



# **LUBRICATION SPECIALISTS (PTY) LTD**

**STANDARD TRADING TERMS AND CONDITIONS**

## 1. INTERPRETATION

In these trading terms and conditions:

- 1.1 the headings to the clauses are for reference purposes only and shall not aid in the interpretation of the clauses to which they relate;
- 1.2 unless the context clearly indicates a contrary intention, words importing any one gender include the other two genders, the singular includes the plural and vice versa, and natural persons include created entities (corporate or unincorporated) and vice versa;
- 1.3 the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have a corresponding meaning namely –
  - 1.3.1 "The Services" means the services which the Customer appoints or requests the Company to render on its behalf or which the Company is in its discretion required to render by virtue of its appointment by the Customer
  - 1.3.2 "the Company" means Lubrication Specialists (Proprietary) Limited, or if exercising its right under clause 2, the member of the Group in respect of which it exercises its rights;
  - 1.3.4 "Customer" " means any person or entity at whose request or on whose behalf the Company undertakes any business or provides any advice, information or service or sells any goods or incurs any costs or disbursements and shall include the agent who represents such Customer;
  - 1.3.5 "goods" means any goods or equipment of whatsoever nature serviced, maintained, repaired, handled, transported or dealt with by or on behalf of or at the instance of the Customer or which come under the control of the Company or its agents or nominees on the instructions of the Customer or in the execution of the Company's duties towards the Customer, and includes any form of covering or equipment used in connection with or in relation to such goods ;
  - 1.3.6 "the Group" means the Company and any Company which is a holding Company or subsidiary of the Company or a subsidiary of the holding Company and any Company within the Group or any subsidiary of any such Company, from time to time, including any Company in which any such Company has a shareholding of more than 20% of the issued shares, which may render services to the Customer in terms of clause 2. Should there at any stage there be a dilution of, or change in the shareholding of the Company or any of the other companies in the Group, these conditions shall notwithstanding such dilution or change remain of full force and effect as between the Customer and the Company;

1.3.7 "INCOTERMS" means the latest official rules for the interpretation of trade terms published by the International Chamber of Commerce from time to time; and

1.3.8 "the owner" means the owner of the goods and any other person who may have or who acquires any interest, financial or otherwise, therein.

## 2. MEMBERS OF THE GROUP RENDERING SERVICES TO THE CUSTOMER

- 2.1 The Company may at its election perform all or any business undertaken or provide advice, information or services, whether gratuitous or not, either itself or it may procure that any member of the Group undertaking such business or providing such advice, information or services as principal upon and subject to the terms and conditions contained herein which shall apply *mutatis mutandis* to the Customer and any such member of the Group.
- 2.2 Each member of the Group shall be deemed to have appointed the Company as its agent for procuring on behalf of any such a member of the Group, the benefit of these standard trading terms and conditions and the Company shall further be deemed to accept such benefits at the time of accepting any instruction to perform any function in rendering any services to the Customer.

## 3. APPLICATION OF TRADING TERMS AND CONDITIONS

- 3.1 Subject to clause 3.2, all and any business undertaken or advice, information or services provided by the Company, whether gratuitous or not, is undertaken or provided on these trading terms and conditions .
- 3.2 Where special terms may be negotiated and agreed in writing for any particular transaction, those terms will apply only to those transactions and any latter or concurrent transaction will remain subject to these Standard Terms and Conditions.

## 4. APPLICABLE LEGISLATION

- 4.1 If the Company is obliged, in the execution of any of its duties and/or responsibilities to comply with any common law or legislative enactment ("the law") of any nature whatsoever, then the Company by complying therewith, shall not be deemed to waive nor abandon any of its rights in terms of these trading terms and conditions.
- 4.2 In addition thereto, in complying with the law, the Company shall not be deemed to have

assumed any onus, obligation, responsibility or liability in favour of the Customer.

- 4.3 If any of the terms of these trading terms and conditions is repugnant to or in conflict with the law, then and in such event the conflicting term embodied herein shall be deemed to be amended and/ or altered to conform therewith, and such amendment and/or alteration shall not in any way affect the remaining provisions of these trading terms and conditions .

