



# General Terms and Conditions of ERS Railways GmbH

Stand February 15th 2022

## Article 1 Definitions

CIM	Uniform Rules concerning the Contract of International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by Protocol of 3 June 1999;
Cargo	goods carried in (or on) the Loading Unit;
Customer	is the party with which ERS enters into an agreement in the sense of Article 2.1;
ERS	means the limited liability company (“GmbH”) ERS Railways GmbH, having its registered office in Hamburg;
Loading Unit	includes any container (and any ancillary equipment attached thereto) or equivalent unit such as swapbodies, high cubes, curtain side containers, reefers, transportable tanks, flatbeds, trailers, open wagons or any comparable loading unit used to transport the Cargo;

## Article 2 General scope, Basis of Contract; Exclusivity Clause

- 2.1 These General Terms and Conditions are applicable to all contracts by which ERS agrees with a Customer to provide transport services, for the carriage of goods by rail or in a multimodal way (then possibly also including road carriage) as well as ancillary services.
- 2.2 These General Terms and Conditions also apply to every offer, further negotiations, acceptance or preliminary agreement in relation to the services of ERS as described above.
- 2.3 Contractual terms and conditions of the Customer are not accepted by ERS. Such terms do not become part of the contract unless ERS explicitly and in text form agreed to their application. This also applies if ERS performs services without reservation whilst being aware of such terms of the Customer.

### **Article 3 Offers and quotations**

- 3.1 Unless stipulated otherwise, offers and quotations of ERS are valid for a period of 14 days. Any offer and quotation may be amended by ERS (in which case a new period of 14 days will take effect) or revoked by ERS before its acceptance. Any acceptance after the 14 days' period will only be binding on ERS upon express confirmation of such acceptance by ERS.
- 3.2 The amounts mentioned in the offers, quotations and agreements cover only those operations/services which are specifically mentioned. All other operations/services will be charged separately.
- 3.3 The amounts mentioned in the offers and quotations do not include VAT or any other governmental levies, surcharges (such as energy surcharges, surcharges for dangerous cargo, etc.), additional handling costs, storage costs or any other extras, unless specifically stipulated otherwise.
- 3.4 All offers made by ERS are free of obligation as long as they have not been accepted by the Customer in text form.

### **Article 4 Obligations, responsibilities and liability of Customer**

- 4.1 The Customer must:
- provide in time all data, documentation and information that is required for the proper performance of the carriage;
  - ensure that the Loading Units and their Cargo comply with all standards, rules, regulations and legislation applicable to the Loading Unit and the Cargo concerned;
  - ensure that the Loading Units are in sound condition, not overloaded and properly sealed, all doorhandles and tanklids properly closed and, if required, dangerous cargo labels applied to the Loading Unit;
  - ensure that the Cargo is properly packed, stowed, lashed and secured in or on the Loading Unit in such a manner that this Cargo will safely withstand the intended carriage, including loading, handling and discharge, and that this Cargo is adequately protected against full or partial loss, against possible damage during transport, against the further risks of the carriage and against harming persons, materials or other goods;
  - load, stow and discharge the Loading Units on or from the wagons as described in Article 7 below;
  - provide ERS unhindered access to the terminals and obtain the necessary terminal slot time;
  - offer the Loading Unit(s) to ERS in the agreed time for the intended transport;
  - provide ERS with all the necessary information as described in Article 6 below.

- 4.2 If Loading Units are not offered to ERS in the agreed time and are then not available or ready for loading upon commencement of the loading operations of the vehicle, these Loading Units are considered not to be presented/delivered to ERS at all (“no show”), in which case the full carriage charge including possible additional charges will be due by the Customer. If Customer can prove that ERS saves costs or expenses by not having to carry such Loading Units, such amount is deducted from the “no show freight”.
- 4.3 The Customer is liable towards ERS for all costs, expenses and damages that ERS suffers as a result of Customer not complying with any of the provisions as mentioned in Article 4.1 above and (in general) with any of the provisions as mentioned in these General Terms and Conditions.
- 4.4 Customer shall indemnify, defend and hold ERS, its officers, directors, employees, partners, licensors and agents, as well as the third parties that ERS has entered into contracts with, harmless from and against any fines, penalties, suits, losses, claims, demands, liabilities, expenses, damages and costs (including reasonable attorney's fees) from any party that are the result of (i) Customer's use of the services, (ii) Customer's breach of any provision of these general terms and conditions or the agreement, (iii) Customer's failure to comply with applicable laws and regulations and/or (iv) any intentional wrong-doing by Customer.
- 4.5 Should ERS incur demurrage or detention fees for reasons beyond its own risk sphere, the Customer will be responsible for paying for such expenses.
- 4.6 All further statutory obligations and liabilities of the Customer remain applicable.

