

STANDARD TRADING CONDITIONS OF CONTRACT

- 1 In these Conditions:
"Company" means Ellery Freight Services Limited.
"Customer" means the Customer with whom this Contract is made.
"Dangerous Goods" means cargo which is volatile or explosive or which is or may become dangerous, inflammable or offensive (including radioactive materials) or which may become liable to damage any person or property whatsoever.
"Goods" means the cargo accepted by the Company together with any container, packaging or pallet(s) supplied by or on behalf of the Customer.
"GST" means the goods and services tax imposed by or under the Goods and Services Tax Act 1985 or any similar or replacement legislation.
"Services" means the whole of the operations undertaken by the Company in respect of the Goods.
"Subcontractor" includes any other person who pursuant to a contract or arrangement with any other person (whether or not the Company) provides or agrees to provide the Services or any part of the Services.
- 2 The Company is not a common carrier and accepts no liability as such. The Company reserves the right to accept or refuse the provision of Services in respect of the Goods at its sole discretion. All Services are provided to the Company subject only to these Conditions which prevail at all times over the conditions of contract of the Customer. In the event of and to the extent of any inconsistency between these Conditions and the conditions which are incorporated into the bill of lading, waybill, consignment note or other transport document issued by the Company, these Conditions prevail.
- 3 The Customer warrants that it is either the owner or the authorised agent of the person or persons owning or having any interest in the Goods or any part of the Goods and enters into this Contract on its own behalf or as authorised agent of that person or those persons. Further the Customer undertakes to indemnify the Company in respect of any liability whatsoever and howsoever arising (including without limiting the foregoing from negligence or breach of contract or willful act or default of the Company or others) in connection with the provision of the Services and/or the Goods to any person (other than the Customer) who claims to have, who has or may hereafter have any interest in the Goods or any part of the Goods.
- 4 The Customer warrants that it has complied with all laws and regulations relating to the nature, condition, packaging, handling, storage and carriage of the Goods and that the Goods are packed to withstand the ordinary risks of handling, storage and carriage, having regard to their nature and indemnifies the Company for all liability and for all costs incurred as a result of or arising out of a breach of this warranty. Further the Customer shall provide to the Company all such assistance, information and documentation that may be necessary to enable the Company to comply with such laws and regulations.
- 5 All customs and/or excise duties, costs, fines or penalties which the Company becomes liable to pay for any reason whatsoever in respect of the Goods and any documentation relating to the Goods pursuant to any applicable laws or regulations (whether or not resulting from or arising out of the negligence of the Company) shall be paid by the Customer.
- 6 (i) The Customer shall not tender for the provision of Services by the Company any Dangerous Goods without presenting to the Company a full description disclosing their nature and in any event the Customer shall be liable for all death, bodily injury, loss and/or damage thereby caused and shall indemnify the Company for such liability.
(ii) If, in the opinion of the Company, the Goods are or are liable to become of a dangerous, inflammable, explosive, volatile, offensive or a damaging nature, they may at any time be destroyed, disposed of or abandoned or rendered harmless by the Company without compensation to and at the cost of the Customer.
- 7 Except as provided by the Carriage of Goods Act 1979, the Maritime Transport Act 1994 and any other legislation compulsorily applicable by New Zealand law to the carriage of goods, the Goods are at the risk of the Customer and not of the Company. The Company shall not, except as compulsorily required by statute as noted above, be responsible in tort or contract or bailment or otherwise for any, and the consequences of any, loss of or damage to or deterioration of the Goods or misdelivery or failure to deliver or delay in delivery of the Goods including chilled, frozen, refrigerated or perishable Goods either in transit or in storage or failure to provide or delay in providing the Services for any reason whatsoever including without limiting the foregoing the negligence or breach of contract or willful act or default of the Company or others or the conversion or misappropriation of the Goods by the Company's servants, agents or Subcontractors. This Clause shall apply to all, and the consequences of all, such loss of or damage to or deterioration of the Goods or misdelivery or failure to deliver or delay in delivery of the Goods or failure to provide or delay in providing the Services whether or not the same occurs in the course of performance by or on behalf of the Company of the Contract or in events which are in the contemplation of the Company and/or the Customer or in events which are foreseeable by them or either of them or in events which could constitute a fundamental breach or a breach of a fundamental term of the Contract.
