



Orca Marine Services

ORCA MARINE SERVICES (PTY) LTD

# STANDARD 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 includes 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 Bidvest Group” means The Bidvest Group Limited and all its subsidiary and associated companies, together with each of their successors in title, or assigns;
  - 1.3.2 “the Company” means Orca Marine Services (Pty) Ltd, or if exercising its right under clause 2, the member of the Group in respect of which it exercises its rights;
  - 1.3.3 “client” means the same as “Customer”;
  - 1.3.4 “Customer” means any person at whose request or on whose behalf the Company undertakes any business or provides any advice, information or services;
  - 1.3.5 “goods” and “cargo” mean any goods handled, transported or dealt with by or on behalf of or at the instance of the Company or which come under the control of the Company or its agents, servants or nominees on the instruction of the Customer, and includes any container, transportable tank, flat pallet, crates, package or any other form of covering, packaging, container 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 Bidvest 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 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.
  - 1.3.9 “Force Majeure Event” means an event, or a series of related events, that is outside the reasonable control of the party affected (including power failures, industrial disputes affecting any third party, changes to the law, disasters, explosions, fires, floods, riots, terrorist attacks and wars).
  - 1.3.10 “perils of the seas” means fortuitous accidents or casualties of the seas but does not include ordinary action of the wind and waves.
  - 1.3.11 “Services” means the transfer between ship and shore, of crew (full ship to shore and vice versa, crew changes); fresh supplies (food, water, vegetables, fruit etc.); ship spares, oil and lubricants; cargo; etc. by means of the Company owned and subcontracted vessels.



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

- 2.1 The company may at its election perform all or any services undertaken, whether gratuitous or not, either itself or it may procure that any member of the Group undertakes such 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**

Subject to clause 5, all and any business undertaken, or services provided by the Company, whether gratuitous or not, is undertaken or provided on these trading terms and conditions.

## **4. OWNER'S RISK**

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

## **5. APPLICABLE LEGISLATION**

- 5.1 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.
- 5.2 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.
- 5.3. The Company's vessels shall only carry the number of crew and persons as determined by the Department of Maritime Affairs; and/or be loaded with cargo up to load limits as determined by the Department of Maritime Affairs, as is indicated on the craft licenses, which licenses shall be made available on request.
- 5.4 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.

## **6. TRANSPORT DOCUMENTS**

The company shall be entitled to issue in respect of the whole or part of any contract for the movement of goods or people, a transport document in a form that shall be within the Company's discretion including a single delivery note for more than one transfer, provided that where any such document is issued, these trading terms and conditions shall continue to apply as between the Company on the one part and the Customer and/or the owner on the other part.

## **7. EXCLUSION OF OBLIGATIONS OF COMMON OR PUBLIC CARRIER**

The company deals with goods and transports people only on the basis that it is neither a common carrier nor a public carrier. The transportation of all goods and people is, unless otherwise specified in these terms and conditions, undertaken at the sole risk and expense of the Customer and subject to these conditions.

## **8. COMPANY'S DISCRETION IN THE ABSENCE OF INSTRUCTIONS**

In the absence of specific instructions given timeously in writing by the Customer to the Company –

- 8.1 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 the acts which may be necessary or requisite for the discharge of its obligations to the Customer; and
- 8.2 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 services it has agreed to perform.

## **9. COMPANY'S GENERAL DISCRETION**

- 9.1 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.
- 9.2 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, store, sell, abandon, or destroy all or part of the goods concerned at the risk and expense of the Customer.

