

1 General

Unless expressly modified or varied in writing by the Seller, the terms and conditions set forth below, and in the Confirmation of Sale ("Confirmation") shall form the contract for purchase between the Buyer and the Seller. Receipt of an order from the Buyer shall be deemed to be acceptance of the terms of this contract.

- 1.1 This contract constitutes the entire agreement between the Buyer and the Seller in respect of the goods listed in the Confirmation ("Goods") and shall supersede all previous proposals, both oral and written, negotiations, representations, commitments, writings, agreements and all other communications, between the parties. This contract may not be released, discharged, changed or modified except by an instrument in writing signed by a duly authorised representative of each of the parties. The terms of this contract shall prevail notwithstanding any variance with the terms and conditions of any documents submitted by the Buyer.
- 1.2 Where there is any inconsistency between these conditions of sale and the Confirmation, the Confirmation will prevail. Any term used in these conditions of sale that is defined in the Confirmation will have the meaning given to that term
- 1.3 The clause headings in this contract appear as a matter of convenience only and shall not affect the construction of this contract.
- 1.4 Each Confirmation shall constitute a separate contract between the Buyer and the Seller.

2 Inspection

- 2.1 The Buyer (at its sole cost) may by prior arrangement with the Seller inspect the Goods, during or prior to packing, during the Seller's usual business hours at the place of packing.

3 Sale by Description

- 3.1 The Goods are sold on description as set out in the Confirmation notwithstanding that a sample or samples may have been submitted.

4 Delivery

- 4.1 The Seller will deliver the Goods to the place, point, port, vessel or carrier specified in the Confirmation, or as otherwise agreed in writing, in accordance with the relevant provision of the Incoterms 2000 (being the International Rules for Interpretation of Trade Terms produced by the International Chamber of Commerce which came into force on 1 January 2000 as amended from time to time) stated in the Confirmation.
- 4.2 Dates specified in the Confirmation or otherwise given for delivery are stated in good faith but are not to be treated as a condition of sale. If delivery of the Goods is delayed for any reason at all (including, and without limitation, the need to obtain any documents or certificates to permit export or importation of the Goods), the Seller will not be responsible or liable in any way to the Buyer or to any other party for loss suffered due to that delay.
- 4.3 The Seller may make delivery by instalments and may cancel delivery of the Goods or any instalments of the Goods without prejudice to its rights to recover all money owed to it by the Buyer for deliveries already made.
- 4.4 Without prejudice to any other rights and remedies which the Seller may have, the Seller may charge storage, transportation or any other related costs or expenses if the Buyer fails to accept or permit delivery at the time or times that the Seller is able to deliver.

5 Price

- 5.1 Subject to clause 5.2 all orders will be filled at prices specified in the Confirmation or as otherwise agreed in writing.
- 5.2 All prices are charged on the basis of supply under the Incoterm 2000 referred to in the Confirmation and are (unless otherwise provided) exclusive of Goods and Services Tax payable under the Goods and Services Tax Act 1985 (NZ) (if applicable), all other taxes, duties, levies or the like payable on Goods supplied, freight costs, insurance charges and all other costs or charges as from the date on which the Seller fulfils its delivery obligations in accordance with clause 4.1, which the Buyer must pay unless otherwise agreed in writing.

6 Payment

- 6.1 Payment shall be tendered by the Buyer to the Seller in accordance with the payment terms stated in the Confirmation and without deduction or set-off of any kind.
- 6.2 Any failure by the Buyer to comply with payment in accordance with the terms of this contract will be a breach of this contract entitling the Seller to take any or all of the steps specified in clause 13.

7 Possession and Risk

- 7.1 Possession of the Goods and risk in the Goods shall pass to the Buyer at the contractual point of delivery as provided in clause 4.1 but shall remain at the Seller's risk to that point. The Buyer must insure the Goods in the Seller's name and the Buyer's name for the respective interests of both parties from the time risk passes to the Buyer until payment in full is made to the Seller.

