2) The basis of the agent's commission or the broker's brokerage is the gross sales price, even where it has been agreed that the buyer shall pay the carriage costs for the seller's account and deduct this amount from the invoice total.

**Section 6**  
**Formation of the Contract.**  
**Reservation of the Designation of one Contracting Party**

(1) If an intermediary (agent or broker) has reserved the right to designate the name of one party to the contract, the other party is bound by the contract even where it raises well-founded objections against the party which is subsequently designated; in this case the intermediary is regarded as the contracting party. Beyond this section 95 HGB (German Code of Commercial Law)<sup>2</sup> remains unaffected.

(2) Where no designation is effected, the intermediary is to be treated as a party to the contract even if it is he himself, and not the other party, who wishes to uphold the contract.

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<sup>2</sup> See p. 53



## **Section 7**

### **Kind and Quality of the Commodities to be Delivered**

The seller shall deliver commodities of the kind and quality described in the contract. Where the contract stipulates the crop from which the commodities are to be supplied the seller shall supply fair average quality from this crop. If the contract for the sale of dried fruits or shell fruits does not stipulate the crop, the seller shall supply from a new crop. Where a contract for the sale of commodities of varying kind and quality, in particular different grades of the same produce, contains no terms as to the proportionate quantities the seller may determine the proportions as he pleases.

## **Section 8**

### **Quantities**

- (1) The word "about" in front of a contractual statement of quantity entitles the seller to deliver up to 5 % more or less.
- (2) The seller is allowed to deliver part-consignment of an economically reasonable size, except where a specific parcel, which at the time of the contract is already at the place of performance, is sold and the buyer is to take delivery there. If it is stipulated that the commodities are to be transported by containers, at least one full container shall be delivered as part-consignment.
- (3) If the buyer has to take delivery of the commodities at the place of performance he may, within the time for accepting delivery, elect to demand delivery by part-consignments of an economically reasonable size.
- (4) The delivery receipt given by the buyer is conclusive evidence of the delivery of the quantity stated therein. This provision does not apply to spices.

**Section 8a**  
**Certificates Proving Customs Tariff Preferences,  
Import Documents**

If according to regulations agreed by the European Union or otherwise made the utilization of preferential customs tariffs may come into question or if according to these regulations the presentation of certificates or other documents issued from outside the Union is necessary for the import, the seller shall timely deliver to the buyer the documents which are required for proving the right to this preference or for the import; certificates shall be delivered by the printed form provided for in the respective regulation.

**Section 9**  
**Place of Performance of the Seller's Obligations**

(1) The place of performance for the delivery of commodities is the seller's domicile, unless agreed otherwise or unless the circumstances indicate a different place of performance. Where a specific parcel is sold the place of performance is, in case of doubt, the place the parcel is situated when the contract is concluded. For contracts with documents for marine transport (Abladegeschäfte) and import transactions by land / dispatch and ex-warehouse transactions the place of performance is determined by the special provisions in Part Two (sections 35, 54, 67, 75).

(2) The place of performance for the delivery and presentation of documents is the buyer's domicile. The seller shall bring the documents to the buyer's business premises or to the buyer's named bank.

**Section 10**  
**Time of Performance of the Seller's Obligations**

(1) Where a time for the delivery of commodities or documents is neither agreed upon nor to be inferred from the circumstances

the buyer may demand delivery immediately. Where no time for accepting delivery is agreed upon or to be inferred from the circumstances the seller may deliver immediately.

(2) Where "prompt" dispatch has been agreed upon for forwarding from one inland place to another inland place the seller shall dispatch the commodities within one week after conclusion of the purchase contract if they are to be carried by road, and within two weeks after conclusion of the purchase contract if they are to be forwarded by inland waterway. For contracts with documents for marine transport (Abladegeschäfte) and import transactions by land / dispatch only the respective special provisions of Part Two (sections 39, 56) apply. In all other cases the word "prompt" denotes a period of three business days.

## **Section 11**

### **Amount of the Purchase Price**

(1) The buyer shall pay the seller the agreed purchase price without discount.

(2) If after the conclusion of a contract of sale a statute or statutory instrument is passed under which the import duties are altered with effect for the agreed time for delivery or a part of this time and in consequence thereof the seller's demonstrable expenses alter, the purchase price shall be adjusted by the amount of this difference. Included in the import duties in the sense of this article are customs duties, skimmed off duties and excise duties. Sentence 1 supra applies mutatis mutandis if the seller's demonstrable expenses alter in consequence of such other regulations as a market organisation or common organisation of agricultural markets may make.

## **Section 12**

### **Due Date for Payment of the Purchase Price**

Where a time for payment of the purchase price is neither agreed upon nor to be inferred from the circumstances the seller may demand payment immediately. As long as an agreed time for taking delivery has not expired the seller may not demand payment of the purchase price until the buyer demands delivery of the commodities.

## **Section 12a**

### **Delivery On-call**

(1) If delivery on-call has been agreed, the Seller must deliver the called quantity within two weeks after the call. The buyer may call for instalments of an economically reasonable size. Where no time for the call has been stipulated the buyer must call for delivery within a reasonable time.

(2) If delivery on-call has been agreed and a time period (delivery time) has also been agreed for the delivery, the buyer can call for delivery of the entire quantity or commercially reasonable partial quantities between the begin of the delivery period and two weeks prior to the end of the delivery period. The buyer must call for delivery of the entire quantity no later than two weeks prior to the end of the delivery period.

(3) If it is stipulated that the commodities are to be transported by containers, at least one full container shall be delivered as part-consignment.

## **Section 13**

### **Cash against Documents, Other Cash Clauses.**

#### **Payment from Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the agreed purchase price without delay upon delivery by the seller of all the contractual

documents duly constituted in accordance with the contract. The buyer may neither set off nor assert a retention right. He has no right to refuse performance. In particular he may not make payment dependent on prior inspection of the commodities not even in the event that the commodities have already arrived at their destination. The buyer's obligation to pay is not affected by any claims, objections or pleas on the grounds that the commodities do not correspond to the contract description. Claims, objections or pleas of the buyer are only to be considered if particular circumstances make the seller's demand for payment appear to be abusive; seller's demand for payment especially is to be regarded as being abusive if and as far as the buyer has set off a claim which is undisputed or has become res judicata.

(2) If the buyer has contracted on "cash against documents" terms, he shall at the seller's request accept in trust contractual documents in good order, unless the seller makes the permission he gives to the buyer to dispose of or to use the documents dependent on conditions to the fulfilment of which the contract gives him no claim.

(3) Para. 1 is also applicable in cases where payment is to be made from a letter of credit against delivery of documents or if the word "cash" is used in any combination with the agreement on manner of payment.

