

General Terms and Conditions for the Purchasing of National and International Rail Freight and Related Services of Rail Cargo Austria AG (RCA)

Status: 1 October 2019

1. Scope

- 1.1. These General Terms and Conditions of Purchase (in the following “GTC-P”) apply to the purchasing of the following services:
 - A. Performance of national and international transportation of goods and other transport related services (such as handling/(temporary) storage etc.) (in the following “Transportation Services”).
- 1.2. These GTC-P apply to any contract according to which the seller (the “Seller”) agrees to provide the services specified in section 1.1. A. to a company within the Rail Cargo Group (the “Buyer”). In the event the Buyer and Seller have entered into a commercial framework agreement, these GTC-P do not apply unless agreed otherwise by the parties.
- 1.3. In connection with these GTC-P Rail Cargo Austria AG (in the following “RCA”) as well as its affiliated undertakings within the meaning of section 189 lit a item 8 Business Code (*UGB*) are the Buyer.
- 1.4. The application of the Seller’s general terms and conditions is subject to the Buyer’s express written consent. This also applies if the Buyer accepts the Seller’s services without objection irrespective of the Buyer being aware of any provisions conflicting with these GTC-P and/or any agreement concluded by the parties. General terms and conditions such as the General Austrian Forwarders’ Terms and Conditions (*AÖSp*) and the German Freight Forwarders’ Standard Terms and Conditions 2017 (*ADSp 2017*) and similar terms and conditions shall not apply.
- 1.5. Furthermore, the parties note that in general the provisions of the COTIF/CIM, to the extent applicable, also apply to the contractual relationship between the Buyer and its customers. Thus, these provisions also apply to the purchasing of international rectified services performed in connection with these GTC-P *mutatis mutandis*.

2. Transportation Services (section 1.1. A.)

- 2.1. In connection with the Transportation Services the Seller performs national and/or international rail freight services in general as the substitute carrier. The COTIF/CIM 1999, respectively SMGS apply in their respective applicable version unless the Buyer is permitted to deviate from these provisions.
- 2.2. The Seller is responsible for the provision of the routes of the train and infrastructure, including the required energy, traction units and train drivers and shall manage the relationship with the infrastructure manager. Furthermore, the Seller must comply with the regulations regarding extraordinary consignments and carriage of dangerous goods provided in the Regulation concerning the International Carriage of Dangerous Goods by Rail (“RID”). The Seller must ensure that the required resources are sufficiently available in order to guarantee the contractually agreed or customarily assumed quality of the services at any time and, in particular, to be able to compensate any short-term failure of such resources without any impairment of the agreed quality.
- 2.3. If the Buyer instructs the Seller to comply with a specific transit period, the following applies:
 - 2.3.1. The transit period commences at the time of acceptance of the goods by the Seller, respectively at the latest at the time of any required inspection by the inspector and terminates at the time of handover to the subsequent carrier, respectively delivery at the contractually agreed location specified for delivery to the consignee, respectively when the circumstances preventing delivery occur.
 - 2.3.2. The transit period shall be extended by the duration of a stay caused without any fault of the Seller. The Seller shall provide for the respective evidence.
 - 2.3.3. The Seller shall notify the Buyer in writing no later than when providing its offer that it is not possible to comply with the transit period specified by the Buyer for whichever reason and provide the reasons for such delay.
 - 2.3.4. If it is apparent at the commencement or, during the transportation, that the agreed transit period might be exceeded, the Seller shall promptly notify the Buyer and request the Buyer’s corresponding instructions.

- 2.4. The Seller accepts / hands over consignments at the agreed location of transfer/handover (*Übernahme-/Übergabestelle*) from / to the Buyer or from / to a further carrier (which can also be a railway undertaking of the Seller), consignor or consignee.
- 2.5. The Seller shall generally use the electronic consignment note/wagon note. To the extent the Seller does not use an electronic consignment note/wagon note and the parties have not agreed otherwise, the data required for the performance of the consignment (*Auftragsdaten*) shall be transferred electronically.