8 Retention of Title

- 8.1 Ownership of the Goods shall be retained by the Seller until payment in full for them, and all other amounts owing to the Seller by the Buyer, is made by the Buyer without set-off, deduction or deferment on account of any disputes or counterclaims or otherwise and until the Buyer has satisfied all obligations owing to the Seller.
- 8.2 Until the price has been paid in full the Buyer shall hold the Goods as fiduciary bailee and agent for the Seller. The Buyer shall store the goods at no cost to the Seller in such a way so that they are clearly identified as belonging to the Seller. The Buyer shall keep separate records in respect of the Goods until payment in full has been made to the Seller.
- 8.3 Except as set out in this clause 8.3, the Buyer shall not sell, dispose of or part with possession of the Goods until payment in full has been made to the Seller. The Buyer shall be entitled to sell and deliver the Goods to third parties in the normal course of its business but the proceeds of such sales shall be specifically earmarked and placed into a separate bank account and must be held in trust by the Buyer for the Seller until all money due to the Seller from the Buyer has been paid.
- 8.4 In the event of:
- The appointment of a receiver or liquidator of the Buyer;
 - The commission of an act of bankruptcy by the Buyer;
 - The Buyer making any composition with its creditors;
 - The diminution by any Bank of the total of any overdraft or other banking facilities extended by the bank to the Buyer ;then the Buyer will pay into a separate bank account for the sole benefit of the Seller all sums received from third parties in respect of sales to them of Goods by the Buyer up to the amount of all indebtedness of the Buyer to the Seller.

9 Force Majeure

- 9.1 If either party is prevented from or delayed in carrying out any of the provisions of this contract by reason of any force majeure circumstance, including acts of God, war, terrorist act, civil unrest, interruption to power supplies, accidents, labour disturbances, breakdown of plant or equipment, lack of or failure of transportation facilities, sources of labour, raw materials, import or export restriction or by reason of any law, order, proclamation, regulation, ordinance, demand or requirement of any governmental agency or department, or by reason of any other cause whatsoever beyond the reasonable control of the party, the party so prevented or delayed from acting shall be excused from such performance to the extent and during the period of such prevention or delay. Any obligation to pay money shall in no event be excused.

10 Governing Law

- 10.1 This contract shall be deemed to be a contract made in New Zealand and its construction, validity and performance shall be governed by New Zealand law (but expressly excluding the United Nations Convention on Contracts for the International Sale of Goods) and the parties submit to the non-exclusive jurisdiction of the New Zealand Courts.

11 Limitations of Liability

- 11.1 The Seller only warrants to deliver the Goods in accordance with the general description under which they were sold, whether or not any special or particular description shall have been given or shall be implied by law. All warranties, descriptions, representations and conditions as to fitness or suitability for any purpose, tolerance to any conditions, merchantability or otherwise, whether of a like nature or not and whether express or implied by law, trade, custom or otherwise are, to the extent permitted by law, expressly excluded.
- 11.2 No agent or representative of the Seller is authorised to make any representations, statements, warranties, conditions or agreements not expressly set out in this contract. The Seller is not in any way bound by any such unauthorised statements nor can any such statement be taken to form a contract or part of a contract with the Seller collateral to this main contract.
- 11.3 Notwithstanding the limitations of liability otherwise provided for in this contract, the Seller's liability to the Buyer whether in contract or tort or otherwise for any loss, damage or injury arising directly or indirectly from any defect in or non-compliance of the Goods or any other breach of its obligations shall not, in any event, exceed an amount equivalent to the price actually paid for the Goods.
- 11.4 The Seller shall not be liable for any consequential, indirect or special damage or loss of any kind whatsoever nor shall the Seller be liable for any damage or loss caused by the Buyer's servants, agents, customers or other persons.
- 11.5 The Buyer shall indemnify and keep indemnified the Seller against any claim by the Buyer or any third party in respect of any liability, losses, costs, expenses, damages or penalties that may be incurred or suffered due to or arising out of a breach of this contract.