## 5. OWNER'S RISK

All storing, (whether in the open or otherwise) loading, unloading, warehousing, transporting or other handling of goods by or on behalf of or at the request of the Customer, owner or the Company, is effected at the sole risk and expense of the Customer and/or the owner, and the Customer indemnifies the Company against any claim which might be brought against the Company, howsoever arising, from such storing, (whether in the open or otherwise), loading, unloading, warehousing, transporting or other handling of goods .

## 6. CUSTOMER'S INSTRUCTIONS

- 6.1 The Customer's instructions to the Company shall be precise, clear and comprehensive. Instructions given by the Customer shall be recognised by the Company as valid only if timeously given specifically in relation to a particular matter in question. Oral instructions, standing or general instructions or instructions given late, even if received by the Company without comment, shall not in any way be binding upon the Company, but the Company may act thereupon in the exercise of its absolute discretion.
- 6.2 In the absence of specific and contrary instructions given timeously in writing by the Customer to the Company –
- 6.2.1 It shall be in the reasonable discretion of the Company to decide at what time to perform or to procure the performance of any or all of the acts which may be necessary or requisite for the discharge of its obligations to the Customer;
- 6.2.2 the Company shall have an absolute discretion to determine the means, route and procedure to be followed by it in performing all or any of the acts or services it has agreed to perform; and
- 6.5 Notwithstanding anything to the contrary herein contained, if at any time the Company should consider it to be in the Customer's interests or for the public good to depart from any of the Customer's instructions, the Company shall be entitled to do so and shall not incur any liability in consequence of doing so.
- 6.6 If events or circumstances come to the attention of the Company, its agents, servants, or

nominees which, in the opinion of the Company, make it in whole or in part, impossible or impracticable for the Company to comply with a Customer's instructions the Company shall take reasonable steps to inform such Customer of such events or circumstances and to seek further instructions. If such further instructions are not timeously received by the Company in writing, the Company shall, at its sole discretion, be entitled to detain, return or store all or part of the goods concerned at the risk and expense of the Customer.

## 7. INSURANCE

- 7.1 The Company shall have no obligation whatsoever to obtain any form of insurance cover on behalf of the Customer in respect of the goods and will only endeavour to do so on the express request of the Customer to do so. Subject to the provisions of clauses 7.3, the Company shall however endeavour to place any insurance cover the Customer timeously and in writing instructs it to effect. Such insurance will be subject to such exceptions and conditions as may be imposed by the insurance Company or underwriter taking the risk and the Company shall not be obliged to obtain separate cover for any risks so excluded.
- 7.2 Should any insurer dispute its liability in terms of any insurance policy in respect of any goods, the Customer concerned shall have recourse against such insurer only and the Company shall not have any responsibility or liability whatsoever in relation thereto notwithstanding that the premium paid on such policy may differ from the amount paid by the Customer to the Company in respect thereof. Insofar as the Company agrees to arrange insurance the Company acts solely as agent for and on behalf of the Customer.
- 7.3 Notwithstanding anything to the contrary herein contained the Company shall in no circumstances be liable for any consequences of any failure to obtain any insurance cover, whether requested to do so by the Customer, or otherwise and the liability of the Company in respect of any claim brought against the Company arising out of or connected with the provisions of this clause 7 shall be regulated and determined in accordance with the provisions of clause 18 and clause 19 of these conditions.

## 8. CUSTOMER'S UNDERTAKINGS

- 8.1 For all purposes hereunder the Customer shall be deemed to have in relation to the Customer's business, the goods and the services to be rendered by the Company in regard thereto, reasonable knowledge of all matters directly or indirectly relating thereto or

arising therefrom including, without limitation, terms of sale and purchase and all matter relating thereto and the Customer undertakes to supply all pertinent information to the Company.

## 8.2 The Customer warrants that –

8.2.1 The Customer acting as agent on behalf of any party is duly authorized by such party to also bind such party to these terms and conditions;

8.2.2 it is either the owner or the authorised agent of the owner of any goods in respect of which the Customer instructs the Company and that each such person is bound by these trading terms and conditions;

8.2.3 in entering into any contract with the Company and/ or in accepting any document issued by the Company in connection with such contract, the owner is also bound by these trading terms and conditions, and in particular, but without prejudice to the generality of the foregoing, it accepts that the Company shall have the right to enforce against it jointly and severally any liability of the Customer under these trading terms and conditions or to recover from it any sums to be paid by the Customer which upon proper demand have not been paid;