#### **Article 5 Data and documentation related to Loading Units and Cargo**

- 5.1 When offering to ERS a Loading Unit for carriage, the Customer shall provide sufficiently in time all data, documentation and information that is required for the proper performance of this carriage and that is related to the Loading Unit(s) and the Cargo, including but not limited to:
- a. data required to comply with the ERS booking requirements (such as type and weight of the Loading Units);
  - b. data and documentation required by customs or other authorities;
  - c. as to dangerous goods: any declaration, specification, documentation and/or other requirements as prescribed by law or prevailing regulations, in particular those in relation to the Regulation concerning the International Carriage of Dangerous Goods by Rail (“RID”), Appendix C to the Convention concerning International Carriage by Rail (COTIF).
- 5.2 ERS shall be entitled but not be obliged to verify the correctness and completeness of the data and documentation provided by the Customer or any third party. ERS may rely on the data without verification. These data and documentation will be used in particular for the transport of the Loading

Units and for invoicing by ERS. They may not be invoked against ERS, in particular they cannot be regarded as conclusive evidence in case of loss or damage.

- 5.3 If the abovementioned data, documentation and information required for the proper performance of the contract of carriage are not provided to ERS in time or turn out to be incorrect or incomplete, ERS reserves the right to suspend or cancel the performance of the contract of carriage and to charge the Customer for the additional costs and expenses in relation thereto.

#### **Article 6 Loading, unloading and storage**

- 6.1 Unless otherwise agreed, the Customer will load and unload the Cargo into and out of the Loading Unit to be carried at its own risk and expense.
- 6.2 The Customer will be responsible for possible costs and charges if the period for loading and/or unloading is exceeded.
- 6.3 A Loading Unit must be offered for loading on the vehicle at the time and place indicated by ERS.
- 6.4 At the place of destination the Loading Unit has to be taken away by the consignee immediately after unloading from the vehicle.
- 6.5 If that is not done, ERS has the right to have the Loading Units stored in the name and for the account as well as at the risk of the Customer. Such storage will be charged separately and ERS shall not be liable for any loss of or damage to the Loading Unit and Cargo which occurs during the period of storage.

#### **Article 7 Performance**

ERS may proceed by any route. Transshipments are allowed, during the carriage ERS may have the Loading Units unloaded and reloaded on a different or the same vehicle.

#### **Article 8 Dangerous goods**

- 8.1 The Customer shall pack, label and document dangerous goods and timely communicate to ERS all the necessary information for the safe transport of these dangerous goods.
- 8.2 If ERS has grounds to believe that the Cargo becomes or may become an actual danger to life or property, such Cargo may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without prejudice to ERS' entitlement to freight and possible additional charges.
- 8.3 Any cost incurred by ERS in connection with such unloading, destruction or rendering innocuous shall be for account of the Customer, who will indemnify ERS against all these costs and against possible claims from third parties.

- 8.4 If additional costs result from the carriage of dangerous goods and/or Cargo becoming an actual danger, these costs will be borne by the Customer.

#### **Article 9 Liability of ERS**

- 9.1 ERS shall be liable for damages in accordance with the statutory provisions unless further limitation of liability is provided for in these General Terms and Conditions; the following limitations of liability do not comprise any extension of ERS's liability beyond the statutory liability.
- 9.2 **In cases of rail transports within Germany, ERS's liability for loss of or damage to the goods shall be limited (in deviation from sec. 431 HGB) to only two (2) special drawing rights for each kilogram.**
- 9.3 **In cases of transports with different means of transport, ERS's liability for loss of or damage to the goods, by application of sec. 452 d para. 2 number 1 HGB and in derogation from sec. 452 a HGB, shall be determined in accordance with the legal provisions of subchapter 1 of chapter 4 of Book 4 HGB, and shall be limited (in deviation from sec. 431 HGB and/or from sec. 452 a, 431 HGB) to only two (2) special drawing rights for each kilogram.** This does not apply, where a transfrontier carriage by rail is supplemented by carriage by road that is not transfrontier; in these cases, the CIM applies (Art. 1 § 3 CIM).
- 9.4 ERS is not liable for any loss nor damages caused by not or not completely performing the contract of carriage if this is a result of circumstances beyond the control of ERS, as further described in the Article with the heading "Force Majeure".
- 9.5 ERS is not liable for any damages or losses directly or indirectly resulting from the failure of Customer to provide the necessary data, documentation or information in time, or because ERS has acted upon incorrect or incomplete data, documentation or information provided by the Customer.
- 9.6 In accordance with sections 434, 436 German Commercial Code (HGB), the above mentioned liability exclusions and limitations also apply to non-contractual claims and to the benefit of the servants.