3. Notification obligations and failure management

- 3.1. The Seller shall timely (*termingerecht*) transfer the operational and commercial data required to perform and process the consignment. The Seller shall promptly notify the Buyer of any deviation of the information, which the Seller received from the Buyer, from the information specified in the documents (e.g. wagon label).
- 3.2. The Seller shall promptly notify the Buyer of any circumstances in the course of the performance of the services, which would result in a non-performance or defective performance of the relevant services. The Seller shall immediately notify the Buyer of any irregularities in connection with the transportation, for example any circumstances preventing carriage, damages, or losses, resulting in the transit period being exceeded (*Lieferfristüberschreitungen*) and any other defaults (*Leistungsstörungen*) as well as subsequent instructions and incidents, irrespective whether such irregularities have an impact or not.
- 3.3. The Seller must promptly notify the Buyer of any claims received by the Seller, incidents or accidents as well as requests to identify damages and reports within the meaning of the CIM as applicable from time to time submitted by the consignee, respectively the entitled party (*Verfügungsberechtigter*) or by any other contact person notified by the Seller to the Buyer within 24 hours upon receipt of such information regarding the claim, incident, or accident. The provision of the respective information is in any event not deemed to be an assumption of any liability.
- 3.4. The Seller is liable for any damages resulting from any breach of these obligations.

4. Fees/Payment/invoicing:

- 4.1. The agreed fees will be invoiced for the Seller's services.
- 4.2. The fees for the use of infrastructure ("IBE") are already included in the respective agreed fees irrespective of the actual name of such fees in the relevant country ("IBE-share"). If the IBE for a route agreed between the Buyer and the Seller in connection with the ordered services (the "Agreed Route") is reduced or increased during the term of the respective contract, the IBE-share for these routes is, if required, also adjusted retroactively from the entering into force of such reduction pro rata to the reduction of the IBE, however, in any event at least in the amount, which customers of the Buyer are legally entitled to claim back. Consequently, the respective fees for the Agreed Routes are adjusted by the balance between the initial and the amended IBE-share. The Seller agrees to promptly notify the Buyer in writing of any reduction of the IBE-share and to provide the Buyer with its calculation as well as any documents required to review the reduction of the IBE as well as to confirm the Seller's calculation of the adjustments of the individual IBE-shares and overall fees following the reduction of the IBE. The Seller is liable for any non-compliance with the corresponding obligations. These obligations also relate to the disclosure of the initial calculation of the IBE-share with respect to the relevant agreed fees. The Buyer is entitled to request disclosure of the initial calculation at any time irrespective of whether the IBE has been reduced. Any reduction of the IBE-share must be immediately taken into account in connection with the future invoicing of fees and any fees already invoiced must be corrected via credit notes. Any amount to be paid back to the Buyer becomes due and payable within 14 days upon the reduction of the IBE-share becoming effective for third parties (*nach im Außenverhältnis eingetretener Wirksamkeit*).
- 4.3. The Seller shall transfer the economic benefit of any subsidies received in connection with an Agreed Route to the Buyer as required by law with retroactive effect from the date on which the subsidy has been granted irrespective of a corresponding request of the Buyer. Such transfer shall ensure that any resulting reduction of the fee is immediately taken into account in connection with the future invoicing of such fees and that any fees already invoiced are corrected by credit notes. The Seller shall transfer the refund (which must at least be equal to the overall amount that customers ordering services in connection with the relevant route are entitled to claim back from the Buyer) within 14 days upon the granting of the subsidy becoming effective for

third parties (*nach im Außenverhältnis eingetretener Wirksamkeit der Förderung*). Section 4.2 relating to the disclosure of the IBE applies accordingly to the obligation to disclose the subsidy and its consequences for the calculation of the fees.

- 4.4. The fees shall only become due and payable upon the full performance of the agreed services and within 45 days (excluding any VAT) upon receipt of the respective invoice unless the parties expressly agree otherwise.
- 4.5. The payment of fees does not constitute any acknowledgement of a proper delivery and/or proper performance of services. The Buyer does not waive any of its claims on whichever legal basis.
- 4.6. The Seller agrees that the Buyer may set off any claims or debt against the Seller's claims or debt.
- 4.7. The invoice must comply with the respective law applicable to value added tax. The invoice must be issued and paid in EUR.