8.2.4 all information and instructions supplied or to be supplied by it to the Company is and shall be accurate, true and comprehensive, and in particular, without derogating from the generality of the foregoing, the Customer shall be deemed to be bound by and warrants the accuracy of all descriptions, specifications and other particulars furnished to the Company and the Customer warrants that it will not withhold any necessary or pertinent information, and indemnifies the Company against all claims, losses, damages and expenses whatsoever, whensoever and howsoever arising as a result of a breach of the foregoing whether negligently or otherwise;

in procuring the service of any third party in the execution of its duties towards the Customer or on the Customer's behalf shall be entitled to act either as an agent for and on behalf of the Customer or as a principal, as it in its absolute discretion deems fit;

9.3 The offer and acceptance of a fixed price for the accomplishment of any task shall not in itself determine whether such task is to be arranged by the Company acting as agent for and on behalf of the Customer or as a principal;

9.4 The Customer acknowledges that when the Company, as agent for and on behalf of the Customer, concludes any contract with a third party, such agreement is concluded between the Customer and the third party;

9.5 Unless otherwise agreed in writing, the Company, when acting as agent for and on behalf of the Customer, shall be entitled to enter into any contract it reasonably deems necessary or requisite for the fulfillment of the Customer's instructions, including, without limitation, contracts for the–

9.5.1 carriage of goods by any route or means or person;

9.5.2 storage, packing, transport, shipping, loading, unloading and/ or handling of goods by any person at any place whether on shore or afloat and for any length of time; and

9.6 Where the Company contracts with third parties to perform all or any of the functions which it has agreed to perform, the Customer agrees that the Company shall have no responsibility or liability to the Customer for any act or omission of such third party, even though the Company may be responsible for the payment of such third party's charges. Notwithstanding the foregoing, the Company undertakes to cede any right of action which it may have against such third parties to the Customer upon demand, the Customer hereby indemnifying the Company against any loss, damage or expense which might arise from the Customer prosecuting such claims or right of action.

9.7 Notwithstanding anything to the contrary contained herein the Customer agrees that all goods shall be dealt with by any third party appointed to perform any function in terms of 9.1, on the terms and conditions, whether or not inconsistent with these trading terms and conditions, stipulated by any such third party, including the carriers, warehousemen and all other parties (whether acting as agents or subcontractors to the Company or otherwise) into whose possession or custody the goods may pass, or subject to whose authority they

## 9. CONTRACTING WITH THIRD PARTIES

9.1 Any business entrusted by the Customer to the Company may, in the absolute discretion of the Company, be fulfilled by the Company itself, by its own servants performing part or all of the relevant services, or by the Company employing, or entrusting the goods or services to third parties on such conditions as may be stipulated by, or negotiated with, such third parties for the purposes of such services, or such part thereof as they may be employed to carry out.

9.2 Unless otherwise agreed in writing, the Company

may at any time be.

- 9.8 If, notwithstanding the provisions of 9.6, it should be held that the Company in any way retains any obligations or responsibilities with regard to the performance of the obligations by a third party, then to the extent that the terms and conditions stipulated by the third party carrier, warehouseman and any other such party, impose a liability, obligation or responsibility on the Company, more onerous than those imposed by these terms and conditions, then such provision shall not apply as between the Company and the Customer or owner and the provisions of these terms and conditions shall have precedence. In all other instances the third party's terms and conditions shall apply.

## 10. THE ACCEPTANCE OF DELIVERY

If delivery of any goods is not accepted by the Customer or party nominated by the Customer at the appropriate time and place then: -

- 10.1 the Company shall be entitled to store the goods or any part thereof at no risk to the Company and at the expense of the Customer; and
- 10.2 Should any amount owing by the Customer to the Company become due and payable and remain unpaid, or in the event that any goods are not accepted for delivery by the Customer or person or entity nominated by the Customer within 21 days of being notified by the Company to collect or accept such goods, the Company shall be entitled and the Customer hereby authorizes the Company and without first obtaining an order of Court, to sell all or any of the goods by public auction or on reasonable notice not exceeding 14 days by private treaty. The net proceeds of any such sale, after deducting therefrom all costs, charges and expenses incurred by the Company, shall be applied in reduction or discharge as the case may be, of the Customer's obligations to the Company in respect of such goods without prejudice to the Company's rights to recover from the Customer any balance which may remain owing to the Company after the exercise of such rights. Should the total amount collected by the Company, after deducting therefrom all costs, charges and expenses incurred by the Company in respect thereof, exceed the full amount of the Customer's obligations to the Company in respect of such goods, the Company shall be obliged to refund such excess to the Customer

## 11. PAYMENT BY THE CUSTOMER

- 11.1 The Customer shall be liable for and shall pay to the Company all costs and expenses incurred by the Company, in providing the services at the request or on the instructions of the Customer himself, the office of the Customer or his nominees, representatives or agents, howsoever communicated to the Company and notwithstanding the fact that any such persons

may have exceeded their authority in requesting or instructing the provision of the particular services.

