



FABER-CASTELL

—since 1761—

C O S M E T I C S

## **General Terms and Conditions of Sale and Delivery (Export) of A.W. Faber-Castell Cosmetics GmbH, Stein**

**valid as of April 2004**

### **1. Scope of the Terms and Provisions**

a. Any and all of our sales transactions, deliveries and other services provided by us inclusive of all subsequent transactions and arrangements made with our customer (hereinafter "Customer") are exclusively based upon our General Terms and Conditions of Sale and Delivery set forth herein (hereinafter "General Terms"), unless otherwise expressly agreed upon in writing by us. The General Terms shall be binding upon Customer at the latest upon receipt of the goods (hereinafter the "Goods") ordered from us. Contradictory or conflicting terms of our Customer shall not be binding upon us, even if not explicitly rejected by us or if delivery to Customer has been effected by us in knowledge of said contradictory or conflicting terms.

b. The parties agree that no oral agreements have been made. Any and all agreements or arrangements, whether oral or written, contrary to or deviating from the General Terms shall not be effective without our explicit written confirmation. All arrangements agreed upon by our representatives shall also require our written confirmation.

### **2. Subject of the Contract, Conclusion of Contracts**

a. All offers made by us are not binding, in particular regarding price, quantities and delivery periods. A contract comes into effect only upon our written confirmation and acceptance of the Customer's order, or, at the latest, upon our delivery of the ordered Goods.

b. Supply contracts, changes, amendments hereto and any supplementary arrangements made with Customer shall only be binding upon us if confirmed by us in writing. Neither obvious errors, spelling mistakes and errors in calculation nor any minor changes and modifications in or of our sales materials and price lists shall entitle Customer to any claims based thereon. The same shall apply with regard to any technical or functional modifications and any other reasonably acceptable alterations of the data and information contained in our advertising and sales material.



FABER-CASTELL

since 1761

C O S M E T I C S

### **3. Prices**

a. All our prices shall be net on an ex factory or ex warehouse basis excluding packaging, freight, transportation and insurance plus sales or value added tax, if applicable, unless expressly otherwise mutually agreed upon in writing. All payments of any sum required hereunder shall be in Euro, unless otherwise specified by us in writing. In any event, any and all customs duties, taxes and other ancillary costs are to be borne by Customer.

b. We shall have the right to revise our pricing schedule without the consent or approval of, or prior notice to our Customer, if the time period between the date of order confirmation and delivery exceeds thirty (30) days and provided we can demonstrate and prove a cost increase that influences our calculation, or the calculation of our suppliers, such as any increase in cost of materials, wages or of collective wages.

### **4. Modalities of Delivery, Down-Payments, Packaging, *force majeure*, Passage of Risk, Damages and Right to Modifications**

a. Unless otherwise agreed upon in writing, all deliveries are made for the account and at the risk of Customer on an ex factory or ex warehouse basis. The Incoterms of the International Chamber of Commerce in Paris (hereafter "Incoterms") in their respective latest version shall apply in addition hereto.

b. Any delivery periods or times shall be not binding and of approximate nature only, unless expressly designated by us in writing as "fixed". All periods of delivery shall be subject to complete clarification of all issues relevant for the execution of the respective order. In any case of subsequent changes or amendments of the order made by Customer, the respective delivery period or time shall start to run anew. In any event, delivery periods shall only commence if all technical issues relating to the respective delivery of Customer have been clarified and Customer has fully complied with its contractual obligations concerning the said delivery. If Goods are purchased from third parties or are manufactured on a contract work basis, all deliveries made to Customer are subject to the timely receipt by us of all materials, components and the Goods from said third parties .

c. Prior to the delivery of any Goods, Customer shall be required to make a down-payment against our invoice upon our request. We shall be entitled to make deliveries in installments.

d. In any event where our performance and, in particular, deliveries are substantially impaired or even became impossible due to reasons for which we are neither responsible nor liable , such as governmental restrictions, fire, strike, lockouts, traffic limitations, shortages of production, energy and raw materials



FABER-CASTELL

— since 1761 —

C O S M E T I C S

and in general all such events which might adversely affect production and/or shipment of the Goods concerned (e.g. mobilization, wars, riots, natural disasters and other unforeseeable circumstances beyond our reasonable control), we shall – at our sole discretion – be entitled to rescind the respective contract in whole or in part or to extend the delivery period or time until a reasonable time after such events have passed. The same is applicable to the extent that such circumstances apply to any of our suppliers. If in such cases delivery periods or times are mutually agreed upon and expressly designated in writing as "fixed", Customer shall, after granting us a reasonable extension of the delivery time, equally be released from any contractual obligations. We shall on no account and in no way be liable to Customer for any delays or damages during the time period when such circumstances exist.