## **10. INSURANCE**

10.1 The Company shall procure, maintain and keep in effect the following insurance:

10.1.1 All risks marine cargo insurance on any Cargo in an amount to the value of N\$100 000,00 per package each and to 5 packages per occurrence; and

10.1.2 Public liability insurance;

10.1.3 shall have no obligation whatsoever to obtain any further insurance cover on behalf of the Customer in respect of the goods or people transported and will only endeavour to do so on the express request of the Customer to do so. Subject to the provisions of clauses 10.2 and 10.3, the Company shall however endeavour to place any insurance cover the Customer timeously (with a minimum of 24 hours) and in writing instructs it to effect. The onus lies upon the Customer to declare the value of the goods to be insured. 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. The cost of such additional insurance shall be charged to the Customer at cost plus 2%. Unless otherwise agreed in writing the Company shall not be under any obligation to obtain separate insurance in respect of separate consignments but may insure all or any of such consignments under any open or general policy held by the Company from time to time.

10.2 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.

10.3 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 10 shall be regulated and determined in accordance with the provisions of clause 39 and clause 40 of these conditions.



## 11. COMPANY'S OBLIGATIONS IN THE ABSENCE OF INSTRUCTIONS

Unless specific written instructions are timeously given to and accepted by the Company, the Company shall not be obliged to –

- 11.1 make any declaration for the purpose of any statute, convention, or contract, as to the nature or value of any goods or as to any special interest in delivery. In particular, the Company shall be under no obligation to make any declaration or to seek any special protection or cover in respect of any goods which are, or fall within the definition ascribed thereto by that body of dangerous goods or other goods which require special conditions of handling; and
- 11.2 arrange for any particular goods to be carried or handled separately from other goods.

## 12. CUSTOMER'S UNDERTAKINGS

- 12.1 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 and the Customer undertakes to supply all pertinent information to the Company.
- 12.2 The Customer warrants that –
  - 12.2.1 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;
  - 12.2.2 in authorising the Customer to enter into any contract with the Company and/or in accepting any document issued by the Company in connection with such contract, the owner, sender or consignee is bound by these trading terms and conditions for itself and its agents and for any parties on whose behalf it or its agents may act, and in particular, but without prejudice to the generality of the foregoing, it accepts that the Company shall have the right to enforce against them jointly and severally any liability of the Customer under these trading terms and conditions or to recover from them any sums to be paid by the Customer which upon proper demand have not been paid;
  - 12.2.3 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, values 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 penalties, damages, expenses and fines whatsoever, whensoever and howsoever arising as a result of a breach of the foregoing whether negligently or otherwise including, without derogating from the generality of the foregoing, any assessment or reassessment;
  - 12.2.4 the goods will be properly, adequately and appropriately prepared and packed, stowed, labelled and marked, having regard inter alia to the implementation by or on behalf of the Company or at its instance of the contract involved, and the characteristics of the goods involved and are capable of withstanding the normal hazards, including but not limited to perils of the sea, inherent in the implementation of such contract and or delivery of the service;
  - 12.2.5 where goods are carried in or on containers, tanks, pallets, crates or any other unit load devices specifically constructed for the carriage of goods by land or sea, (each such device hereinafter individually referred to as "the transport unit") then save where the Company has been given and has accepted specific written instructions to load the transport unit –
    - 12.2.5.1 that the transport unit has been properly and competently loaded;
    - 12.2.5.2 that the goods involved are suitable for carriage in or on the transport unit; and
    - 12.2.5.3 that the transport unit is itself in a suitable condition to carry the goods loaded therein between ship and shore and complies with the requirements of all relevant parties, including but not limited to relevant government authorities, stevedores and carriers.



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

- 13.1 The Company shall be entitled to recover any amounts due to it by the Customer in respect of instructions relating to the supply of services from the Customer, 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.
- 13.2 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.

### **14. HANDLING OF CARGO BY STEVEDORES**

All cargo transported aboard a vessel shall be rigged by stevedores prior to being placed aboard a Company vessel, or subcontracted vessel, once loaded the stevedores shall ensure that the cargo is secure whilst in transit, once the cargo is ready to be removed from the vessel, the stevedores shall unfasten the cargo, rig the cargo for lifting and communicate operations with the crane or derrick operator whilst the goods are being offloaded from the vessel. Under no circumstances shall the Company or its crew be required to undertake the loading or unloading of cargo nor be held liable for any damages incurred during the loading or unloading of cargo.