- 11.2 The Customer shall pay to the Company for the services rendered by the Company the charges agreed or as quoted or, in the event of there being no agreement or quote as to charges or in the event of a particular service not being provided for in the scale of agreed charges, the Customer shall pay the Company the ordinary or customary tariffs charged by the Company for such services or a reasonable charge for the services in respect of which no charge has been agreed.
- 11.3 The Customer shall reimburse the Company for all costs and expenses incurred by the Company arising out of the receipt of currency from the Customer or the remittance of currency to or on behalf of the Customer or the dishonouring of any cheque paid on behalf of the Customer.
- 11.4 The Company shall not be obliged to make any disbursement whatsoever on behalf of the Customer until such time as the Company shall have been paid all amounts due by the Customer to the Company for the services provided by the Company and have received sufficient funds for the purpose of making the particular disbursement. The Company may either before, during or after providing the relevant services require a Customer to furnish security for the payment of such amounts as are or will become due to the Company by the Customer for providing the services and for the due reimbursement of disbursements made or to be made by the Company. Notwithstanding anything to the contrary herein contained, all disbursements made by the Company on behalf of a Customer shall be immediately due and repayable by the Customer to the Company.
- 11.5 Information furnished to a Customer by the Company as to the costs and expenses of providing the services or any matter relating thereto, whether in the form of an estimate, offer, quotation or tender, shall be deemed to be information furnished for the guidance of the Customer only and shall not be binding on the Company unless the contrary has been expressly stated in such estimate, offer, quotation or tender.
- 11.6 Unless specifically indicated otherwise in writing on the Company's invoices or unless the Customer was granted credit facilities by the Company in writing, the Customer shall pay to the Company in cash immediately upon presentation of invoice, all sums due to the Company and in every instance:
- 11.6.1 Free of exchange and any other charges at such address as the

Company may require.

11.6.2 In such currency as the Company may direct.

11.6.3 Without demand and free of any deduction or set off on the due date of payment.

11.7 No payments will be withheld or deferred by the Customer on account of any claim or counterclaim which the Customer may allege.

11.8 Any amount not paid on due date for payment shall bear interest at the maximum permissible rate allowed by law on accounts not settled within the agreed terms of credit and calculated on daily balance and compounded monthly in arrears.

11.9 All and any money received by the Company from the Customer shall be appropriated by the Company in its sole and absolute discretion in respect of any undisputed indebtedness owing by the Customer to the Company, notwithstanding that the Customer might, when making payment, seek to appropriate the payment so made to any particular debt or portion of a debt.

11.10 The Customer undertakes to pay the Company Value Added Tax at the then prescribed rate, payable in respect of the exclusive amount reflected in any invoice.

11.11 In the event of the Company having granted any credit terms or facilities to the Customer in writing, which provide the Customer a deferred period of time to effect payment of any amount due to the Company, and in the event of the Customer being in default of payment of any one or more amount due and payable, or being in default of any other term or condition on which such credit facility was granted, then notwithstanding any other term to the contrary where-so-ever contained, the Company shall be entitled to forthwith revoke such credit facilities and declare all amounts immediately due and payable and proceed for recovery of all amounts which would be due and payable to the Company, were it not for the credit terms or facilities granted to the Customer.

11.12 The Company shall under no circumstances be precluded from raising a debit and obtaining payment in respect of any fee or disbursements due to it notwithstanding the fact that a previous debit or debits, whether excluding or partly excluding the items subsequently requiring to be charged or recovered, had been raised and whether or not any notice had been given that further debits were to follow.

## **12. RISK OF ITEMS POSTED OR ELECTRONICALLY TRANSMITTED**

12.1 Subject to the provisions of clause 27, and notwithstanding any prior dealings between the

Company and the Customer all documents, cash, cheques, bank drafts or other remittances, sent to the Company through the post or electronically transmitted shall be deemed not to have been received by the Company unless and until they are actually received by the Company.