e. All delivery periods and times agreed upon shall be extended for the time period the Customer is in default of acceptance of the Goods or with its obligations resulting from or arising out of the respective contract Customer entered into with us (including any duty on part of Customer to contribute). In this case we shall be entitled to compensation of any damages thereby incurred by us including the compensation of additional expenditures, if any. Further, the risk of accidental loss, destruction or deterioration of the Goods shall then immediately pass to Customer. If we are in default of delivery, Customer shall grant us in writing (by Registered Letter/Return Receipt requested) a reasonable extension period which shall, however, not be shorter than four (4) weeks from the date on which delivery was to be made. After fruitless elapse of the foregoing grace period for reasons for which we are liable, Customer shall be entitled to rescind the respective purchase agreement.

f. For products exclusively manufactured upon the specific request of and/or to specifications set by Customer, we reserve the right to modify delivery quantities by up to a maximum of ten (10) per cent of the overall order quantity.

g. Unless otherwise agreed in writing with our Customer, the computation and charging of freight cost is based upon the weight and sizes as determined by us. We shall, at our sole discretion, which will not be exercised unreasonably, select the concrete carrier(s) and shipping routes. We shall, however, neither be liable nor responsible for having failed to select the cheapest and speediest way of transportation.

h. All our products are delivered ex factory or ex warehouse in their original packaging only. We will not make any changes to packaging and especially not pack our products on blister or skin cards supplied by third parties. Unless otherwise agreed upon in writing, the cost for packaging materials shall be borne by Customer.

i. The risk of loss and/or deterioration shall pass to Customer upon delivery of the Goods to the carrier performing the shipment/transportation, or, at the



FABER-CASTELL

since 1761

C O S M E T I C S

latest, upon leaving our warehouse or factory. Transport damages shall be claimed by Customer without delay upon receipt of the respective consignment by giving prompt notice to the carrier concerned. Any return of Goods is subject to our express and prior written approval.

j. Orders on call placed by Customer shall be accepted within the time period stipulated in the order confirmation. If Customer is in default with its respective call for more than one (1) month, we shall have the right to immediately ship to Customer the remaining order quantity.

## **5. Terms of Payment, Furnishing of a Letter of Credit, Late Payment**

a. Except as otherwise expressly agreed to in writing by us, all payments due us by Customer shall be facilitated by Customer by causing a bank acceptable to us to issue and deliver to us an irrevocable letter of credit for each order assuring payment in Euro or in any other currency specified by us, payable to us by the issuing bank upon presentation of sight drafts accompanied by an original and one (1) copy of each invoice, packing list and bill of sale or bill of lading. Said irrevocable letter of credit shall be for one hundred (100) per cent of each invoice amount and payable in Germany. At all events all our invoices shall become due and payable immediately upon receipt, and we shall have the right to invoice Customer on a pro-rata basis if part deliveries were made.

b. Money orders, checks, promissory notes, bills of exchange and the like shall only be accepted if expressly approved by us in writing in advance and shall be subject to complete and unrestricted crediting to our accounts. Processing, handling and discounting fees shall be solely borne by Customer. We do not assume any responsibility or liability for presenting the foregoing documents on time. All payments made by Customer shall be free from deduction and set-off, unless counterclaims of Customer are not disputed by us or are finally assessed by a competent court. To the same extent Customer shall not be entitled to withhold any payment owed to us. Any discounts granted by us are subject to full and correct acceptance of delivery and due payment by Customer. If products are returned, previously granted discounts for such an order are debited to Customer's account.

c. In the event that Customer fails to pay any sum to us on or after the due date thereof, the amount owed shall bear interest at a rate of eight per cent p.a. (8 % p.a.) above the base interest rate as defined under Section 247 of the German Civil Code (BGB), and which is published by the German Central Bank (Bundesbank), applicable on the relevant agreed payment date without us being required to give further notice to Customer. If the foregoing rate however exceeds the maximum interest rate allowable by the mandatory applicable laws, then interest shall accrue at the maximum rate allowable by such laws plus value



FABER-CASTELL

since 1761

C O S M E T I C S

added tax, if applicable. Our right to claim additional damages caused by such default shall remain unaffected thereby.

d. If Customer does not pay the purchase price for the Goods or repeatedly does not meet its payment obligations on time, or if we become aware of a substantial deterioration in its financial soundness according to objective banking standards of assessment, we shall be entitled to unilaterally revoke all previously granted payment terms, to declare all payment obligations of Customer immediately due and payable, and/or at our choice to rescind all existing agreements with Customer, to only execute any future deliveries against an irrevocable Letter of Credit on terms determined by us or to require prepayment in full for any future deliveries.

e. In addition hereto the Uniform Customs and Practice for Documentary Credits (UCP) of the International Chamber of Commerce in the currently valid version shall apply.