### **15. SUBCONTRACTING**

- 15.1 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.
- 15.2 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.

### **16. TERMS AND CONDITIONS OF AGENTS AND SUBCONTRACTORS**

- 16.1 Notwithstanding anything to the contrary contained herein the Customer agrees that all goods (or people transported) shall be dealt with by any third party appointed to perform any function in terms of 15, on the terms and conditions, whether or not inconsistent with these trading terms and conditions, stipulated by any such third party, including the carriers, stevedores, warehousemen, government departments, 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 may at any time be.
- 16.2 If, notwithstanding the provisions of 15.2, 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, stevedore, warehouseman, government department 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.



## **17. GOODS REQUIRING SPECIAL ARRANGEMENTS**

Except under special arrangements previously made in writing the Company will not accept or deal with bullion, coins, banknotes, securities or other currency, precious stones, jewelry, valuables, antiques, pictures, human remains, livestock, plants, tobacco products, spirits, wine, mobile telephones and their components, or computers and their components or parts. Should the Customer nevertheless deliver such goods to the Company or cause the Company to handle or deal with any such goods otherwise than under special arrangements previously made in writing the Company shall incur no liability whatsoever in respect of such goods, and in particular, shall incur no liability in respect of its negligent acts or omissions in respect of such goods. A claim, if any, against the Company in respect of the goods referred to in this clause 17 shall be governed by the provisions of clauses 39 and 40.

## **18. GOODS REQUIRING PRIOR CONSENT OF THE COMPANY**

- 18.1 The Customer shall obtain in advance the Company's specific written consent to accept into its possession or control or into the possession or control of any of its servants, sub-contractors, agents or employees any goods, including radio-active materials, which are or may become perishable, dangerous, inflammable or noxious, or which by their nature may injure, damage, taint or contaminate, or in any way whatsoever adversely affect any person, goods or property, including goods likely to harbour or attract vermin or other pests, or any goods defined as hazardous and/or dangerous in the Tariff or rules for carriage of TransNamib Holdings Limited, or so classified in the IMDG Code or any other code or regulations of, or published by, any other International Organisation. The Customer warrants that such goods, or the case, crate, box, drum canister, tank, flat, pallet, package or other holder or covering of such goods will comply with any applicable laws, regulations or requirement of any authority or carrier and that the nature and characteristics of such goods and all other data required by such laws, regulations or requirements will be prominently and clearly marked on the outside cover of such goods.
- 18.2 If any such goods are delivered to the Company, whether or not in breach of the provisions of clause 18.1, such goods may for good reason as the Company in its discretion deems fit including, without limitation, the risk to other goods, property, life or health be destroyed, disposed of abandoned or rendered harmless or otherwise dealt with at the risk and expense of the Customer and without the Company being liable for any compensation to the Customer or any other party, and without prejudice to the Company's rights to recover its charges and/or fees including the costs of such destruction, disposal, abandonment or rendering harmless or other dealing with the goods. The Customer indemnifies the Company against all loss, liability or damage caused to the Company as a result of the tender of goods to the Company.

## **19. PERISHABLE GOODS**

- 19.1 Without limiting or affecting any other terms of these trading terms and conditions, goods (whether perishable or otherwise) in the care, custody or control of the Company may at the Customer's expense be sold by private treaty or public auction or otherwise, or otherwise disposed of by the Company, in its sole discretion, without notice to the Customer, sender, owner or consignee, if –
- 19.1.1 such goods have begun to deteriorate or are likely to deteriorate;
- 19.1.2 such goods are insufficiently addressed or marked;
- 19.1.3 the Customer cannot be identified; or
- 19.1.4 the goods have not been collected or accepted by the Customer or any other person after the expiration of 21 days from the company notifying the Customer in writing to collect or accept such goods, provided that if the Company has no address for the Customer such notice period shall not be necessary, and payment or tender of the net proceeds, if any, of the sale thereof after deduction of those charges and expenses incurred by the Company in respect thereof shall be equivalent to delivery of such goods.
- 19.2 Should any amount owing by the Customer to the Company in respect of any matters referred to in clause 19.1 become due and payable and remain unpaid, or in the event that any goods are not accepted for delivery as provided for in 20 below, the Company shall be entitled and the Customer hereby authorises 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.