12.2 In the event that any payment to the Company is effected electronically, then the Customer bears the risk in respect of such payment until such time as the payment is received and cleared into the Company's bank account.

## **13. QUOTATIONS & ESTIMATES**

13.1 The Company shall be entitled at any time by notice to the Customer to cancel, amend or resile from any quotation, estimate or executory agreement in circumstances where it becomes impracticable or uneconomical for the Company to carry out the contract at the quoted or estimated rate and the Customer shall have no claim whatsoever against the Company for any loss that the Customer might incur as a result of the Company cancelling, amending or resiling from the quotation, estimate or executory agreement.

13.2 In the event of any general increase in the wages payable by the Company to their labour, whether such increase shall be in terms of an agreement between the Company or any trade union or not, during the currency of this contract, or any other increase in the Company's costs brought about by factors beyond the Company's control, which without limiting the generality of which shall include, but not limited to alternations in port working hours, port dues and freight, surcharges, demurrage, insurance premiums, equipment rental or statutory cost increases, the rates in this agreement will be adjusted, if necessary retrospectively, to the date such increase in wages or costs came into effect, by applying a surcharge based on the ratio which such increased costs bear to the Company's total cost and a certificate signed by the Company's auditors specifying only the reason for the increase in general terms and the amount of the surcharge, with a statement that it has been arrived on a basis equitable to both Customers and Company, shall be conclusive evidence as to the amount of such surcharge.

## **14. NO CLAIMS AGAINST COMPANY DIRECTORS AND EMPLOYEES**

The Customer undertakes that no claim shall be made against any director, servant or employee of the Company which imposes or attempts to impose upon him any liability in connection with the rendering of any services which are the subject of these trading terms and conditions and the Customer hereby waives all and any such claims.

## 15. BENEFIT OF DISCOUNTS

The Company is entitled to the benefits of any discounts obtained and to retain and be paid all brokerages, commissions, allowances and other remunerations of whatsoever nature and kind and shall not be obliged to disclose or account to the Customer, or Customer for any such amounts received or receivable by it.

## 16. LIEN

16.1 All goods and documents relating to goods including bills of lading and import permits, as well as all refunds, repayments, claims and other recoveries received by the Company from the Customer on the Customer's behalf, shall be subject to a special and general lien or pledge either for money due in respect of such goods or for other moneys due to the Company from the Customer, owner, or their agents, if any.

16.2 In delivering the goods or documents into the custody of the Company or its agents for any purpose whatsoever, such delivery shall for the purposes hereof be deemed to be delivery of the same in pledge and as security for all amounts owed to the Company at that time or which become payable in the future. In the event of the Company utilising the services or premises of any third party for any purposes including the transportation or storage of any goods, such third party shall be the agent of the Company for purposes of exercising the Company's right to retention under lien and/or pledge.

16.3 If any moneys due to the Company are not paid within 14 days after notice has been given to the person from whom the moneys are due that such goods or documents are being detained, they may be sold by public auction or by private treaty or in some other way disposed of for value at the sole discretion of the Company and at the expense of such person, and the nett proceeds (if any) applied in or towards satisfaction of such indebtedness.

16.4 The Customer shall not be entitled to effect or allow to be effected any security in respect of the goods or the documents relating to the goods, including without limitation, any general or special notarial bond, pledge, hypothec, right of retention, or lien and pledge, without the prior written consent of the Company. The lien and pledge and right of retention in favour of the Company referred to above in 16.1 and 16.2, shall operate as a first and prior charge against the goods, currency and/or the documents relating to the goods and no other security shall rank prior to the Company's lien, pledge or right of retention.

## 17. INDEMNITY BY THE CUSTOMER

17.1 Without prejudice to any of the Company's rights

and securities under these trading terms and conditions, the Customer indemnifies and holds harmless the Company against all liabilities, damages, costs and expenses whatsoever incurred or suffered by the Company arising directly or indirectly from or in connection with the Customer's express or implied instructions or their implementation by or on behalf of or at the instance of the Company and in particular, but without limitation of the foregoing, in respect of any liability whatsoever which may be incurred-

17.1.1 arising from the failure of any warranty given to the Company being true and correct or accurate; and/ or

17.1.2 to any hauler, carrier, warehouseman or other person whatsoever at any time involved with such goods arising out of any claim made directly or indirectly against any such person by the Customer or owner of such goods or by any person having an interest in such goods or by any other person whatsoever; and/or

17.1.3 claims by Suppliers for the cost and expenses of goods or services provided to the Customer at the Company's special instance and request ;

17.2 Notwithstanding that the Company may seek recovery of any amount due to it, from any person other than the Customer, the Customer shall remain liable to make payment of the said amount to the Company upon demand, at any stage.