## **6. Defective Goods, Warranty of Quality, Third-Party Goods**

a. Unless expressly otherwise agreed to in writing by us, we only assume warranty for the Goods sold to Customer to the maximum extent prescribed by the applicable mandatory legal regulations .

b. Customer shall upon receipt of each shipment immediately inspect the Goods concerned and shall notify us in writing of any alleged defect thereof within a time period of eight (8) days from receipt of the Goods. If substantial defects in material or workmanship are of a hidden nature and consequently cannot be detected by Customer within the foregoing deadline upon due and diligent inspection of the Goods, such notification shall be made within eight (8) days from detection of any such defects. In case the above-required notices are not given in writing within the specified time limit by Customer to us, the warranty for the concerned defect(s) shall be statute-barred and no warranty shall then be assumed by us. The notices shall be considered timely, if Customer delivers such notices to us within the above-mentioned time limits in writing.

c. Notwithstanding the above, our warranty shall expire at the latest one (1) year after delivery of the Goods. This restriction shall not apply in the case of fraud on our part.

d. We can only be held liable for those defects or damages which substantially impair the fitness for use, provided that the said defectiveness or damage has not been caused by inappropriate handling in the course of transportation of the Goods to the respective place of destination. Upon our request, Customer shall without any delay provide us either with some representative samples of the



FABER-CASTELL

since 1761

C O S M E T I C S

allegedly defective Goods or shall submit to us other appropriate evidence in a form approved by us in advance.

e. If and to the extent that the alleged defects or damages prove after our examination to be justified, we shall be entitled at our sole discretion and choice to either exchange the defective Goods by shipping faultless Goods to the Customer at our cost, to repair the defective Goods or to credit our Customer for said Goods based on a detailed invoice which the Customer is required to provide us with and which specifies in detail the relevant purchase price plus the expenses and expenditures Customer proves to us to have incurred in the course of the transportation of the defective Goods. We further shall be entitled to request return of the defective shipment in whole or in part, or otherwise disposal thereof in accordance with our specific instructions. If repair or exchange is refused without justification or if repair or replacement would be unreasonable to Customer, i.e. in case of improper delay or if 2 (two) attempts to repair or to replace the defective Goods ultimately failed, Customer shall then be entitled to claim a reasonable reduction of the purchase price or to rescind the agreement. Customer shall however not be entitled to rescind the agreement, if the defect is comparatively of minor significance.

f. Customer shall be solely responsible for determination whether the Goods ordered are suitable for the specific use intended, and we shall to this extent not assume any warranty or liability. If the respective order was based on samples, such samples shall only be considered as approximate indication of the intended use.

g. We shall only be liable for any warranties or representations, if and to the extent that they were expressly given in writing in a legally binding manner.

h. Customer undertakes to store perishable Goods delivered by us in strict accordance with our instructions. Otherwise all and any warranty for such Goods is excluded.

i. If Goods are delivered to Customer which are manufactured by one of our suppliers and not by us, our warranty obligations hereunder shall be deemed to be met by assignment of all of the warranty claims we have against the respective supplier to Customer who hereby accepts such assignment on account of performance. Only after first taking court action against the supplier and solely to the extent that such action does not relieve Customer of his alleged warranty claims against us, Customer may seek remedy against us.

j. The above terms shall only apply insofar and to the extent, as they do not conflict with applicable mandatory laws.