12 Interest

- 12.1 If the purchase price of the Goods (or any part) or any other amount payable by the Buyer under this contract is not paid on the date when payment is due, interest will be charged at the rate of 20% (or such other rate as shall from time to time be fixed by the Seller), from the date payment is due until

the date of actual payment. All money received by the Seller from the Buyer shall be applied first in payment of interest and costs and secondly in reduction or satisfaction of the unpaid purchase price.

13 Default

- 13.1 Where the Seller considers that the Buyer may be unable to meet its payment obligations to the Seller, the Seller may without prejudice to any of its other rights and remedies under this contract or at law do all or any of the following:
- require the Buyer to stop selling or otherwise disposing of the Goods;
 - demand payment of all or part of any sums due;
 - require security for the Buyer's obligations before the Seller makes further supplies to the Buyer; or
 - without notice, withhold deliveries of goods ordered by the Buyer.
- 13.2 Where:
- the Buyer is in breach of any of the terms of this contract (including failure to make payment on the due date);
 - the Buyer becomes insolvent, commits an act of bankruptcy, is adjudicated bankrupt or any like matter occurs;
 - an application is made for the Buyer's liquidation or a liquidator or receiver or a manager is appointed in respect of the Buyer's assets;
 - the Buyer enters into an agreement or arrangement for amalgamation with another company;
 - the Buyer no longer carries on business or threatens to stop carrying on business;
 - an arrangement or compromise is made or likely to be made with the Buyer's creditors; or
 - the Buyer's ownership or effective control is transferred or the nature of its business is materially altered,
- then, without prejudice to the Seller's other rights and remedies under this contract or at law, the Seller do all or any of the following:
- exercise all or any of its rights under clause 13.1;
 - where the Buyer has failed to make payment on due date, charge interest in accordance with clause 12;
 - cancel this and any other contract of supply with the Buyer; or
 - recover and/or resell any of the Goods and enter any premises where the Seller believes the Goods are stored and the Buyer grants the Seller an irrevocable right and authority to do so. The Seller may only recover and resell for its own account sufficient goods to satisfy all unpaid liabilities, the costs of recovery and resale and the costs referred to in clause 13.3. If the Seller recovers any excess, it will not be liable in damages to the Buyer but must account to the Buyer for the excess.
- 13.3 The Buyer will pay all costs and expenses (including costs on a solicitor/client basis, debt collectors' costs, transportation and storage costs) it incurs in enforcing or attempting to enforce its rights under this contract. The Seller may deduct any costs and expenses incurred from the proceeds of sale of any goods recovered from the Buyer.

14 Import and Export Licences

- 14.1 Where an import licence, a foreign exchange control authorisation or similar authorisation is required for the performance of this contract, the Buyer shall with due diligence obtain it in good time. Subject to clause 14.2, if the requisite licence or authorisation cannot be obtained in time to effect timely delivery or within a reasonable time subsequent, this contract shall be voidable at the Seller's option by giving notice to the Buyer. The Seller may in addition postpone or delay performance of its obligations pending the obtaining of any such licence or authorisation.
- 14.2 The Buyer shall immediately notify the Seller of the grant or any absolute or qualified refusal to grant a requisite import licence, or authorisation, or both.