## 18. LIMITATION OF COMPANY'S LIABILITY

18.1 Subject to the provisions of clause 18.2 and clause 19, the Company shall not be liable for any claim of whatsoever nature (whether in contract or in delict) and whether for damages or otherwise, howsoever arising including but without limiting the generality of the aforesaid claims arising from –

18.1.1 any negligent act or omission or statement by the Company or its servants, agents, sub-contractors or nominees; and/or

18.1.2 any act or omission of the Customer or agent, third party or supplier of the Customer with whom the Company deals; and/or

18.1.3 any loss, damage or expense arising from or in connection with the quality, inherent vice, defect or description of the consumables or

accessories provided by the Company; and/or

- 18.1.4 any loss, damage or expense arising from or in any way connected with the quality, inherent vice, defect or description of any goods; and/or
- 18.1.5 any loss, damage or expense arising from or in any way connected to any circumstance, cause or event beyond the reasonable control of the Company, including but without limiting the generality of the aforesaid, any act of God, any act of Government or other authority, strike, lock-out, political unrest, stoppage or restraint of labour; unrest, danger or accidents of the sea, perils, hostile actions or riots and/or
- 18.1.6 damages arising from loss of market or attributable to delay in forwarding or failure to carry out any instructions given to the Company timeously or at all; and/or
- 18.1.7 damage, (including damage or loss relating to the injury or death of any person) injury suffered by the Customer or any person whatsoever arising out of any cause whatsoever as a result of the Company's execution or attempted execution of its obligations to the Customer and/or the Customer's requirements or mandate; unless –
  - (a) such claim arises from a grossly negligent act or omission on the part of the Company or its servants; and
  - (b) such claim arises at a time when the goods in question are in the actual custody of the Company and under its actual control; and
  - (c) the claim is not time barred by virtue of the provisions of clause 19 hereof or otherwise.

18.2 Notwithstanding anything to the contrary contained in these trading terms and conditions, the Company shall not be liable for any indirect and consequential loss, special damages or loss of profits arising from any act or omission or statement by the Company, its agents, servants, sub-contractor or nominees, whether negligent or otherwise.

## **19. MONETARY LIMITATION OF LIABILITY OF THE COMPANY**

19.1 No claim of any nature whatsoever and howsoever arising in respect of any loss or damage to goods, miss-delivery of goods, delay in the delivery of any goods, non performance of the Company's duties and obligations or

unworkmanlike performance of duties by the Company or in respect of any other damages, loss or cause of action whatsoever (whether or not similar to, or in the nature of, the aforesaid), may be brought against the Company or (subject in any event to the provisions of clause 18) any of its Directors or Employees, unless it/they have received written notice of the claim from the Customer specifying full details of the claim, within 5 days of the cause of the claim coming to the Customer's knowledge, or the date when such cause should reasonably have come to their knowledge (whichever shall, as applicable, be the sooner), nor may any such claim be brought after the expiry of a period of nine months calculated from the date of the cause of the claim coming to the Customer's knowledge, or the date when such cause should reasonably have come to their knowledge, (whichever shall, as applicable, be the sooner)

19.2 Notwithstanding clause 19.1, the Company's liability for any loss or damage, howsoever arising, whether in contract or in delict, arising directly or indirectly from the Company Operations performed for and on behalf of the Customer shall not exceed an amount of N\$500,000.00 (FIVE HUNDRED THOUSAND NAMIBIAN DOLLAR) ("the Annual Limit") in respect of all occurrences giving rise to liability in any calendar year (being 1 January to 31 December), regardless of the nature, number and amount of claims arising.

19.3 The Customer must give the Company immediate notice of any occurrence giving rise to any loss, damage, injury or death and the Company shall be discharged from all liability unless legal proceedings are commenced against it within 1 (one) year of the date of the occurrence.