#### **Section 14 Documents Held in Trust**

The buyer must return documents received in trust by 4 p.m. on the business day following their tender if he has not by that time fulfilled the conditions on which the seller had permitted him to dispose of or use them. Documents not in conformity with the contract are to be regarded as approved if the buyer does not return them in time. Where the buyer makes use of a document without first fulfilling the conditions on which the seller permitted him to dispose of or use it, these conditions are to be regarded as approved.

## **Section 15**

### **Force Majeure**

Both contracting parties are released from their obligation to perform where one party is prevented from performing by an unforeseeable, unavoidable event (force majeure) for which it is not responsible and which occurs after the contract is concluded. The party prevented from performing shall immediately inform the other party of the force majeure; if it fails to fulfil this obligation it will be liable in damages for non-performance of the contract.

## **Section 16**

### **Interest upon a Claim becoming Due**

Money obligations bear interest at an annual rate of 5 percent since the day they become due. This does not affect any further claims in the event of default.

## **Section 17**

### **Principal Performance, Withdrawal and Damages in the case of Delay**

(1) Principal performance for the purpose of these Conditions of Business consists of delivery of the commodity, delivery of the documents, payment of the purchase price, the call for delivery, acceptance of the commodity, accepting return of commodities which do not comply with the contract in the case of section 19 para. 3 as well as the performance additionally designated in these Conditions of Business as principal performance for certain types of transactions.

(2) An obligee may grant an obligor a reasonable period of grace in which to effect an already due principal performance or to declare his readiness to perform the same. If the time has expired, he may elect to withdraw from the contract and/or to demand damages for non-performance, unless performance has been effected in time or the declaration of readiness to

perform, for which declaration the period of grace was granted, has been made. If a transaction constitutes a fixed term commercial purchase within the meaning of § 376 (1) HGB (German Commercial Code),<sup>3</sup> no deadline needs to be set pursuant to sentence 1. The obligee can only claim performance in this situation if the obligee notifies the obligor immediately after expiration of the fixed time or period for performance that the obligee insists on performance.

(3) The respite must amount to at least three business days; it shall be notified in writing or text form (§126b BGB, German Code of Civil Law).

(4) As damages for non-performance the obligee may claim the difference to his disadvantage between the market price on the relevant date and the contract price. The relevant date is the first business day after expiry of the respite. When calculating damages in such a case any agreed "about" clause is not to be taken into account.

(5) The obligee may choose to effect a covering transaction in order to ascertain damages. This covering transaction is to be for the obligor's account if the following conditions are observed:

- a) The covering transaction is to be negotiated by an impartial, expert broker.
- b) The broker shall first of all invite firms other than the contracting parties, which in his considered opinion come into consideration as business competitors, to make bids. He shall inform the obligor of the most favourable bid and invite him also to make a bid; the obligor shall not be heard if the covering transaction is being effected in order to ascertain damages for non-performance of another covering transaction in which the obligor was as such already a party. The broker shall then inform the obligee of the overall most favourable bid and invite him also to make a bid. A written note is to be made by the broker of the firms consulted and their bids. The covering transaction is to be concluded with

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<sup>3</sup> See page 54

the bidder who made the most favourable bid. In the case of a covering purchase the obligee's bid is not to be considered if no other bids have been made.

c) The covering transaction is to be commenced and carried out without delay.

d) In the case of a covering purchase any agreed "about" clause is not to be taken into account.

(6) Other calculations of damages are not excluded by paras. 4 and 5.

(7) Claims under §§ 280 paras. 1, 2, 286 BGB<sup>4</sup> for damages which can be asserted in addition to the claim for performance in the event of default (damages in addition to performance) are not affected.

## **Section 18** **Unjustified Refusal of a Principal Performance**

If a party declares to the other party without justification that the first party will not fulfill a principal duty within the meaning of section 17 of these Conditions of Business, the other party, at its election, can withdraw from the contract and/or demand damages for non-performance. In calculating damages paras. 4 to 6 of section 17 are to be applied. The relevant date in the sense of section 17 para. 4 is the first business day after the declaration as described in sentence 1 reaches the addressee.

## **Section 19** **Commodities not in Conformity with the Contract.** **Rights of the Buyer**

(1) If the commodities do not correspond to the contract description at the time when the risk passes to the buyer, he may avail himself, at his option, of the rights contained in paras.

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<sup>4</sup> See page 51



2 to 7, insofar as the further necessary preconditions are satisfied.

(2) The buyer may demand compensation from the seller amounting to the difference in value on the relevant date between the commodities which do not correspond to the contract description and commodities which do correspond to the contract description (depreciation).

(3) The buyer may demand rescission of the contract where the depreciation amounts to more than 10 % of the market price in force on the relevant date for commodities conforming with the contract description. The commodities not conforming with the contract description are to be invoiced back to the seller at this market price. Section 346 para 3 no. 3 BGB (German Civil Code)<sup>5</sup> apply *mutatis mutandis*. Moreover the buyer may demand compensation for necessary expenses. If the buyer demands that rescission of the purchase contract, the seller is required to take back the commodity that was not in conformity with the contract.

(4) The buyer may demand, at his option, the removal of the defect by the seller or delivery of commodities free from defects as supplementary performance subject to section 439 BGB (German Civil Code)<sup>6</sup> where the depreciation amounts to more than 10 % of the market price in force on the relevant date for commodities conforming with the contract description. The buyer may grant a seller a reasonable period of grace in which to supplementary perform. If the time has expired he may demand rescission of the contract subject to para 3 unless supplementary performance has been effected in time.

(5) The relevant date in the sense of paras. 2, 3 and 4 is the day on which the buyer notified the seller that the commodities did not turn out to be in conformity with the contract description.

(6) The buyer can demand damages pursuant to §§ 440, 280, 281, 283 and 311a BGB or compensation for expenses made in

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<sup>5</sup> See p. 52

<sup>6</sup> See p. 52

vain pursuant to § 284 BGB if the prerequisites in the provisions in the law are satisfied.

(7) If the delivered commodity does not belong to the kind designated in the contract (defect related to kind), the buyer can, at its election, declare that the buyer will not accept delivery of the commodity which does not comply with the contract as performance or allow the delivery to constitute performance.

(8) If the seller offers to rescind or to supplementary perform the contract, or if a survey report in accordance with the Rules for Experts has established a depreciation of more than 10 %, the seller may request the buyer to declare within three business days after receiving the request whether he elects to rescind or to supplementary perform the contract. If the buyer does not declare his intention within this time he loses his right to rescind or to supplementary perform the contract. Such of the buyer's rights as are contained in para. 7 remain unaffected.