## **20. THE ACCEPTANCE OF DELIVERY**

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

20.1 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

20.2 the provisions of clause 19.2 shall apply mutatis mutandis.

## **21. FORCE MAJEURE**

21.1 Where a Force Majeure Event gives rise to a failure or delay in either party performing its obligations under these terms and conditions (other than obligations to make payment), those obligations will be suspended for the duration of the Force Majeure Event.

21.2 A party who becomes aware of a Force Majeure Event which gives rise to, or which is likely to give rise to, any failure or delay in performing its obligations under these terms and conditions, will:

(a) forthwith notify the other; and

(b) inform the other of the period for which it is estimated that such failure or delay will continue.

21.3 The affected party will take reasonable steps to mitigate the effects of the Force Majeure Event.

## **22. SUNDRY GOODS RECOGNISABLE AS THE CUSTOMER'S**

The company shall have no obligation to take any action in respect of any goods which may be recognisable as belonging to the Customer unless and until it receives suitable instructions relating to those goods together with all necessary documents.

## **23. EXAMINATION OF LANDED GOODS**

The company will not be responsible for examining or counting of any goods received. All examinations and declarations are to be administered by the Customer and or their agent.

## **24. DUTIES, TAXES, IMPOSTS, LEVIES AND DEPOSITS**

The Customer, shall be liable for any duties, taxes, imposts, levies, deposits or out-lays of whatsoever nature levied by or payable to the authorities, intermediaries or other parties at any port or place for or in connection with the goods and/or people transported and whether at the time of transport and/or at any subsequent time and for any payments, fines, penalties, expenses, loss or damage or whatsoever incurred or sustained by the Company in connection therewith or arising thereout.

## **25. SAFETY BRIEFING**

All crew and where applicable, other persons to be transported by Company, shall prior to boarding the Company's vessels undertake and be bound by the contents of a safety briefing provided by the skipper of the vessel. After such briefing has been completed, all crew and persons to be transported shall sign the acknowledgment of understanding and acceptance of the release and waiver, which documents shall be made available to the Customer at an earlier date if requested.

## **26. PAYMENT BY THE CUSTOMER**

- 26.1 Unless otherwise specifically agreed by the Company in writing the Customer shall pay to the Company in cash immediately upon presentation of account all sums due to the Company without deduction or set-off and payments shall not be withheld or deferred on account of any claim or counterclaim which the Customer may allege.
- 26.2 Payment of all amounts due to the company shall be made:
- 26.2.1 Free of exchange and any other charges at such address as the company may require.
- 26.2.2 In such currency as the Company may direct.
- 26.2.3 Without demand and free of any deduction or set off on the due date of payment.
- 26.3 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.
- 26.4 All and any moneys 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.
- 26.5 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.
- 26.6 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.

## **27. DEBITING FEES AND DISBURSEMENTS**

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.

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

- 28.1 Subject to the provisions of clause 49, and notwithstanding any prior dealings between the Company and the Customer all documents, cash, 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.
- 28.2 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.

## **29. QUOTATIONS & ESTIMATES**

- 29.1 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.
- 29.2 Without in any way limiting the provisions of clause 29.1 all quotations, estimates and agreements are subject to revision without notice, having regard to changes in currency exchange rates and upward movements in amounts payable by or on behalf of, or at the instance of the Company to third parties, including, without limitation, freight,



surcharges, insurance premiums, equipment rental and labour which charges and upward movements take place after quotation. Any revision of rates as aforesaid will be commensurate with the change in the currency exchange rate or the increase in such amounts payable. Any such increase shall, failing agreement between the parties, be determined by the then auditors of the Company or any other auditors nominated by the Company, who in such determination shall act as experts and not as arbitrators and whose decision shall be final and binding on the parties.