19.4 The Customer indemnifies and holds the Company harmless against any claim or liability (and any expense arising there from) insofar as such claim or liability exceeds the Company's liability under these Trading Terms and Conditions.

## **20. BREACH**

20.1 If the Company breaches any of these trading terms and conditions or any agreement between it and the Customer and fails to remedy such breach within 30 days of the date of receipt of written notice requiring it to do so then the Customer shall be entitled to compel performance by the Company of the obligations it has defaulted in, but shall not be entitled to cancel these trading terms and conditions or any agreement between the Customer and the Company.

20.2 No provision in these trading terms and



conditions shall derogate from the Company's common law rights in the event that the Customer breaches any term or condition of the agreement .

20.3 The Company shall be entitled to forthwith cancel any agreement between it and the Customer by written notice if –

20.3.1 The Customer commits any breach of its obligations under the agreement and fails to remedy that breach within 7 (seven) days of its being given written notice to do so;

20.3.2 The Customer commits any act of insolvency in terms of any applicable Insolvency Legislation;

20.3.3 The Customer is deemed to be unable to pay its debts in terms of any deeming provision of any applicable legislation relating to Companies or Insolvency;

20.3.4 The Customer compromises or attempts to compromise with its creditors;

20.3.5 Any provisional or final liquidation order is granted for the sequestration, winding up, bankruptcy or judicial management, of the Customer, or any equivalent order is made in terms of any applicable law with regard to the status of the Customer;

20.3.6 The Customer fails to satisfy any default or other judgment granted against it, within 10 (ten) days.

20.4 Notwithstanding the aforesaid provisions, the Company will be entitled to terminate its appointment hereunder upon written notice to the Customer.

## **21. RECOVERY OF DEBTS DUE TO THE COMPANY**

21.1 The Company shall be entitled to recover any amounts due to it by the Customer in respect of instructions relating to or in terms of any contract in respect of particular goods from the Customer or Owner or if the Customer acts as agent for a disclosed or undisclosed principal from the Customer or the principal, as the Company in its absolute discretion deems fit.

21.2 The Customer agrees that in the event of the Company or any member of the Group instituting legal proceedings against the Customer to recover amounts due in terms of any agreement or for breach of these trading terms and conditions or for enforcement of any other obligations or for the recovery of damages owed by the Customer to the Company or any member of the Group in terms of such agreement, the

Customer shall be liable for all legal costs incurred by the Company or member of the Group, on the scale as between attorney and own client, as well as collection commission and tracing agent's fees.

21.3 The parties agree that any legal action or proceedings arising out of or in connection with these trading terms and conditions, or the granting of any credit, may at the Company's sole discretion, be brought in the relevant Court in the country having territorial and civil jurisdiction, where the Company's registered office is situated at the commencement of the proceedings, and the Customer irrevocably submits to the non-exclusive jurisdiction of such Court. The Company shall have the option within that jurisdiction, or any other competent jurisdiction, of proceeding either in the High (or Superior) Court or in the Magistrate's (or Inferior) Court, notwithstanding that the amount of the claim may exceed the jurisdiction of that Magistrate's (or Inferior) Court, to which jurisdiction the Customer hereby consents.

## **22. WARRANTIES AND REPRESENTATIONS BY THE COMPANY**

The Company makes no warranties and representations to the Customer save as may be specifically provided herein or as notified in writing by the Company to the Customer from time to time. The Customer acknowledges that the Company is not in any way bound by any oral statement, representation, guarantee, promise, undertaking, inducement or otherwise which may have been made at any time by any salesman, employee, representative or any person acting or purporting to act for or on behalf of the Company, whether negligently or otherwise unless such statements, representations, guarantees, promises, undertakings, warranties or inducements are supplied or made in writing by an employee duly authorised by written resolution of the board of directors of the Company in response to a written enquiry specifying accurately and in complete detail what information is required.

## **23. DISPUTES**

23.1 Should there be any dispute of any nature whatsoever between the parties in regard to any aspect, matter or thing relating to these trading terms and conditions and whether or not the Company has executed its obligations in terms of any agreement it has with the Customer, then and in such event the Customer shall nevertheless be obliged to perform its remaining obligations in terms of any such agreement as though the Company had performed properly and to the Customer's satisfaction.