(9) Each lot tendered in effectuation of a permissible part delivery is to be judged independently. In this sense part deliveries also take place when in fulfilment of a contractual obligation several lots are tendered simultaneously.

(10) Each lot is to be judged as a whole. But where less than 10 % of the lot is not in conformity with the contract and this part can be separated without difficulty from the rest the separated part is to be judged independently.

(11) The provisions of paras. 1 to 6 and 8 to 10 apply also where the contract of sale includes the clause "Payment after approval of the commodities".

(12) The rights contained in paras. 2 – 5 are subject to a limitation period of six months beginning to run from delivery of the commodities unless the seller concealed fraudulently the defect.

**Section 20**  
**Commodities not in Conformity with the Contract,**  
**The Buyer's Duties**

(1) The buyer shall inspect the commodities without delay after delivery by the seller, insofar as this is feasible in the orderly course of business. If the commodities were delivered by container and if the consignee forthwith dispatches the same container including the commodities remaining therein to another place, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded; if the consignee did not forthwith dispatch the container including the commodities remaining therein to another place, the buyer shall inspect the commodities without delay after they could have been unloaded and taken in stock in the orderly course of business at the place of delivery. Where the buyer takes delivery of the commodities at a factory he needs not commence his investigation until they have arrived at their destination.

(2) If it is apparent that the commodities do not correspond to the contract description, he shall notify the seller without delay that the commodities have not turned out to be in conformity with the contract. If the buyer fails to notify the seller in time the commodities are to be treated as approved, unless the nonconformity was not noticeable in the course of a proper inspection.

(3) If the buyer has resold the commodities and moved them accordingly they are treated as having been approved, unless the non-conformity with the contract description was not noticeable in the course of a proper inspection.

(4) The special provisions contained in Part Two of these Conditions of Business apply to contracts with documents for marine transport (Abladegeschäfte), import transactions by land / dispatch, import transactions by land / collections and ex-warehouse transactions.

## **Section 21 Shortages**

A shortage need not be notified within the time laid down in section 377 HGB (German Code of Commercial Law)<sup>7</sup> if the buyer is not claiming supplementary delivery of the shortage but only a reduction in the purchase price. The claim for restitution of the excess purchase price paid becomes time-barred six months after delivery.

## **Section 22 Documents not in Conformity with the Contract, The Buyer's Duties**

(1) The buyer shall return documents not in conformity with the contract, together with a statement of the reasons for their return, at the latest on the third business day after their delivery; the buyer may avail himself of reasons notified after the expiry of this time only where a reason given at first was well-founded and the defect was then corrected by the seller. If the buyer fails to return the documents properly and in time they are treated as having been approved, unless they are so defective or so incomplete that the seller must have considered approval out of the question.

(2) Documents not in conformity with the contract are also treated as having been approved where the buyer makes use of them. If the buyer makes use of the documents solely for the purpose of inspecting the commodities, they shall be treated as having been approved only where the sale was made on "cash against documents" terms.

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<sup>7</sup> See p. 54

**Section 23**  
**Purchase Subject to Examination**

(1) A contract of purchase subject to examination is concluded on the condition that the contract shall not take effect if the buyer declares to the seller that he does not wish to take the commodities.

(2) The buyer must make this declaration at the latest on the first business day after tender. If the declaration is not made in time, the contract is regarded as having been concluded unconditionally. If the declaration is not made in time or the taking is declared, the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection.

(3) The seller is bound to tender to the buyer commodities of the kind agreed upon. The tendering of such commodities is a principal performance in the sense of section 17 (1); damages are to be calculated by reference to commodities of average quality.

**Section 24**  
**Purchase after Approval of Sample**

(1) A purchase after approval of sample is concluded on condition that the buyer shall approve the sample.

(2) The seller shall tender to the buyer a sample of commodities of the kind which were sold. The tendering of such a sample is a principal performance in the sense of section 17 (1); damages are to be calculated by reference to commodities of average quality.

(3) The buyer must approve the sample if it conforms with the contract description. Approving the sample is a principal performance in the sense of section 17 (1).

## **Section 25 Inspection Costs**

In every case the buyer shall bear the costs of the inspection which he is obliged to make and shall pay the seller for the samples which he draws.

## **Section 26 Transfer of Inspected Commodities from one Warehouse to Another**

If the seller has not given the buyer sufficiently in advance the opportunity to supervise the transportation and re-storage he may not, without the buyer's prior approval, transfer or have transferred to another warehouse commodities which the buyer has already inspected. If the seller is guilty of contravening this regulation, the buyer, at its election, can withdraw from the contract and/or claim damages for non-performance. section 17 paras. 4 to 6 apply mutatis mutandis.

## **Section 27 (repealed)**

## **Section 28 Reservation of Title**

The seller retains the title to commodities which he has delivered as well as to products processed from them until payment of his individual claims and until settlement of any balance in his favour on a running account, even where the commodities are to be processed (sections 947, 948, 950, 951 BGB [German Civil Code]). The buyer may sell commodities delivered to him and objects produced by working on them only in the orderly course of business. On concluding the contract of

sale the buyer assigns as security to the seller all claims which he has under the sale or on any other legal basis. The buyer is entitled to collect the payments that he has assigned to the seller as long as he fulfils his contractual obligation to pay the seller. Where the total of the claims assigned exceeds the nominal value of the claim to be secured by more than 20% the seller shall select claims totalling the amount of the excess and reassign them to the buyer. If besides assigned claims other kinds of securities have been assigned, the total of all securities assigned has to be taken into account for the arising of a claim for release.

### **Section 29**

#### **Sale on Condition that the Seller Receives Delivery**

(1) A party which has contracted to sell subject to its receiving correct and punctual delivery, or subject to a similar reservation, is released from its obligation to deliver or to guarantee delivery if it has previously concluded a corresponding contract of purchase and if under this contract it receives an incorrect or late delivery or no delivery at all. A contract of purchase meets this requirement if upon careful consideration the expectation of a correct, complete and punctual delivery was justified, and if the seller, concurrently with the sale, definitely and verifiably intended it to be for the purpose of obtaining the commodities to be delivered by himself. Where the seller entered a contract of purchase for the purpose of obtaining commodities to be delivered by himself under several contracts of sale he is released from his obligations to all the buyers only to the extent that he has not received correct, complete or punctual delivery; where the seller, concurrently with the contract of sale, definitely and verifiably settled an order of succession for the fulfilment of his obligation to deliver, each contract of sale is to be regarded independently.

(2) Insofar as the buyer recognises that the seller is released from his obligation to perform he may demand that the seller assigns to him all the rights under the contract of purchase if he

undertakes to perform the corresponding obligations of the seller.