5. Liability

- 5.1. The following provisions apply to the liability of the Seller in connection with the services specified in section 1.1. A. to the extent legally permitted:
 - 5.1.1. Generally, all relevant provisions of the CIM, respectively the SMGS (each as applicable from time to time) relating to the Buyer's liability towards its customers apply with respect to the Seller's liability towards the Buyer to the extent an event giving rise to the Seller's liability occurs on the Agreed Route. If the transportation contract between the Buyer and its customers provides for stricter liability provisions (e.g. in the event of the exceeding of transit periods (*Lieferfristüberschreitungen*), the Buyer is entitled to include such stricter liability provisions in the contract with the Seller and the Seller is liable in accordance with these provisions.
 - 5.1.2. The Seller is liable for all its employees and any third party used in connection with the performance of the transportation.
- 5.2. The following provisions apply to the Seller's liability for any damages, which are not subject to section 5.1. above:
 - 5.2.1. The Seller is liable for any direct or indirect damages and other losses suffered by the Buyer in connection with the performance of any services specified in section 1.1.A. unless mandatory law provides otherwise.
 - 5.2.2. Furthermore, the Seller is liable for any damage it caused, in particular damages to wagons of the parties, to the used infrastructure, traction unit, loading or transport unit and/or to the loading equipment. The Seller shall indemnify and hold harmless the Buyer for any claims of third parties.
- 5.3. The Buyer is not liable for any damages to property or personal injury of the Seller or any third parties in connection with the performance of the services unless the Buyer has caused such damages intentionally or with gross negligence. The Seller shall promptly notify the Buyer in writing of any detected or caused damages to property or personal injury. The Seller shall indemnify and hold harmless the Buyer for any claims in connection with such damages.

6. Contractual penalty

- 6.1. If the Seller fails to perform the contractually agreed services, e.g. the train does not leave at all (non-performance), wagons are accepted / handed over too late (defective performance) etc., it has to pay a contractual penalty to the Buyer irrespective of the Seller's fault and whether any damage has occurred. No contractual penalty has to be paid if the Buyer has caused the non-compliance. The Seller has to provide evidence for any fault of the Buyer.
- 6.2. The contractual penalty equals 50% of the agreed fees in the case of defective performance and, in the case of non-performance, 100% of the agreed fees unless agreed otherwise.
- 6.3. The obligation to pay a contractual penalty arises at the date of the non-performance of the contractually agreed services as set out above and irrespective of the Buyer having suffered any damages. The Buyer is entitled to deduct such contractual penalty also from any current invoice, respectively set off the contractual penalty with any claims of the Seller.
- 6.4. Any warranty claims of the Buyer and any liability of the Seller remain unaffected.

7. Insurance

- 7.1. The Seller has to take out insurance which is adequate for the risks in connection with the performance of the contractually agreed services and provide the Buyer with evidence of such

insurance upon request.

8. Rescission/cancellation/early termination

- 8.1. The Buyer is entitled to rescind the contract not only in the case of a delayed performance but also in the case of the loss of its confidence in the Seller (e.g. due to a breach of contract, refusal to comply with material provisions of the relevant contract). The right to claim damages (in particular in connection with delayed performance or non-performance) and any other rights remains unaffected by such rescission.
- 8.2. The Buyer is entitled to cancel all services to be provided by the Seller (or parts thereof) at any time without providing any reasons. If the Buyer cancels the services prior to such services being provided, the Seller is not entitled to any fees. In the case of a cancellation after the Seller has commenced to provide the services, the Seller is entitled to a pro rata fee if it was ready to perform the services and has been prevented to provide such services only due to circumstances, which have not been caused by the Seller and which are within the sphere of the Buyer.
- 8.3. In connection with continuing obligations, the Buyer is entitled to terminate the respective contractual relationship in the case of important reasons. Important reasons are in particular all reasons as a result of which the Buyer cannot be reasonably expected to continue the contractual relationship.