23.2 Without affecting the generality of clauses 23.1 the Customer shall not be entitled to

withhold payment of any amounts, by reason of any dispute with the Company, whether in relation to the Company's performance in terms of any agreement, or lack of performance or otherwise, after which payment the Customer's rights of action against the Company in terms of this clause can be enforced. Until such payment is made, any rights that the Customer may have, shall be deemed not yet to have arisen and it is only the payment to the Company which releases such rights and makes them available to the Customer in respect of any claim that he may have against the Company.

- 23.3 In any dispute between the Company and the Customer the Company shall be deemed to have performed its obligations in a proper and workmanlike manner and strictly in accordance with any agreement between it and the Customer, until such time as the Customer proves the contrary.

## 24. TIME FOR PERFORMANCE BY THE CUSTOMER

Time is of the essence for the performance by the Customer of all obligations owed to the Company in terms of any agreement with it governed by these terms and conditions.

## 25. INCOTERMS

Any INCOTERM which might be made applicable to any contract between the Company and the Customer or between the Company acting on behalf of the Customer and any third party, shall be interpreted in accordance with the published guidelines issued from time to time by the International Chamber of Commerce and particularly the Introduction to the official publication containing the latest INCOTERMS published and in force as at the time of the incorporation of INCOTERMS into such contract. In the event that any specific INCOTERM as published, is in the view of the Company inappropriate for the transaction to be undertaken, or is unclear, then the Company shall, within its sole discretion, have the right to amend or vary that term, or add rules or provisions for the interpretation thereof.

## 26. NOTICES ADDRESS AND DOMICILIUM

- 26.1 The Customer chooses at the address at which all notices and legal process may be sent (i.e. its *domicilium citandi et executandi*) as the address set out in the Quotation, if any, failing which any place of business of the Customer that is within any jurisdiction of a Namibian Court, as elected by the Company.
- 26.2 All notices, demands, communications or payments intended for the Customer may be made or given at the Customer's *domicilium* for the time being.
- 26.3 A notice sent by the Company to the Customer's *domicilium* shall be deemed to be received:

26.3.1 on the same day, if delivered by

hand;

26.3.2 on the tenth day after posting, if sent by prepaid registered mail.

- 26.4 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by the Customer shall be an adequate written notice or communication to it notwithstanding that it was not sent or delivered at its chosen *domicilium citandi et executandi*.

## 27. SPECIAL CONDITIONS RELATED TO ELECTRONIC DATA

- 27.1 Notwithstanding the provisions of any legislation or other law regulating electronic communications and transactions, the Company shall only be deemed to have received electronic data and/or messages when such electronic data and/or messages have been retrieved, processed and read by the addressee.
- 27.2 Under no circumstances whatsoever and howsoever arising (including negligence on the part of the Company or its employees) shall the Company be liable for any loss or damage arising from or consequent upon the provision by the Company to the Customer in whatever manner and/or form, of incorrect information, including electronically communicated information or data, where such incorrect information or data has been generated by and provided to the Company by any person with whom the Company conducts business, and/or any other third party.
- 27.3 The Company shall furthermore under no circumstances whatsoever be liable for any loss or damage arising from or consequent upon any failure and/or malfunction, for whatever reason, and regardless of negligence in whatever degree on the part of the Company, of the Company's computer systems and/or software programmes, provided and/or operated by the Company and/or by any person with whom the Company conducts business, and/or any third party, and which systems shall include the Company's electronic automated information service provided to its Customers.

## 28. GENERAL

- 28.1 This agreement constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.
- 28.2 No party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded herein.
- 28.3 No addition to, variation or consensual

cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of all the parties.

- 28.4 No indulgence which the Company may grant to the Customer shall constitute a waiver of any of the rights of the Company, who shall not thereby be precluded from exercising any rights against the Customer which might have arisen in the past or which might arise in the future.
- 28.5 The parties undertake at all times to do all such things, to perform all such acts and take all such steps and to procure the doing of all such things, the performance of all such actions and the taking of all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and import of this agreement.
- 28.6 The Customer may not be entitled to cede, assign or otherwise transfer all or any of its rights, interest or obligations under and in terms of these Standard Terms and Conditions except with the prior written consent of the Company. The Company may cede, assign or otherwise transfer all of its rights, interest or obligations under and in terms of these Standard Terms and Conditions without the prior written consent of the Customer.
- 28.7 This agreement shall be interpreted and implemented in accordance with the laws of the Republic of Namibia.