15 Claims for Discrepancy or Defective Goods

- 15.1 Subject to the remainder of this clause, where the Buyer has any claim for discrepancy or shortage in the Goods or for defective goods, the Seller must receive the Buyer's written claim containing full details within 14 days of receipt of the Goods at the final destination stated in the Confirmation.
- 15.2 Subject to the limitations of liability set out elsewhere in this contract, and provided the Seller had a reasonable opportunity to investigate the claim, it will use its best endeavours to settle the claim by way of consultation and negotiation with the Buyer.
- 15.3 If the parties are unable to settle any claim made under this clause the claim shall be referred to a registered surveyor in accordance with clause 16.
- 15.4 If the Buyer does not comply with the above requirements it will be deemed to have accepted the Goods and the Seller will not incur any liability whatsoever to the Buyer.
- 15.5 The Seller will not be responsible for any damage to or deterioration occurring in the Goods after delivery in accordance with this contract from any cause whatsoever and such damage or deterioration will not release the Buyer from liability for full payment of the Goods.

16 Survey Procedure

- 16.1 All claims for survey or disputes between the parties to the contract in respect of quality and/or quantity of the Goods shall be referred to the arbitration of registered surveyors, appointed by the Seller.
- 16.2 If the Buyer objects to the registered surveyor appointed by the Seller it shall, within five (5) days after receiving notice in writing from the Seller of the identity of the appointed surveyor, appoint a registered surveyor to act on its behalf and give notice of the same to the Seller.
- 16.3 In the event of the surveyors appointed under any of the preceding clauses failing to agree on an award within seven (7) days after the date when the last of them were appointed, they shall within a further four (4) days appoint an umpire to be agreed upon between them, such umpire to be a registered surveyor and in the event of such surveyors failing to agree on such appointment within the time herein specified, such umpires shall be appointed by the **International Chamber of Commerce** or any other competent body selected for the purpose on the application of the Seller.
- 16.4 The decision of the surveyor or umpire, as the case may be, shall be final and binding on the parties, subject to manifest error on the part of the surveyor or umpire.

17 Arbitration

- 17.1 If any dispute or difference (otherwise than in relation to a claim made in respect of clause 15) shall arise between the parties hereto in any way arising out of the terms hereof or in connection with any purchase of Goods such dispute or claim shall be referred to the arbitration of a single arbitrator if the parties can agree upon one, or otherwise to an arbitrator appointed by the president of the Auckland District Law Society, and any such reference shall be a submission to arbitration within the meaning of the Arbitration Act 1996 and its amendments and the provisions of the second schedule of the Act shall apply.
- 17.2 Nothing in this clause will prevent either party from taking immediate steps to seek urgent interlocutory relief before the appropriate Court.

18 Personal Properties Securities Act 1999

- 18.1 The Buyer will grant to the Seller a security interest in all present and after acquired Goods and their proceeds. On the Seller's request the Buyer shall promptly execute any documents and do anything else required by the Seller to ensure that the security interest created under this contract constitutes a perfected security interest (as that term is defined in the Personal Property Securities Act 1999 ("PPSA")) over the Goods and their proceeds including providing any information the Seller reasonably require to complete a financing statement or a financing change statement.
- 18.2 The Buyer will pay to the Seller all costs, expenses and other charges incurred, expended or payable by the Seller in relation to the filing of a financing statement or a financing change statement in connection with this contract.
- 18.3 The Buyer agrees that nothing in sections 114(1)(a), 117(1)(c), 133 or 134 of the PPSA shall apply to this contract and that its rights as debtor in sections 116, 119, 120(2), 121 - 126, 127, 129 and 132 of the PPSA shall not apply to this contract. The Purchaser waives any right to receive a verification statement under the PPSA.

19 Waiver and Forbearance

- 19.1 All the Seller's original rights, powers, exemptions and remedies shall remain in force notwithstanding any neglect, forbearance or delay in the enforcement of them.
- 19.2 If any of the terms or conditions of this contract are held by a Court to be ineffective because of non-registration, illegality or any other reason, then that term or condition or part of it will be severed from all other terms and conditions without affecting the validity or enforceability of all other terms and conditions or part of them.
- 19.3 The Seller may vary these terms and conditions at any time by notice in writing to the Buyer. Any such variation shall apply to orders accepted by the Seller after the variation has been made.