9. Miscellaneous

- 9.1. The Seller shall comply with any domestic and European Union law, in particular with labour and social law as well as the applicable health and safety regulations, respectively the Health and Safety Regulation for Railway Employees (*Eisenbahn-ArbeitnehmerInnenschutzverordnung - EisbAV*) as well as the state of the art.
- 9.2. The Seller is obliged to take any required measures to prevent corruption and white-collar crime (in this connection it must also be considered that all employees of the Rail Cargo Group are public officials within the meaning of the Austrian Criminal Code) (*StGB*). The Seller is in particular obliged to implement all required organisational or personnel-related measures and to ensure that it and any individuals or companies working for it comply with all (criminal) law relating to the prevention of corruption and white-collar crime.
- 9.3. The Seller agrees to comply with all relevant foreign trade law regulations. The Seller shall notify the Buyer in writing and in due time of all regulations, prohibitions and restrictions. The Seller shall indemnify the Buyer for any damages resulting from the non-compliance with foreign trade law regulations. Furthermore, the Seller is obliged to review and compare the names and addresses with the relevant anti-terror watch lists and to notify the Buyer if any names or addresses match those included in these lists.
- 9.4. The Seller has obtained all approvals and permissions required for the performance of the ordered services, respectively will only use subcontractors which have obtained all approvals and permissions required for the performance of the ordered services. Upon request, the Seller will provide the Buyer with the relevant approvals or permissions. In the event an approval or permission is not granted, and this results in the performance of the services becoming impossible or defective, the Seller is liable to the Buyer for any resulting damages.
- 9.5. To the extent the Seller's employees or any party acting on behalf of the Seller are nominated, respectively authorised to receive and pass on instructions, such employees or party must have sufficient knowledge of German or English to be able to perform the respective instruction.
- 9.6. The fees and the services performed by the Seller are subject to an annual evaluation on a group-wide level. The Seller agrees that such evaluation is performed by the Buyer and that any data in connection with such evaluation are transferred and coordinated within the group as well as used as a basis for an improvement process.
- 9.7. The Seller shall only use subcontractors in connection with the performance of the ordered services which have been approved by the Buyer. The Seller ensures that any of its subcontractors comply with these GTC-P as well as the respective contract between the Seller and the Buyer.
- 9.8. If the Buyer and/or the Seller has (have) provided information on a confidential basis during the negotiations, the respective other party (i.e. the Seller or the Buyer) shall not disclose such information and shall not use it for any purpose other than for which it has been disclosed, irrespective whether the parties subsequently enter into a contact or not.

10. Data protection

- 10.1 RCA stores personal data relating to the Seller and contact details as well as personal data relating to the function and responsibilities of the Seller's employees in its CRM system to the extent this is necessary for the performance of the respective contract (Art. 6 Abs. 1 lit. b GDPR) as well as to safeguard the legitimate interests of the controller (Art. 6 Abs. 1 lit. f GDPR). Such personal data will also be used within the Rail Cargo Group (RCA and companies affiliated to it within the meaning of § 189a Z 8 UGB) and if required, may also be disclosed to any subcontractor used by RCA and/or the Rail Cargo Group in connection with these purposes.
- 10.2 The Seller is obliged to inform its employees about the disclosure of this information (contact details, function and responsibilities) to RCA and Rail Cargo Group (RCA and companies affiliated to it within the meaning of § 189a Z 8 UGB).
- 10.3 RCA keeps personal data relating to the customer/consignor as long as this is required to achieve the respective purpose, or as long as there are any contractual or legal obligations or justified interests to retain such data (e.g. to perform the ordered services, to comply with legal obligations to retain certain personal data, or to establish any legal claims).
- 10.4 Subject to applicable law the Seller is entitled to the following rights in relation to personal data:
 1. Right of access to personal data (Art. 15 GDPR)
 2. Right to rectification (Art. 16 GDPR)
 3. Right to erasure (Art. 17 GDPR)
 4. Right to restriction of processing or the right to object to the processing (Art. 18 GDPR)
 5. Right to data portability (Art. 20 GDPR)
 6. Right to lodge a complaint with a supervisory authority (Art. 77 GDPR).

11. Applicable law / place of jurisdiction

These GTC-P are subject to Austrian law excluding its conflict of law rules provided by its private international law and the United Nations Convention on Contracts for the International Sale of Goods (CISG). To the extent legally permitted, the court having jurisdiction for commercial disputes in Vienna shall have exclusive jurisdiction for any dispute arising out or in connection with these GTC-P and/or the contractual relationship or its violation, termination or invalidity.

12. Severability

If any of the provisions of these GTC-P is invalid or unenforceable, the remaining provisions of these GTC-P are not affected. These GTC-P must be amended or interpreted to replace the invalid, unenforceable or incomplete provision in a way as the Buyer and the Seller would have reasonably agreed.