#### **Article 10 Prices**

- 10.1 All prices as mentioned in the agreements between the Customer and ERS are exclusive of VAT. Whenever applicable, Customer must additionally pay VAT.
- 10.2 Unless otherwise agreed or indicated, all prices, rates and charges will be stated in Euros.

## **Article 11 Payment**

- 11.1 Freight and carriage charges are deemed earned upon loading of the Loading Unit on the vehicle.
- 11.2 Freight, charges and other amounts due for services provided by ERS are payable without discount or deductions on receipt of an invoice by ERS. ERS may send several invoices in respect of the same consignment.
- 11.3 The amounts due shall be received by ERS latest within fifteen (15) days of the date of the invoice.
- 11.4 The Customer is not allowed to set off against claims by ERS (no compensation), unless Customer's claim is undisputed by ERS or has been finally decided by a court..
- 11.5 On demand of ERS, the Customer shall provide security for any amount due or to become due within the next three months.
- 11.6 ERS has at all times the right to claim full or partial payment in advance.
- 11.7 If Customer in good faith disputes any invoiced amount it shall notify ERS by registered letter with documentation identifying the disputed amount within thirty (30) days following receipt of such disputed invoice, failing which the invoice shall be deemed accepted by the Customer. In such case, Customer must nevertheless pay the full amount of the invoice within fifteen (15) days of the date of the invoice. ERS shall subsequently issue a credit note if any invoice has to be amended.
- 11.8 With respect to all claims ERS has against the Customer, ERS shall have a pledge ("Pfandrecht") and a right of retention ("Zurückbehaltungsrecht") on all goods, documents and money of the Customer which ERS holds or will hold in its possession. In addition, ERS shall have a pledge ("Pfandrecht") and a right of retention ("Zurückbehaltungsrecht") with respect to all claims ERS has against the Customer under the same transport contract on all goods, documents and money of a third person that agreed to the transport which ERS holds or will hold in its possession. Failing payment of the amount due the security shall be sold as provided by statute or, if so agreed, by private sale.

## **Article 12 Force Majeure**

- 12.1 ERS is entitled to invoke Force Majeure if its services are in whole or in part, temporarily or not, prevented or impeded by circumstances reasonably beyond the control of ERS, including but not limited to acts of God, unfavourable weather conditions, war, terrorism, epidemics, pandemics, business blockades, strikes, work interruptions or work to rule actions and lock out, delay or improper supply to ERS of spareparts, goods or services ordered from third parties, the use of the rail infrastructure by any other rail carrier, or any other circumstances that are not for risk of ERS.
- 12.2 In the case of Force Majeure on the part of ERS, its obligations shall be suspended. ERS shall immediately notify the Customer of the occurrence as well as the cessation of the Force Majeure.

12.3 If the situation of Force Majeure lasts longer than thirty (30) consecutive days, both ERS and the Customer are authorized to terminate in writing the non feasible part of the Agreement with immediate effect. In case of such a termination resulting from Force Majeure, ERS and the Customer will not be liable for damages towards eachother.

**Article 13 Place of performance, place of jurisdiction, third party notice and applicable law**

13.1 Place of performance is Hamburg.

13.2 The Regional Court of Hamburg shall have jurisdiction for all disputes arising from and/or in connection with the contracts to which these General Terms and Conditions are applicable. This also applies for disputes regarding the validity of a contract.

13.3 In case of contracts on cross border cross border railway transports the jurisdiction of the Regional Court of Hamburg shall be in addition to the places of jurisdiction provided for in the CIM; in all other cases, particularly also in contracts on multimodal carriages, the Regional Court of Hamburg shall have exclusive jurisdiction.

13.4 A third party notice against ERS in any other jurisdiction is not permitted.

13.5 These General Terms and Conditions and all the contracts to which they apply shall be governed by German law.