- 8 Where any handling, installation, removal, assembly or erection of any kind whatsoever is required to be undertaken by the Company, the Company shall not be liable for any death, injury, loss or damage which may result from or arise out of what the Company undertakes. Further the Customer shall indemnify the Company in respect of any such liability whether or not that liability arises from negligence or breach of contract or willful act or default of the Company or the Company's servants, agents or Subcontractors.
- 9 (i) The Customer authorises the Company and any Subcontractor to subcontract on any terms the whole or part of the provision of the Services.
(ii) The Customer undertakes:
(a) that no claim or allegation shall be made, whether by the Customer or any other person who is or who may subsequently be interested in the provision of the Services and/or in the Goods, against any person (other than the Company) by whom (whether it is a Subcontractor, principal, employer, servant, agent or otherwise) the Services or any part of the Services are or is provided which imposes or attempts to impose upon such person any liability whatsoever and howsoever arising (including without limiting the foregoing from negligence or breach of contract or willful act or default of the Company or others) in connection with the provision of the Services and/or the Goods and if such claim or allegation should nevertheless be made to indemnify the Company and the person against whom such claim or allegation is made against the consequences of such claim or allegation. For the purpose of this Clause 9(ii), the Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all such persons and each of them and all such persons and each of them shall to this extent be or be deemed to be parties to this Contract; and
(b) to indemnify the Company against any claim or allegation made against it by any person in connection with any liability, arising out of or relating to the provision of the Services and/or the Goods.
- 10 Every exemption, limitation, condition and liberty in these Conditions and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Company or to which the Company is entitled in accordance with these Conditions shall also be available and shall extend to protect:
(i) all Subcontractors;
(ii) every servant or agent of the Company or of a Subcontractor;
(iii) every other person (other than the Company) by whom the Services or any part of the Services are or is provided; and
(iv) all persons who are or may be vicariously liable for the acts or omissions of any persons falling within paragraphs (i), (ii) or (iii) of this Clause 10;
and, for the purpose of this Clause 10, the Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of such persons and each of them and all such persons and each of them shall to this extent be or be deemed to be parties to this Contract.
- 11 (i) The Customer authorises any deviation from the usual manner in which the Services are provided which may in the absolute discretion of the Company be deemed reasonable or necessary in the circumstances.
(ii) If the Customer expressly or impliedly instructs the Company to use or it is expressly or impliedly agreed that the Company will use a particular method of providing the Services the Company will give priority to that method but its adoption remains at the sole discretion of the Company and the Customer authorises the Company to provide the Services by another method.
- 12 Insurance will not be arranged by the Company except with the express written instructions of the Customer and then only at the Customer's expense and on lodgement of a declaration as to value prior to acceptance of the Goods by the Company. The Company may charge the Customer for arranging such insurance.
- 13 The charges of the Company shall be considered earned as soon as the Goods are delivered to the Company and under no circumstances shall any of those charges be refunded. The Company may charge by weight, measurement or value and may at any time reweigh, remeasure or revalue or require the Goods to be reweighed, remeasured or revalued and charge proportional additional charges accordingly. The Customer is and remains responsible to the Company for all its proper charges whether or not the Goods are delivered and/or the Services are provided as instructed and whether or not they are damaged.
- 14 The Company shall have a lien on the Goods and any documents relating to the Goods and/or any other Goods or cargo of the Customer in the possession or control of the Company and any documents relating to those other Goods or cargo for all sums payable by the Customer to the Company for that purpose and shall have the right to sell such Goods or cargo by public auction or private treaty without notice to the Customer. The Company shall be entitled to retain the sums due to it, in addition to the charges incurred in detention and sale of such Goods or cargo, from the proceeds of sale and shall render any surplus to the entitled person.
