

HEMISPHERE FREIGHT SERVICES LIMITED

TERMS AND CONDITIONS OF TRADE



Introduction

1. These terms and conditions shall apply to all Carriage performed or undertaken by the Company and to every contract of Carriage entered into by the Company. Except as provided in paragraphs 4 and 5 below, all other terms, conditions or warranties, expressed or implied, are hereby excluded. The Company shall not be bound by any purported waiver or variation of these terms and conditions unless the same is in writing and signed by a Director of the Company.
2. If there is any inconsistency between these terms and conditions and the terms and conditions contained in any other document issued by or on behalf of the Company in connection with a particular Carriage of Goods, these terms and conditions shall prevail.
3. If any such other document referred to in paragraph (2) above deals with any matter not dealt with in these terms and conditions, then such matter only shall be governed by that other document.
4. These terms and conditions are subject only to any mandatory contrary provision of law. Where a mandatory contrary provision of law makes the whole or any part of these terms and conditions void or unenforceable, such part shall be severed and shall not affect the validity or enforceability of any other part. For the avoidance of doubt, sections 6-10 Contractual Remedies Act 1979 are hereby excluded.
5. If the Client has acknowledged in writing the supply of Services is for the Client's business purposes (as that term is defined in the Consumer Guarantees Act 1993) or if the Client has actually acquired the Services for such purposes, the Consumer Guarantees Act shall not apply to the transaction. Where the Act conditions and the Consumer Guarantees Act, the Consumer Guarantees Act shall prevail and any such conflict shall not be deemed to be an attempt to contract out of the Consumer Guarantees Act.

Interpretation

6. The following rules of interpretation shall apply unless the context clearly requires otherwise:
 - (a) The singular includes the plural and vice versa.
 - (b) A gender includes all genders.
 - (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
 - (d) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
 - (e) A reference to legislation or to a provision of legislation includes a modification, re-enactment or substitution of it, and any regulation or statutory instrument issued under it.
 - (f) A reference to conduct includes an omission, statement and undertaking, whether oral or in writing.

Definitions

Carriage means the carriage, storage, warehousing, packaging, handling, packing, unpacking, consolidation, despatch, loading of any Goods or any Container or both, and includes any such service provided by the Company as forwarding, transport, customs or shipping agent of the Client, and any services ancillary to or connected with any of the above.

Client means any person or entity which contracts (either as principal or agent for another) with the Company for the performance of the Carriage of or in respect of the Goods, and includes any person or entity who actually receives any such services.

Company means Hemisphere Freight Services Limited, its officers, employees, agents, Subcontractors and representatives and includes all subsidiaries and all companies related to any subsidiary of the foregoing.

Dangerous Goods means Goods which are volatile or explosive or which are or may become dangerous, flammable or offensive (including radioactive materials) or which may become liable to damage any person or property whatsoever and includes all Goods which fall or may fall within the definition of hazardous, dangerous, explosive, flammable or radioactive goods in any legislation, regulations, code or convention (whether or not legally enforceable) relevant to the Carriage of the Goods.

Goods means the goods, chattels or other items which are the subject of Carriage.

Premises means any place or places where Goods are held, warehoused, stored or removed from time to time.

Subcontractor means:

- (a) Any person, firm or corporation with whom the Company may arrange for the carriage of any Goods; and
- (b) Any employee, agent or subcontractor of any of the persons in paragraph (a) above.