(3) The seller is under a duty to inform the buyer without delay of any circumstance which puts in doubt the correct, complete or punctual delivery to himself. If the seller fails to do this without delay he will not be released from his obligations.

### **Section 30 Arbitration**

(1) All disputes arising out of a contract concluded subject to these Conditions of Business or with a "Waren-Verein Arbitration" clause shall be decided by a Arbitral Tribunal; no action may be brought in a court of law. This arbitration clause also binds the personally liable partners of the contracting parties. The Arbitral Tribunal is competent to determine the validity of the main contract. The Arbitration Rules drawn up by the Members' Assembly of the Waren-Verein der Hamburger Börse e.V. shall govern the organisation of this Arbitral Tribunal, the procedure to be observed by it, the costs of the proceedings, the competence of ordinary courts (section 1062 ZPO [German Code of Civil Procedure]) and the responsibility of the Waren-Verein der Hamburger Börse e.V., its bodies and its staff including its advisor; for each act of the procedure the latest edition is applicable.

(2) If an arbitration award is annulled or an application for a declaration of enforceability of an award is rejected by the ordinary court for reasons other than the lack of a valid arbitration agreement, the arbitration agreement shall not be exhausted.

(3) Paras. 1 and 2 apply also to the relationship between one contracting party and a broker who has negotiated the contract or an agent who has negotiated or concluded the contract, as well as to the relationship between several participating brokers or agents.



## **Section 31**

### **Experts**

(1) In cases of dispute the depreciation of the commodities or the market price of commodities or a weight deficiency in sales by delivered weight (section 35 para. 3) may be verified by a survey report made in accordance with the Rules for Experts. The disputed condition and quality of commodities or of a sample can only be verified by a survey report drawn up in such a manner.

(2) The Rules for Experts are drawn up by the Members' Assembly of the Waren-Verein der Hamburger Börse e.V. For each act of the procedure the latest edition is applicable. The survey report is binding on the Court of Arbitration unless it is obviously wrong or is based on an incorrect procedure.

(3) Paras. 1 and 2 apply also where Waren-Verein Arbitration was agreed upon.

## **Part Two**

### **Additional Provisions for Specific Types of Transactions**

#### **I. CONTRACTS WITH DOCUMENTS FOR MARINE TRANSPORT**

**(Abladegeschäfte)**

##### **Section 32**

##### **Definition. Applicable Provisions**

(1) Where commodities are sold which are to be, or were, shipped for carriage by sea (Abladegeschäft) the provisions of sections 32 to 51 apply. Such transactions are in particular those concluded on FAS, FOB, CFR and CIF basis.

(2) Where "ex-warehouse" has been agreed at the same time, the provisions of sections 74 to 80 apply with priority

##### **Section 33**

##### **Shipping by the Seller or by a Third Party**

The seller may also deliver commodities which were shipped by a third party.

##### **Section 34**

**(repealed)**

**Section 35**  
**Place of Performance. Passing of the Risk**

(1) The place of performance for the delivery of commodities is the port of shipment.

(2) The risk passes to the buyer as soon as the commodities

- in the case of CIF, CFR and FOB transactions have been placed on board the ship in the port of shipment or the seller has procured the commodity that has already been delivered accordingly,
- in the case of FAS transactions, have been delivered alongside the ship at the loading location designated by the buyer in the port for shipping or the commodity has already been delivered accordingly,

and the seller's intention that the commodities are destined for the buyer has become readily apparent.

(3) Where commodities sold on "delivered weight" terms are lost during the voyage the loss in weight which would, according to past experience, have taken place during the voyage shall be deducted from the shipped weight, and the purchase price shall be calculated on the basis of the remaining weight; the same applies where the commodities are damaged and gain in weight during the voyage.

**Section 36 \*)**  
**Inspection Forbidden**

After shipping the commodities the seller may no longer inspect or alter them. Nor may he make it possible for a third party to inspect or alter them after they have been shipped.

**Section 37**  
**Quantities. Weighing Fees**

(1) It shall be presumed that the quantities certified in the bill of lading are correct.

(2) The buyer can prove a weight deficiency only by presenting a weight list which a public appointed and sworn weigher or a comparable authorized person has issued at his request, which must be made at the latest five business days after completion of discharge of the ship; if experts have received within these five business days a request to determine the kind and quality of the commodities, the period is extended to ten business days. This rule of evidence does not apply if the commodities had been transported by container and the consignee has dispatched the same container from the port of destination to another place forthwith after discharge.

(3) The weighing fee is to be borne by the buyer.

**Section 38**  
**Reservation of the Right to Designate the Port of Destination**

(1) Where the buyer has by contract reserved to himself the right to designate the port of destination the commodities may only be shipped in accordance with his instructions on this point. The buyer is under a duty to send his instructions two weeks before commencement of the time for shipment, but no sooner than on the third business day after the contract is concluded. The sending of these instructions is a principal performance in the sense of section 17 (1).

(2) The seller's agent and the broker who negotiated the transaction are authorized to receive such instructions.

## **Section 39**

### **Time for Shipment**

(1) Where a period of time has been stipulated for "Abladung", "Verladung" or "Verschiffung" (time for shipment) the commodities must be taken on board ship within this time. It is at the seller's option when he ships the commodities within the time for shipment.

(2) Where "prompt" delivery for shipment, loading or shipment has been agreed the following time stipulations in the sense of para. 1, beginning at the conclusion of the contract, shall be observed:

- 15 days for taking aboard commodities in European ports on the Baltic Seas the North Sea and the Atlantic Ocean with the exception of those in Spain and Portugal,
- 21 days for taking aboard commodities in ports in Spain and Portugal, on the Mediterranean and Black Seas, as well as on the east coast of North America including the Great Lakes,
- 30 days for taking aboard commodities in other ports.

(3) Where commodities are sold "afloat" they must be on board ship at the time the contract is concluded.

(4) Where the time for shipment has not been observed the buyer may avail himself of the rights set out in section 17, without first having granted the seller a period of grace in accordance with section 17 paras. 2 and 3.

## **Section 40**

### **Carriage**

(1) Unless expressly agreed otherwise the commodities may be carried directly or indirectly. Where direct carriage has been expressly agreed the ship may not, during the voyage from the port of shipment to the port of destination. call at any port which is further from the port of destination than is the port of shipment;

the ship may only call at other intermediate ports which lie on a route that the ship would reasonably be expected to take, having regard to the shipping conditions prevailing when the contract was concluded.

(2) Transshipments are permissible if the shipper had already destined the commodities for the contractual port of destination on the first shipment.

(3) If delivery FOB has been agreed, the agreement must be understood in the case of doubt to mean that the seller assumes responsibility for procuring the space on the ship.