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

The Customer undertakes that no claim shall be made against any director, servant, (including any independent contractor employed from time to time by the Company), agent 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.

### **31. CUSTOMER'S ORAL INSTRUCTIONS**

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.

### **32. VARIATION OF THESE TRADING TERMS AND CONDITIONS**

No variation of these trading terms and conditions shall be binding on the Company unless embodied in a written document signed by the managing director personally, or alternatively by two other duly authorised directors of the Company. Any purported variation or alteration of these trading terms and conditions otherwise than as set out above shall be of no force and effect, whether such purported variation or alteration is written or oral, or takes place before or after receipt of these standard trading terms and conditions by the Customer.

### **33. NON-WAIVER**

No waiver of any of these terms and conditions shall be binding or effectual for any purpose unless in writing and signed by or on behalf of the party giving the same. Any such waiver will be effective in a specific instance and for the purpose given. No failure or delay on the part of either party hereto in exercising any right, power or privilege hereunder will constitute or be deemed to be waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

### **34. GOVERNING LAW**

These trading terms and conditions and all agreements entered into between the Company and the Customer pursuant thereto and on the terms thereof shall be governed by and construed in accordance with the laws of Namibia.

### **35. SUBMISSION TO JURISDICTION**

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 superior court or in an inferior court, notwithstanding that the amount of the claim may exceed the jurisdiction of that inferior court, to which jurisdiction the Customer hereby consents.



## **36. 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 whether or not they are customarily retained by or paid to freight forwarders, warehousemen or transporters and shall not be obliged to disclose or account to the Customer, or principal for any such amounts received or receivable by it.

## **37. LIEN**

37.1 All goods and documents relating to goods including bills of lading and import permits, as well as all refunds, repayments, claims and other recoveries, shall be subject to a special and general lien or pledge either for moneys due in respect of such goods or for other moneys due to the Company from the Customer, sender, owner, consignee, importer or the holder of the bill of lading or their agents, if any.

37.2 In delivering the goods 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.

37.3 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.

37.4 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 37.1 and 37.2, shall operate as a first and prior charge against the goods and the documents relating to the goods and no other security shall rank prior to the Company's lien, pledge or right of retention.

## **38. INDEMNITY BY THE CUSTOMER**

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, third party claims, 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 in relation to any services and in particular, but without limitation of the foregoing, in respect of any liability whatsoever which may be incurred

38.1 arising from the failure of any warranty given to the Company in respect of the goods being true and correct; and/or

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

38.3 in respect of any goods referred to in clause 18. 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; and/or

38.4 from any perils of the sea or force majeure event.



## **39. LIMITATION OF COMPANY'S LIABILITY**

39.1 Subject to the provisions of clause 39.2 and clause 40, 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 –

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

39.1.2 any act or omission of the Customer or agent of the Customer with whom the Company deals; and/or

39.1.3 any loss, damage or expense arising from or in any way connected with the marking, labelling, numbering, non-delivery or mis-delivery of any goods; and/or

39.1.4 any loss, damage or expense arising from or in any way connected with the weight, measurements, contents, quality, inherent vice, defect or description of any goods; and/or

39.1.5 any loss, damage or expense arising from or in any way connected with 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, stoppage or restraint of labour; and/or

39.1.6 damages arising from loss of market or attributable to delay in forwarding or in transit or failure to carry out any instructions given to the Company; and/or

39.1.7 loss or non-delivery of any separate package forming part of a consignment or for loss from a package or an unpacked consignment or for damage or mis-delivery; and/or

39.1.8 damage or 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 46 hereof or otherwise.