- 15 Every special instruction to the effect that charges shall be paid by a person other than the Customer shall be deemed to include a stipulation that if that nominated person does not pay those charges within seven (7) days of delivery or attempted delivery of the Goods, then the Customer shall pay those charges to the Company within seven (7) days of being notified of that person's failure to pay.
- 16 The Company shall not be responsible in negligence or contract or otherwise for loss, damage, costs, fines or penalties incurred by the Customer or any other person resulting from or arising out of or in connection with any quotation, advice, statement, representation or information given or made by or on behalf of the Company to the Customer or others as to the classification of or any matter material to the valuation of or the liability for or the amount, scale or rate of customs and/or excise duty or other impost, tax or rate charged in respect of the Goods or any cargo whatsoever. In giving or making any such quotation, advice, statement, representation or information the Company relies solely on the particulars provided by the Customer which warrants that those particulars accurately and completely describe all aspects of the Goods or cargo and the transaction(s) relating to the Goods or cargo.
- 17 Where Goods have been carried in a temperature controlled container or cargo space, the Customer may request copies of such temperature data as has been electronically, automatically or mechanically recorded by recording equipment contained in, attached to or integral in such container or cargo space. Upon such request, and upon the Customer paying or agreeing to pay the Company's actual and reasonable costs in relation thereto, the Company agrees that such data as is in its possession or power shall, as soon as practicable, be made available to the Customer.
- 18 It is agreed by both the Customer and the Company that such data, whether or not obtained after a request by the Customer shall, in the event of court proceedings between them, be deemed to be admissible in evidence by either of them, without the need for compliance with the usual rules of evidence. Upon being admitted into evidence the data shall be deemed to be prima facie evidence of the temperature conditions within the container or cargo space during the period of time covered by the data.
- 19 In all cases where liability of the Company has not been excluded or limited, whether by these Conditions, by statute or by international convention or otherwise, the liability of the Company whatsoever and howsoever arising is limited to:
(i) New Zealand \$100 or the value of the Goods the subject of the Contract at the time the Goods were received by the Company, whichever is the lesser; or
(ii) in the case of a proven breach of an implied warranty provided by the Consumer Guarantees Act 1993, the payment of the cost of having the Services supplied again.
- 20 Where the Services are compulsorily subject to the Carriage of Goods Act 1979, the liability of the Carrier shall be limited to \$1500.00 for each unit of goods lost or damaged.
- 21 The Company shall not be bound by any agreement purporting to waive or vary these Conditions unless such agreement to so waive or vary shall be in writing and signed by an executive officer of the Company.
- 22 (i) Any claim for loss or damage must be notified in writing to the Company within seven (7) days of delivery of the Goods or of the date upon which the Goods should have been delivered.
(ii) In any event the Company shall be discharged from all liability whatsoever in connection with the provision of the Services and/or the Goods unless suit is brought and served within nine (9) months of the provision of the Services or delivery of the Goods or when the Services should have been provided or the Goods should have been delivered. The Company hereby expressly contracts out of the operation of section 19 of the Carriage of Goods Act 1979, including, without limitation, the operation of section 19(4) of that Act, which shall be of no application whatsoever.
- 23 (i) All the rights, immunities and limitations of liability in these Conditions shall continue to have their full force and effect in all circumstances and notwithstanding any breach of this Contract or of these Conditions by the Company or any other person entitled to the benefit of such provisions.
(ii) It is agreed that if any provision or any part of any provision of these Conditions is unenforceable such unenforceability shall not affect any other provision or any other part of such provision.
- 24 Notwithstanding anything herein contained the Company shall continue to be subject to any implied guarantee provided by the Consumer Guarantees Act 1993 if and to the extent that that Act is applicable to this Contract and prevents the exclusion, restriction and modification of such warranty.