#### **Section 41 Advice of Shipment**

(1) The seller shall inform the buyer of the name of the ship on which the commodities to be delivered under the contract have been shipped (advice of shipment); if the commodities are carried by container, the seller shall at the same time inform the buyer of the number of the container. In the case of spices the seller shall also inform the buyer of the date of the bill of lading and the marking of the commodities.

(2) The seller shall send the advice of shipment at the latest on the third business day after the shipment. If the advice is sent after expiry of this time and in consequence thereof the buyer is demonstrably damaged, the seller has to compensate for the damage. The obligation for the sending of the advice of shipment falls due at the latest on the third business day after expiry of the time for shipment.

(3) Where commodities are sold afloat time begins with the expiry of the day on which the contract was concluded.

(4) On the sending of the advice of shipment the purchase is limited to the commodities designated therein. The seller may only deliver such commodities as have been shipped according to the advice. Minor errors in the advice impose no liability on the seller.

(5) The rendering of the advice of shipment is a principal performance in the sense of section 17 (1).

(6) The seller's agent and the broker who negotiated the transaction are authorized to render and to receive the advice of shipment.

## **Section 42 Documents**

(1) The seller shall deliver to the buyer one of the following documents:

- a bill of lading,
- a shipping certificate,
- a quay receipt or
- a delivery order of the shipping company.

The shipping document must designate the port of loading, the day of shipment, the name of the vessel, the port of destination, and the kind and quantity of the commodities; if Carriage by Container was stipulated, the shipping document must designate the number of the container and indicate whether the container is intended for on-carriage from the port of destination. The seller shall also deliver an invoice and if necessary the certificates mentioned in section 8a. In the case of CIF contracts the

insurance policy or any other proof of insurance coverage

is to be attached; this shall show coverage for the commodities to the purchase price plus 10 % anticipated profits in accordance with DTV Cargo Insurance Conditions 2000 restricted coverage (DTV Güterversicherungsbedingungen 2000) in the latest current edition or some equivalent coverage. The contents of all documents must conform with the contract of sale.

(2) The buyer does not need to accept documents which indicate that a delivery for shipment, a carriage, or the kind and

quality or quantity of commodities was not in conformity with the contract (incorrect documents), and those documents which in some other respect fail to meet the requirements of para. 1, or those documents to which not all documents to be delivered in accordance with paras. 1 and 4 or a special agreement have been attached (incomplete documents).

(3) The seller shall deliver the documents to the buyer without delay after the rendering of the advice of shipment. This obligation falls due at the latest when the vessel reaches the port of destination.

(4) If the documents are not tendered until the vessel has been discharged in the port of destination for longer than one business day, they must be accompanied by a certificate from the seller and each previous seller showing how long each has had the documents in his possession after completion of discharge. During this time no seller may hold the documents in his possession for longer than one business day; each seller shall pass them on to his buyer as quickly as possible and by the fastest means which can be expected of him.

(5) If the documents are not tendered until the vessel has been discharged in the port of destination for longer than one business day, the following provisions apply instead of para. 4 as far as dried fruits and shell fruits are concerned: on request declared by the buyer before documents according to contract having been tendered, the said documents must be accompanied by a certificate of the seller and each previous seller who has passed on the documents later than the first business day after completion of discharge and after receiving the respective request, showing how long each has had the documents in his possession after completion of discharge. This obligation of the seller ceases if he has already passed the contractual documents to the buyer before receiving the request and notified the buyer of this without delay. During this time no seller may hold the documents in his possession for longer than one business day. Each seller may pass the documents at his choice to his buyer by mail or through mediation of a bank; the duration of this forwarding is not to be considered as possession of a seller.



(6) The delivery of the documents and the delivery of the certificates described in paras. 4 and 5 are principal performances in the sense of section 17 (1).

### **Section 43**

#### **Call**

Where delivery on call has been agreed upon, the quantity called for is to be shipped within two weeks of call; if no cargo space is available within the second half of this period, shipment on the next departing vessel suffices. Aside from this, the provisions in section 12a apply. If the total quantity has not been called for in a timely manner pursuant to section 12a paragraph 2 sentence 2, the seller can unload without a call.

### **Section 44**

#### **Shipment not in Conformity with the Contract.**

#### **Carriage not in Conformity with the Contract**

(1) Where the advice of shipment shows that the commodities described therein were not shipped or are not being carried in time, or that the shipment or carriage fails in some other respect to conform with the contract, the buyer may, at its option, withdraw without further ado from the contract and/or claim damages for non-performance, or accept the commodities as performance and in addition claim those damages resulting from the breach of the contract. After the advice of shipment has been received the seller can set the buyer a time limit for choosing one of these rights. If the buyer does not inform the seller of his choice in time, he is only entitled to claim damages for non-performance. The time must amount to at least three business days.

(2) If damages for non-performance are claimed, paras. 4 to 6 of section 17 are applicable in calculating them. The relevant date is the first day after the receipt of the buyer's declaration that he chooses to claim damages for non-performance, and at

the latest the first business day after expiry of a time set by the seller in accordance with para. 1.

### **Section 45**

#### **Documents not in Conformity with the Contract**

(1) Where the seller of spices has offered incorrect documents the buyer may, at his option, without further ado withdraw from the contract and/or claim damages for non-performance. Further attempts to perform by the seller (second tenders) are excluded. In calculating the damages paras. 4 to 6 of section 17 are applicable. The relevant date is the first business day after the rejection of the incorrect documents. Instead of rescinding and claiming damages for non-performance the buyer may demand delivery of correct documents if he notifies the seller of this within three business days after tender of the documents.

(2) Where the seller of other commodities has offered incorrect or incomplete documents and the buyer has refused to accept such documents, second tenders by the seller are not excluded. The buyer can set the seller a reasonable time for tendering correct and complete documents. If the time has expired he may, at his option, withdraw from the contract and/or claim damages for non-performance unless performance has been effected in time. The time must amount to at least three business days, and is to be stipulated in writing or text form (§ 126b BGB, German Code of Civil Law). In calculating the damages paras. 4 to 6 of section 17 are applicable.

### **Section 46**

#### **Inspected Parcels**

A parcel which, contrary to section 36, has been inspected need not be accepted by the buyer as performance. Where the seller has tendered such a parcel the buyer can to that extent, at his option, without further ado withdraw from the contract and/or claim damages for non-performance. In calculating the damages paras. 4 to 6 of section 17 are applicable. The relevant

date is the first business day after the rejection of the documents.