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

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

40.1 In the event that the Company is liable to the Customer in terms of clause 39.1, or otherwise, in no such case whatsoever shall any liability of the Company, howsoever arising, exceed whichever is the least of the following respective amounts –

40.1.1 the value of the goods evidenced by the relevant documentation or declared by the Customer for customs purposes or for any purpose connected with their transportation;

40.1.2 the value of the goods declared for insurance purposes;

40.1.3 Should the Customer suffer Loss or Damage not covered by the insurance policies referenced in clause 10 the collective liability of the Company, shall be and is in all instances limited to N\$50 000,00;

40.2 If it is desired that the liability of the Company in those cases where it is liable to the Customer in terms of clause 39.1 should not be governed by the limits referred to in clause 40.1, written notice thereof must be received by the Company before any goods or documents are entrusted to or delivered to or into the control of the Company (or its agents or sub-contractors), together with a statement of the value of the goods. Upon receipt of such notice the Company may in the exercise of its absolute discretion agree in writing to its liability being increased to a maximum amount equivalent to the amount stated in the notice, in which case it will be entitled to effect special insurance to cover its maximum liability and the party giving the notice shall be deemed, by so doing, to have agreed and undertaken to pay the Company the amount of the premium payable by the Company for such insurance. If the Company does not so agree the limits referred to in clause 40.1 shall apply.

## **41. GENERAL AVERAGE**

The Customer indemnifies and holds harmless the Company in respect of any claims of a general average nature which may be made against the Company and the Customer shall provide such security as may be required by the Company in this connection.

## **42. BREACH**

42.1 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.

42.2 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.

42.3 The Company shall be entitled to cancel any agreement between it and the Customer by written notice if – 42.3.1 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;

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

42.3.3 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;

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

42.3.5 Any provisional or final 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;

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

## **43. 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.

## **44. DISPUTES**

44.1 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 obligations in terms of any such agreement as though the Company had performed properly and to the Customer's satisfaction.

44.2 The Customer's remedy, having performed its obligations as provided in clause 44.1, shall be limited to an action against the Company for repayment of either the whole or portion of the amount which the Customer alleges, constitutes an overpayment.

44.3 Without affecting the generality of clauses 44.1 and 44.2 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.

44.4 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.

## 45. SEVERABILITY

If any provision of these terms and conditions is unenforceable, then the Company shall be entitled to elect (which election may be made at any time) that such provision shall be severed from the remaining provisions of these terms and conditions which shall not be affected and shall remain of full force and effect.

## 46. TIME BAR

46.1 No claim of any nature whatsoever and howsoever arising in respect of any loss or damage to goods, mis-delivery of goods, delay in the delivery of any goods or in respect of any other damages, loss or cause of action whatsoever (whether or not similar to, or in the nature of, the foregoing), may be brought against the Company or (subject in any event to the provisions of clause 30) 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 end of any transit or 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 Customers knowledge, or the date when such cause should reasonably have come to their knowledge, or the date of delivery of the goods or, in the event that goods have not been delivered, the date upon which the goods should have been delivered in the ordinary course of business (whichever shall, as applicable, be the sooner),

46.2 In addition to clause 46.1 hereof, it is recorded that the Company shall in any event be discharged from all liability whatsoever and howsoever arising in respect of any service provided to the Customer or which the Company has undertaken to provide, unless summons or other process initiating legal proceedings is issued and served on the Company within nine months after the cause of action in respect of any such alleged liability arose and immediate notice is given in writing to the Company of such a suit having been brought.

## 47. 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.

## 48. NOTICES

All notices in terms of these trading terms and conditions shall be given in writing and delivered by hand or sent by telefax or e-mail. The Customer appoints as his/her/its *domicilium citandi et executandi* for all purposes under these standard terms and conditions its physical address, telefax number or e-mail address provided by the Customer to the Company on any letterhead, order or other document generated or completed by the Customer.



## **49. SPECIAL CONDITIONS RELATED TO ELECTRONIC DATA**

- 49.1 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.
- 49.2 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.
- 49.3 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.