FABER-CASTELL

—since 1761—

C O S M E T I C S

## **7. Retention of Title and other Security Rights, Insurance**

a. The ownership of the Goods we supplied shall remain with us until payment in full has been made for all and any claims resulting from the overall business relationship with our Customer including all ancillary claims and charges. If payment is made by check, promissory note or the like, title to the Goods shall not pass to the Customer until all open accounts of Customer are settled and the respective amounts have been credited to our accounts. The same shall apply if individual claims of Customer become part of a current account and if the balance was struck and approved by us.

b. In so far as the validity of the above retention of title is subject to any requirements or regulations governing form – in particular as to registration with the competent authority – according to the mandatory applicable laws of Customer's country, Customer shall meet these said requirements and/or regulations in order to ensure validity of the retention of title.

c. Goods sold with our express approval to Customer for the purpose of resale shall be sold on condition that Customer does upon resale assign all claims he may have against such third parties to us in the amount of the respective purchase price plus ancillary cost and interest rates, if any. In the course of current account transactions, such retention of title and assignment of claims shall serve as security for any debit balance in our favor. Upon our request Customer shall be obliged to notify said third parties of the fact of the assignment of the corresponding purchase price claims and shall further provide us with all information and documentation we may require to exercise our rights vis-à-vis said third parties resulting from the assignment made. We shall be entitled to notify said third parties of the assignment once Customer is in default of the respective payments. Subject to our revocation Customer is entitled to collect the assigned claims to the extent and as long as Customer is not substantially in default with any obligation stemming from its business relationship with us.

d. Any conversion of Goods into a new article or processing or transformation of the delivered Goods undertaken by Customer shall be deemed as having been carried out on our behalf. We shall have ownership of any so processed or altered item. If the Goods are mingled with items not belonging to us to produce new products, Customer shall grant us part ownership of those new products in proportion to the value of the Goods at the time of manufacture.

e. Without our express prior written approval Customer shall not be entitled to mortgage or grant any lien to the said Goods, or to transfer these by way of security to a third party. Upon the filing of any petition (whether voluntary or involuntary) under any bankruptcy or insolvency laws, Customer shall no longer be entitled to collect on our behalf the assigned claims without any need on our part to expressly revoke such previous right of Customer.





FABER-CASTELL

since 1761

C O S M E T I C S

f. In general, Customer shall be obliged to treat the Goods which are subject to our title with diligent care and to insure such Goods against risks like fire and theft and all other risks which are customarily subject to comprehensive general liability policies. Customer shall assign to us all claims he may have in this regard against the insurance company in an amount covering the purchase price of Customer plus additional cost and expenditures, if any.

g. A withdrawal of the Goods subject to our ownership by us from Customer shall not require prior rescission of the respective contract with Customer. In those cases where our above rights are substantially impaired or endangered, we or our duly authorized representatives shall have the right to intervene and be entitled to retake, sell or otherwise deal with or dispose of all or any part of the Goods whose ownership remains vested with us and to initiate all measures which are appropriate and reasonable in our view to secure our rights including access to the place where the Goods are stored. If third parties are involved as concerns the storage of such Goods, Customer shall ensure by way of proper contractual arrangements with said third parties, that they will not hinder us in taking possession of the Goods concerned and recovering these from the storage facilities. Customer shall immediately inform us of any occurrence or act of third parties which might adversely affect our rights. Further, we shall be entitled to seek a court injunction to prevent Customer or third parties from selling, transferring or otherwise disposing of the Goods. All costs relating to the withdrawal of the Goods or to any action hereunder shall be borne by Customer.

h. Moreover, we shall have a claim for separation and recovery of all Goods not belonging to the bankrupt estate if Customer has not met its payment obligations towards us in whole or in part.

i. In the case that third parties attach security interests to Goods or claims in our property or assigned to us hereunder, Customer shall immediately inform us and shall bear any and all costs for legal proceedings which it is necessary for us to initiate in order to protect our title and/or security interest; Customer shall finally bear those costs if not reimbursed by the adverse party in litigation, if applicable.

j. If the value of all securities for which we obtained or retained the title, calculated at cost-price, exceeds the respective claim by more than twenty (20) per cent, we shall be obliged upon request of our Customer or of a third party whose rights are affected by the said exceeding securities to release at our sole discretion the respective securities in whole or in part accordingly.

k. The above provisions shall not apply if and to the extent mandatory applicable laws prevent this. In this event Sect. X. hereof shall apply.