### **Section 47** **Delay in the Forwarding of Documents**

Where the seller does not observe the time limit set out in section 42 para. 4 sentence 2 or para. 5 sentence 4, he shall indemnify his buyer for any loss which can be shown to have been caused by the delay. A seller in a chain shall also reimburse his buyer for the loss that the latter can be shown to have suffered through the default of a previous seller.

### **Section 48** **Commodities not in Conformity with the Contract, The Buyer's Rights**

(1) If the commodities do not correspond to the contract description at the time the risk passes to the buyer, the provisions of section 19 apply.

(2) Insofar as the commodities are not of the kind described in the contract the buyer may, at his option, without granting a period of grace withdraw from the contract and/or claim damages for non-performance. In calculating the damages paras. 4 to 6 of section 17 are applicable. The relevant date is the day on which the buyer notifies the seller that the commodities have not turned out to be in conformity with the contract.

(3) If the buyer has rejected the commodities with regard to a generic defect (section 19 para. 7) or if he had demanded rescission of the contract (section 19 para 3), he shall return the commodities to the seller at the place of the port of destination. This provision applies even if the consignee had transferred the commodities before their inspection (section 49) from the port of destination to another place.

**Section 49**  
**Commodities not in Conformity with the Contract,**  
**the Buyer's Duties**

(1) If the commodities were carried by container and the consignee dispatches the same container including the commodities remaining therein forthwith after the discharge from the port of destination to another place, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded.

(2) If the commodities were carried by container and the consignee did not dispatch the container including the commodities remaining therein forthwith after the discharge from the port of destination to another place, the buyer shall inspect the commodities without delay after they could have been unloaded on the quay of the port of destination or in a warehouse at the place of the port of destination in the orderly course of business.

(3) In all other cases the buyer shall inspect the commodities without delay as soon as the discharge of the vessel is completed and insofar as this is feasible in the orderly course of business. Where the seller already notifies the buyer before the commodities have been discharged, the time for inspection begins on receipt of this notification. Under no circumstances does the time for the inspection of the commodities begin before the buyer has received the documents.

(4) If it is apparent that the commodities do not correspond to the contract description, the buyer shall without delay notify the seller that the commodities have not turned out to be in accordance with the contract. This time limit is regarded in any event as having been observed if the complaint is received by the seller within three business days after the beginning of the time for inspection. If the buyer fails to notify the seller in time, the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection. If the buyer has sold the commodities to a third party and has forwarded the documents accordingly, it suffices to

preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible to the seller for the punctual sending of the notification by his buyer and subsequent buyers.

(6) Should circumstances for which the buyer is not responsible prevent him from inspecting the commodities or sending notification, he shall without delay inform the seller of this fact. If the buyer fails to inform the seller in time he may not invoke these circumstances. If the seller was responsible for such a circumstance, the buyer need do nothing to fulfil the obligations laid out in paras. 1 to 4, unless and until the seller notifies him that this obstacle has been removed.

## **Section 50**

### **Shortages, the Buyer's Duties**

The last buyer shall forward the weight list to his seller within ten business days of its date. The other buyers in the chain shall forward the weight list without delay to their respective sellers. If the times for forwarding the weight list are not observed, the weight stated in the bill of lading is treated as accepted; each buyer is responsible for the punctual forwarding of the weight list by his buyer and subsequent buyers. The claim for compensation for shortages is time-barred six months after completion of discharge of the vessel.

## **Section 51**

### **Letter of Credit**

(1) Where the parties have agreed upon a letter of credit arrangement for the payment of the purchase price the buyer is responsible for the bank's notifying the seller of the availability of the money ten days before commencement of the period for shipment; where the contract is concluded later than on the eleventh day before the commencement of this period the buyer is responsible for the bank's notifying the seller immediately of the availability of the money.

(2) Ensuring that the notification is received in time is a principal performance in the sense of section 17 (1).

## **II. IMPORT TRANSACTIONS BY LAND / DISPATCH**

### **Section 52 Concept, Applicable Provisions**

Where it is agreed that the seller shall dispatch the commodities over a national frontier by rail (railway import transaction) or by road (truck import transaction), the provisions of sections 52 to 64 apply.

### **Section 53 Export Duties, Customs Duties, Unloading Costs**

- (1) The duties connected with the export from the supplying country are to be borne by the seller, even where such duties are levied in transit.
- (2) The costs for unloading are invariably to be borne by the buyer.

### **Section 54 Place of Performance, Passing of the Risk**

- (1) The place of performance of the obligation to deliver is the place of loading. The risk passes over to the buyer in these situations as soon as the commodities have been handed over for carriage if the seller's intention that the commodities accepted for transport are destined for the buyer has become readily apparent.

### **Section 55 Reservation of the Right to Designate the Destination**

- (1) Where the buyer has by contract reserved to himself the right to designate the place of destination or the name of the consignee or both (destination) the seller may only dispatch the

commodities in accordance with the buyer's instructions on this point. The buyer is under a duty to send such instructions two weeks before commencement of the time for dispatch or the time for delivery but not earlier than on the third business day after conclusion of the contract. The sending of these instructions is a principal performance in the sense of section 17 (1).

(2) The seller's agent and the broker who negotiated the transaction are treated as authorised to accept the buyer's instructions as to the destination.

### **Section 56** **Time for Dispatch, Time for Delivery**

(1) In the case of railway import transactions, where a period of time for dispatch has been agreed upon, the commodities must have been accepted for carriage by the railway authority Within this period; the relevant date is the one stamped on the waybill with the date-stamp of the forwarding station. In the case of truck import transactions, where a period of time for dispatch has been agreed upon, the commodities must have been accepted for carriage by the carrier and have been loaded on to the truck by this time. It is at the seller's option when he has the corn modifies accepted for carriage within this time. Dispatch is a principal performance in the sense of section 17 (1).

(2) If "prompt" dispatch has been agreed upon, the seller shall dispatch the commodities within ten days of the conclusion of the contract of sale.

(3) If the seller has undertaken the obligation of delivering the commodities within a certain period of time, he is under a duty to place the commodities at the disposal of the buyer at the place of destination within this period. The provisions about the passing of risk in § 54 are not affected.



## **Section 57**

### **Advice of Dispatch, Appropriation**

(1) The seller shall notify the buyer of the particulars of loading (advice of dispatch). That is to say

- in the case of railway import transactions: the quantity loaded, the date stamped on the waybill with the date-stamp of the forwarding station, the number of the waggon on which the commodities were loaded and if applicable the number of the container.
- in the case of truck import transactions: the quantity loaded, the date of loading, the name of the carrier, the official registration number of the truck on which the commodities were loaded and if applicable the number of the container.

(2) The seller shall render the advice of dispatch at the latest on the third business day after the loading. If the advice is rendered after expiry of this time and in consequence thereof the buyer is demonstrably damaged, the seller has to compensate for the damage. The obligation for the rendering of the advice of dispatch falls due at the latest on the third business day after expiry of the time for dispatch.