- 25 These Conditions shall be governed by and construed in accordance with the laws of New Zealand.
- 26 (i) Unless otherwise stated, all charges quoted are exclusive of GST and where GST is applicable to any such charges, it will be payable by the Customer in addition to those charges.
(ii) The Company charges a fee for each service that it provides, including the arranging of insurance and the payment on the Customer's behalf of disbursements such as insurance premiums, airline fuel surcharges, shipping company CAF and BAF charges and port service charges. Such fees will be included in the amounts shown on the Company's invoices as disbursements and will not be separately identified.
(iii) The terms of the Company's Credit Account Agreement, where credit has been granted to the Customer, are deemed to be incorporated into and to form part of these Standard Trading Conditions.
- 27 Personal Property Securities Act 1999
- 27.1 Without limiting anything else in these terms and conditions, the Customer acknowledges that:
(a) these terms and conditions create, in favour of the Company, a security interest in all present and after-acquired Goods (being, for the avoidance of doubt, all the Customer's present personal property and after-acquired property except for any item of personal property which has not or which is exclusively the proceeds of any item of personal property which has not) been supplied by the Company to (or for the account of) the Customer) to secure the payment by the Customer to the Company of the Amount Owing; and
(b) these terms and conditions will apply notwithstanding anything, express or implied, to the contrary contained in any purchase order (or its equivalent, whatever called) of the Customer; and
(c) the Security Interest shall continue until the Company gives the Customer a final release.
- 27.2 The Customer undertakes to:
(a) promptly do all things, sign any further documents and/or provide any information which the Company may reasonably require to enable the Company to perfect and maintain the perfection of its Security Interest (including by registration of a financing statement);
(b) give the Company (addressed to the Financial Controller or equivalent) not less than 14 days' prior written notice of any proposed change in the Customer's name and/or any other change in the Customer's details (including, but not limited to, changes in the Customer's address, facsimile number, trading name or business practice).
- 27.3 The Customer waives its right to receive a verification statement in respect of any financing statement relating to the Security interest.
- 27.4 To the extent permitted by law, the Customer and the Company contract out of:
(a) section 114(1)a of the PPSA; and
(b) the Customer's rights referred to in sections 107(2)(c), (d), (h) and (i) of the PPSA.
- 27.5 The Customer agrees that the Security Interest has the same priority in relation to all amounts forming part of the Amount Owing, including future advances.
- 28.1 If an Event of Default occurs:
(a) the Company may suspend or terminate any contract;
(b) the Amount Owing shall immediately become due and payable notwithstanding that the due date has not arisen;
(c) the Company may enforce the Security Interest; and
(d) the Company may (without the consent of the Customer) appoint a receiver in respect of any Goods and any receiver is authorised to do anything referred to in these terms and conditions and otherwise to exercise all rights and powers conferred on a receiver by law.
- 28.2 The Customer agrees that, at any time after an Event of Default has occurred and is continuing or at any time if any Goods are at risk, the Company may:
(a) take possession of any Goods; and/or
(b) sell or otherwise dispose of any Goods,
in each case in such manner and generally on such terms and conditions and conditions as it thinks fit, and, in each case, otherwise do anything the Customer could do in relation to those Goods. The Company and the Customer agree that section 109(1) of the PPSA is contracted out of in respect of particular Goods if, and only for so long as, the Company is not the secured party with priority over all other secured parties in respect of those Goods. As the Customer's agent, the Company (and its employees and agents) may, without prior notice, enter any land or premises where the Goods are kept in order to take possession of and/or remove them, without being responsible for any damage caused in doing so. The Customer agrees to procure all other rights (including consents) necessary to enable, and to indemnify the Company (and its employees and agents) against any liability incurred in connection with, such entry, taking of possession and removal. The Company may resell any of the Goods and apply the proceeds of sale in reduction of the Amount Owing.