## **8. Compliance with the German Foodstuffs and Commodities Act (LMBG)**

The goods manufactured and sold by us are cosmetics in the sense of Sect. 4 of the German Foodstuffs and Commodities Act.

a. It shall be prohibited to the Customer to arouse the impression by public statements not co-ordinated with us, in particular by advertising statements, or by a change of the design of the goods that it were the goods' main purpose to alleviate or cure diseases, sufferings, bodily injury or disease symptoms, with the consequence that they were to be classified as drugs in the sense of Sect. 2 of the German Drug Law (Arzneimittelgesetz, AMG). In case of any culpable contravention the Customer shall fully indemnify and otherwise hold us harmless against any and all claims raised by third parties against us. This shall also include the legal costs and expenses in case any competitor and/or authority claims restraint, information and/or damages from us.

b. In case the Customer wishes a modification of the design in a way that the cosmetic were to be classified as a drug in the sense of Sect. 2 of the AMG we will instruct the customer appropriately and request to adjust the design in a way that an infringement of the AMG is avoided or to agree to such adjustments made by us. If the Customer fails to do so we shall be entitled to refuse the (further) completion of the order and to terminate the agreement with immediate effect. The Customer shall be obliged to compensate us for the resulting loss.

c. In case the Customer supplies the packaging and/or the substances he assures that such comply with the legal provisions, in particular with the provisions of the Foodstuffs and Commodities Act. The Customer in this respect shall hold us harmless for any and all claims raised by third parties as well as for the legal costs and expenses, which might result from an infringement of legal provisions. Sec. 9 lit. d of this General Terms shall apply additionally.

## **9. Limitation of Liability**

a. In the case of slight negligence, our liability, including that of our employees, workers, staff members, representatives, or in general any person employed by us in performance of our obligations including any other person entrusted with covenants and duties which relate to the business relationship with Customer, shall be limited to product-specific foreseeable, typical, direct and immediate losses or damages. We shall further not be liable for any breach of non-essential obligations under the relevant contract due to slight negligence.

b. The above shall not impair our liability under mandatory applicable laws which require us to accept extended liability or responsibility. Neither shall the above apply for personal injuries or loss of life of Customer which are attributable to culpable acts or omissions by us.



FABER-CASTELL

since 1761

C O S M E T I C S

c. Customer's claims for damages based on the defectiveness of Goods shall be statute-barred one (1) year after delivery of the concerned Goods. The foregoing shall not apply in case of gross negligence on our part or personal injuries or loss of life of Customer which are attributable to culpable acts or omissions by us.

d. We shall by no means be liable for materials, component parts, active ingredients, prescriptions, recipes and compounds, representations and warranties, freight specifications or manufacturing instructions provided by or obtained from Customer. We shall not be obliged to examine the foregoing items with regard to their conformity with product liability laws and/or any other mandatory applicable legal provisions. Customer shall fully indemnify and otherwise hold us harmless against any and all claims raised by third parties against us, including any losses, claims for injury and damage, costs and expenses or legal fees.

## **10. Return Shipments**

a. Any and all return shipments ("Returns") which are not caused by us are subject to the prior written approval of our field service or our service team located at our headquarters. Without such approval, we are entitled to refuse any such Returns.

b. In the event that we accept a Return, we shall be entitled to deduct a handling and processing fee of ten per cent (10 %) of the price we invoiced for the returned Goods when crediting Customer.

c. We shall only accept Returns of such Goods which were ordered within the past three (3) months (counting from the date of our invoice).

d. Goods which are not listed in our current price lists for specialized retailers or whose appearance has been changed will not be accepted as Returns.

## **11. Severability**

The invalidity or unenforceability of one or several of the terms and provisions set forth above shall not affect the validity of the remaining terms. The invalid, or unenforceable term shall then be replaced by the parties hereto with a legally valid term whose contents come as close as possible to the economic purpose originally intended and pursued with the invalid term.



FABER-CASTELL

since 1761

C O S M E T I C S

## **12. Place of Performance, Place of Venue, Governing Law, CISG**

a. Unless otherwise agreed upon in writing, the exclusive place of performance for all obligations, covenants and deliveries for both parties hereto shall be Stein, Germany unless the nature of the specific matter mandatorily requires a different place of performance.

b. The Local Court of Nuremberg/Germany respectively the District Court of Nuremberg-Fuerth/Germany shall be the exclusive place of venue for all disputes which may arise from or relating to our business relationship with Customer, unless another applicable place of venue is mandatorily and exclusively given. At our sole discretion we shall equally have the right to bring action against Customer at any other court that may be competent to rule upon the concrete case matter pursuant to applicable national or international law.

c. The business relationship between Customer and us including any and all existing agreements, disputes and dealings, as well as these General Terms shall be exclusively governed by the substantive laws of the Federal Republic of Germany without regard to any conflict-of-law principles. The United Nations Convention on the International Sale of Goods (CISG) shall not apply unless mutually agreed upon and confirmed in writing.

## **13. Storage of Data**

Customer agrees that its data, which are relevant for the performance of the contract, may be stored and processed by us within the admissible limits of applicable mandatory data protection laws.