(3) Rendering of the advice of dispatch is a principal performance in the sense of section 17 (1).

(4) The purchase is confined by the advice of dispatch to the commodities designated therein. The seller may only deliver such commodities as have been forwarded according to the advice of dispatch. Minor errors in the advice of dispatch impose no liability on the seller.

(5) The seller's agent and the broker who negotiated the transaction are treated as authorised to accept and render the advice of dispatch.

(6) The seller is under a duty to render the advice of dispatch stipulated in para. 1 to the buyer even if in accordance with an assignment or instructions of the buyer the commodities are dispatched directly to a third party.

**Section 58**  
**Delivery for Carriage by the Seller or by a Third Party**

The seller may also deliver commodities which were delivered for carriage by a third party.

**Section 59**  
**Delivery on Call**

Where delivery on call has been agreed upon the seller shall dispatch the quantity called for within two weeks of call. Aside from this, the provisions in section 12a apply. If the total quantity has not been called for in a timely manner pursuant to section 12a paragraph 2 sentence 2, the seller can dispatch without the call.

**Section 60**  
**Cash against Documents, Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the contractual purchase price upon delivery of the following documents:

- in the case of all import transactions against delivery of the certificates mentioned in section 8a if necessary,
- in the case of railway import transactions against delivery of the duplicate of the waybill and the seller's invoice,
- in the case of truck import transactions against delivery of the first copy of the consignment note (Article 5 CMR) and the seller's invoice; the consignment note must contain an entry by the sender to the effect that from the time when the consignment note is drawn up, the consignee shall have the right of disposal (Article 12, para. 3 CMR). In the case of dispatch in countries not adhering to the Convention on the Contract for the International Carriage of Goods by Road (CMR), payment is to be effected against delivery of equivalent documents.

Where letter of credit terms have been agreed upon, payment from this letter of credit is to be made upon delivery of the same documents.

(2) The buyer has no actionable claim for the delivery of the waybill duplicate or of the first copy of the consignment note (Article 5 CMR) or of an equivalent document. The delivery of these documents is merely a precondition of the buyers obligation to perform first contained in para. 1.

### **Section 61 Commodities not in Conformity with the Contract, the Buyer's Duties**

As soon as the waggon or the truck or if applicable the container has arrived at the place where the final consignee intends to have the commodities unloaded, the buyer shall inspect them without delay, insofar as this is feasible in the orderly course of business. If it is apparent that they do not accord with the contract description, the buyer shall notify the seller without delay that the commodities have not turned out to be in conformity with the contract. If the buyer fails to notify the seller in time, the commodities are deemed to have been approved, unless their non-conformity with the contract description could not be observed on proper inspection. Where the buyer has resold the commodities on terms that his buyer shall take delivery of them from the railway authority or from the carrier, it is sufficient to preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible for the sending in due time of the notification from his buyer and subsequent buyers.

### **Section 62 Shortages, the Buyer's Duties**

Where the seller delivers less than he has invoiced to the buyer, the latter must lodge a complaint about the short-delivery as soon as the waggon or the truck or if applicable the container

has arrived at the place where the final consignee intends to have the commodities unloaded. If the buyer fails to lodge a complaint without delay, the quantity stated in the invoice is deemed to have been accepted. Where the buyer has resold the commodities on terms that his buyer shall take delivery of them from the railway authority or from the carrier, it is sufficient to preserve his rights if he forwards without delay the notification received from his buyer. He is, however, responsible for the sending in due time of the notification from his buyer and subsequent buyers.

### **Section 63**

#### **Import Duties on Rescission of the Contract**

Import duties paid by the buyer are only to be included in the expenses which he may recover from the seller on rescission of the contract, if recovery cannot be demanded otherwise.

### **Section 64**

#### **Demurrage**

Each buyer may demand that the seller arranges matters so that the buyer will not be charged with demurrage for the period of time including the first business day after the tendering of the goods.

### **III. IMPORT TRANSACTIONS BY LAND / COLLECTION**

#### **Section 65 Concept, Applicable Provisions**

Where it is agreed that the buyer shall collect the commodities and where it is envisaged by the parties that the commodities are then to be forwarded over a national frontier the provisions of sections 65 to 73 shall apply.

#### **Section 66 Export Duties, Customs Duties**

The duties connected with export from the supplying country are to be borne by the seller, even where such duties are levied in transit.

#### **Section 67 Place of Performance and Carriage**

- (1) Place of performance for the obligation of the seller to deliver is where the commodity must be provided for collection.
- (2) In case of doubt the buyer is to have the commodities collected from the seller by motor vehicle.
- (3) The seller may and must keep the commodities in a container ready for collection only if this has been specially stipulated. Such agreement may be implied from the circumstances, especially from the quantity of packages sold. As far as dried fruits or shell fruits are concerned, the contents of each container must be specially marked.

**Section 68**  
**Time of Performance for Obligations of the Seller**

Where a period for taking delivery is agreed the buyer can demand delivery of the commodities at any time within this period at his option. However, he must notify the seller of the collection in reasonable time; a notification period of three business days is deemed under all circumstances to be sufficient.

**Section 69**  
**Delivery on Call**

Where delivery on call has been agreed upon the seller shall hold ready for collection the quantity called for within two weeks of call. Aside from this, the provisions in section 12a apply.

**Section 70**  
**Cash against Documents, Letter of Credit**

(1) Where "cash against documents" terms have been agreed upon the buyer shall pay the contractual purchase price upon delivery of a seller's invoice and a certificate of receipt duly issued by the railway authority or the carrier or a forwarding agent authorized by the buyer. The certificate of receipt must contain clear indication of the railway authority or the carrier or a forwarding agent; it must bear the stamp or the signature of the railway authority or the carrier or a forwarding agent. Where letter of credit terms have been agreed upon, payment from this letter of credit is to be made upon delivery of the same documents.

(2) The buyer has no actionable claim for the delivery of the certificate of receipt mentioned in para. 1. The delivery of this document is merely a precondition of the buyer's obligation to perform first contained in para. 1.

**Section 71**  
**Commodities not in Conformity with the Contract,**  
**The Buyer's Duties**

The provisions of section 61 apply accordingly.

**Section 72**  
**Shortages. The Buyer's Duties**

The provisions of section 62 apply accordingly.

**Section 73**  
**Import Duties on Rescission of the Contract**

Import duties paid by the buyer are only to be included in the expenses which he may recover from the seller on rescission of the contract, if recovery cannot be demanded otherwise.

## **IV. EX-WAREHOUSE TRANSACTIONS**

### **Section 74 Applicable Provisions**

(1) If it has been agreed that the seller must deliver the commodities ex-warehouse and the parties have not provided that the commodities are supposed to be subsequently transported across a national border, the provisions in sections 74 to 80 apply.

(2) The same provisions are similarly applicable where commodities are sold "ex-quay/warehouse" or on similar terms and the seller tenders ex-warehouse.

### **Section 75 Place of Performance, Passing of the Risk**

The place of performance of the seller's obligation to deliver is the place where the warehouse is situated. The risk passes to the buyer when the buyer takes delivery of the commodities, or at the latest at expiry of the time for taking delivery within the meaning of section 77. The buyer bears the risk of removing the commodities.

### **Section 76 Tender**

The seller shall tender the commodities to the buyer by delivering a warehouse receipt or an irrevocable delivery order of the warehouse keeper. Where "cash against documents" or other prepayment terms are not agreed, a delivery order signed only by the seller himself suffices instead of the documents specified in sentence 1. Where cash against documents is agreed, or where the tender is from a warehouse situated in the free port, an invoice is to be attached.



**Section 77**  
**Period for Taking Delivery**

(1) The buyer shall take delivery of the commodities within two weeks of tender (period for taking delivery).

(2) The commodities are stored at the seller's expense for the duration of the period for taking delivery.

**Section 78**  
**Costs of Removing the Commodities**

The buyer bears the costs of removing the commodities.

**Section 79**  
**Commodities not in Conformity with the Contract,  
the Buyer's Duties**

(1) The buyer shall inspect the commodities without undue delay after they are made available at the warehouse, insofar as this is feasible in the orderly course of business. If it is apparent that they do not conform with the contract description, the buyer shall notify the seller within three business days after tender that the commodities have not turned out to be in accordance with the contract. A longer period does not apply even if the sale is on "cash against documents" terms.

(2) If the commodities were tendered by container and the consignee dispatches the same container including the commodities remaining therein to another place within the period for taking delivery, the buyer shall inspect the commodities without delay after the container has arrived at the place where the final consignee intends to have the commodities unloaded. If the commodities were tendered by container and the consignee did not dispatch the same container including the commodities remaining therein to another place within the period for taking delivery, the buyer shall inspect the commodities without delay as soon as they

could have been unloaded after expiration of the period for taking delivery at a warehouse in the orderly course of business.

(3) If the buyer fails to notify the seller in times the commodities are to be treated as approved, unless the non-conformity was not noticeable in the course of a proper inspection.

(4) If force majeure or circumstances for which the seller is responsible prevent the buyer from inspecting the commodities or making the declaration, the buyer shall notify the seller of this without delay. In such a case the period laid down in para. 1 commences when the seller notifies the buyer that the obstacle has been removed.

### **Section 80** **Short Weights and other Shortages**

(1) The delivery receipt given by the buyer is conclusive evidence of delivery of the quantities stated therein.

(2) The buyer may only prove a weight deficiency by presenting a weight list supplied by a public appointed and sworn weigher or a comparable authorized person.

**The Conditions of Business of the Waren-Verein refer at several points to certain provisions of the German Civil Code (Bürgerliches Gesetzbuch [BGB]) or of the German Code of Commercial Law (Handelsgesetzbuch [HGB]). For better understanding of the text of the Conditions of Business these provisions are printed below as far as available on [http://www.gesetze-im-internet.de/Teilliste\\_translations.html](http://www.gesetze-im-internet.de/Teilliste_translations.html)**

### **Section 14 BGB Entrepreneur**

(1) An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession.

(2) A partnership with legal personality is a partnership that has the capacity to acquire rights and to incur liabilities.

### **Section 126b BGB Text form**

If text form is prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium. A durable medium is any medium that

1. enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and

2. that allows the unchanged reproduction of such declaration.

### **Section 275 BGB** **Exclusion of the duty of performance**

(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

(2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

(3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

(4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.

### **Section 280 BGB** **Damages for breach of duty**

(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused

thereby. This does not apply if the obligor is not responsible for the breach of duty.

(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.

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(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.

### **Section 346 (BGB) Effects of revocation**

(1) If one party to a contract has contractually reserved the right to revoke or if he has a statutory right of revocation, then, in the case of revocation, performance received and emoluments taken are to be returned.

(2) In lieu of restitution or return, the obligor must provide compensation for value, to the extent that

1. restitution or return is excluded by the nature of what has been obtained,
2. he has used up, disposed of, encumbered, processed or redesigned the object received,
3. the object received has deteriorated or has been destroyed; but deterioration that is caused by the object being used in accordance with its intended use is not taken into account.

If consideration is specified in the contract, then this is to be used as a basis when the compensation for value is calculated; if compensation for value for the benefit of use of a loan is to be paid, it can be shown that the value of the benefit of use was lower.

(3) The duty to compensate for value does not apply

1. if the defect justifying revocation only became apparent during processing or transformation of the object,
2. to the extent that the obligee is responsible for the deterioration or destruction or that the damage would also have occurred if the object had remained with the obligee,
3. if in case of statutory revocation the deterioration or destruction occurred with the person entitled, although the latter showed the care that he customarily exercises in his own affairs.

Any remaining enrichment must be returned.

(4) The obligee may demand damages, in accordance with sections 280 to 283, for breach of a duty under subsection (1) above.

### **Section 439 (BGB)** **Cure**

(1) As cure the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied.

(2) The seller must bear all expenses required for the purpose of cure, in particular transport, workmen's travel, work and materials costs.

(3) Without prejudice to section 275 (2) and (3), the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects, the importance of the defect and the question as to whether recourse could be had to the alternative kind of cure without substantial detriment to the buyer. The claim of the buyer is restricted in this case to the alternative kind of cure; the right of the seller to refuse the alternative kind of cure too, subject to the requirements of sentence 1 above, is unaffected.

(4) If the seller supplies a thing free of defects for the purpose of cure, he may demand the return of the defective thing in accordance with sections 346 to 348.

### **Section 95 (HGB)**

(1) Where one party accepts a contract note in which the commercial broker has not disclosed the identity of the other

party, that party shall be bound to the transaction with the other party, whose identity is to be disclosed to him subsequently, unless reasonable objections are raised against the other party.

(2) The identity of the other party shall be disclosed within a time period in accordance with local custom, or, in the absence thereof, within a time period appropriate in light of the circumstances.

(3) If the identity is not disclosed or reasonable objections are raised against the disclosed person or firm, the party shall be entitled to hold the commercial broker liable for performance of the transaction. Such claim shall be excluded if the party does not, on request of the commercial broker, declare without undue delay whether it demands performance.