Not a Common Carrier / Liability

7. The Company is not a common carrier and will accept no liability as such. The Company carries on business as a customs and forwarding agent and is not the actual carrier unless the Goods are carried on an aircraft, ship or other conveyance owned or operated by the Company. The obligations of the Company are limited to arranging Carriage of the Goods by a reputable carrier. The Goods are carried at the Client's risk and the Client authorises the Company to act as its agent to enter into the terms and conditions in the transport document on behalf of the Client.
8. The Company is authorised to arrange on any terms for the Carriage of the Goods by any Subcontractor. The Subcontractor shall then be entitled to the full benefit of these terms and conditions to the same extent as the Company. The Company shall be deemed to enter into any contract for the Carriage of the Goods for its own benefit and also for the benefit of and as agent and trustee for any Subcontractor and its and the Subcontractor's officers, employees, agents and representatives.
9. The Client agrees to indemnify the Company against any claim or allegation made against the Company by any person in connection with any liability arising out of or relating to the Goods or the Carriage of the same.
10. The Company may without notice to the Client adopt any means, mode, route or procedure whatsoever for the Carriage of Goods. If the Client instructs the Company to use a particular means, mode, route or procedure of Carriage the Company will use its best endeavours to follow such instruction but, if in the question of the Company it is unreasonable or impractical to follow such instruction the Client agrees that the Company is not bound to do so.
11. The Client warrants that it is either the owner or authorised agent of the owner of the Goods. By entering into this contract the Client accepts these terms and conditions on behalf of itself and all other persons having an interest in the Goods.
12. The Goods may, at the sole discretion of the Company and at the Client's risk and expense, be held at any Premises and may be moved from any Premises to any other Premises.
13. Neither the Company nor its Subcontractors, officers, employees, agents or representatives shall under any circumstances whatsoever be liable in negligence, any other tort, in contract or on any other basis whatsoever, and whether arising from misconduct or wilful default, for:
 - (a) Any loss or destruction of or damage to the Goods (including an deterioration, contamination or evaporation of any chilled, frozen, refrigerated or perishable Goods); or
 - (b) Any non-delivery, mis-delivery, delay in delivery of, or failure to produce the Goods;
 - (c) Any advice, representation, information (not being a quotation, advice, etc to which paragraph 14 applies), any assistance, or any service of any kind provided in any form by or on behalf of the Company in the course of or in connection with the Carriage of the Good;
 - (d) Any accident, injury, death or loss to any Goods, machinery, persons or property arising from the use of any vehicle, cargo handling appliances or other equipment;
 - (e) Any consequential or indirect loss whatsoever (including loss of profits or loss of market) arising from or in connection with any of the matters or things referred to in 13(a), (b), (c) or (d).
14. The Company shall not under any circumstances whatsoever be liable for any loss, damage, cost, fine or penalty sustained or incurred by the Client, the owner of the Good or any other person resulting from or in connection with any quotation, advice, prediction, forecast, statement, representation or information given of made by or on behalf of the Company, whether negligently or otherwise, as to liability of the Goods for customs duty, excise duty or any other impost or tax or as to the particular tariff or classification applicable thereto. Further, in giving or making any such quotation, advice, prediction, forecast, statement, representation or information, the Company relies solely on the information provided by the Client who warrants that the information provided by it to the Company accurately and completely describes all aspects of the Goods and the transaction or transactions relating to the acquisition, sale, importation and/or export of the Goods.
15. In all cases where liability has not been effectively excluded, whether by these terms and conditions or otherwise, the total liability of the Company to the Client or to any other person shall be limited to the lesser of:
 - (a) \$100;
 - (b) The value of the Goods at the time the Goods were received by the Company;
 - (c) A resupply of the Goods or payment of the cost of resupplying the Goods.
16. In any case to which the Carriage of Goods Act 1979 applies, the Company's liability shall at "limited carrier's risk" and the amount of such liability shall be calculated accordingly.
17. The Client shall indemnify the Company, its Subcontractors, officers, employees, representatives and agents against any claims against any of them arising from any of the matters in paragraph 13 and 14 of these terms and conditions.
18. Where the Company for any reason becomes liable to pay customs duty, excise duty, costs, expenses or penalties in respect of or in connection with the Goods or any documents relating to the Goods, the Client shall forthwith indemnify the Company in respect of all such sums, whether or not the liability on the Company arose from the Company's negligence or breach of contract.

Client Warranty

19. The Client warrants that it has complied with and will continue to comply with all laws, customs, conventions, codes and other regulations relating to the nature, condition, packaging, handling, storage and Carriage of the Goods and that the Goods are packed to withstand the ordinary risks of handling, storage and Carriage, having regard to their nature. The Client agrees to indemnify the Company for all liability and for all costs incurred by the company as a result of or arising out of a breach of this warranty.
20. The Client shall provide to the Company all such assistance, information, descriptions, valuations and documents as the Company considers to be necessary or prudent to enable the Company to comply with all relevant laws, customs, conventions, codes and regulations in a timely manner. The expenses and charges of the Company in effecting such compliance, and compliance with the requirements of any harbour, dock, airport, railway, shipping, customs, warehouse or other authority shall be paid by the Client.

Insurance

21. Insurance will not be arranged by the Company except on the express written instructions of the Client, and then only at the Client's expense and on lodgement of a declaration as to value prior to acceptance of the Goods by the Company. The insurance may be on the terms and conditions of a marine open cargo policy held by the company and if so the policy wording will be available on request. The company makes no representations and advice regarding any aspect of any insurance arranged for the Client, including as to the suitability or appropriateness of the insurance for the Client's requirements, the policy terms, conditions or exclusions or as to the competitiveness of the cost of the insurance. In the event of a claim the Client, shall have recourse solely against the insurer and the Company shall not be under any responsibility or residual liability to the Client, for the loss of or damage to the Goods or the failure of the policy to meet a claim in respect of the same. If the insurance is arranged under the Company's marine open cargo policy, the Client acknowledges that the Company may pay its insurer an annual or declaration premium, the effect being that the sum charged to the Client, is (a) not directly payable to the insurer and is therefore not held in trust by the Company for either the insurer or the Client, and (b) includes a fee component for the service the Company provides in securing insurance for the Client. The Client acknowledges and agrees that the Company is under no obligation to separately identify the fee component or to disclose the same at any time.

Dangerous Goods

22. The Client shall not tender any Dangerous Goods for Carriage without first providing the Company with a full written description of the Goods and the nature and degree of their volatility so they can be properly classified, described, packaged and labelled for Carriage in accordance with the provisions of all relevant laws, regulations, codes, customs and conventions. If the Client fails to do so, it shall be liable for any resulting loss or damage and shall indemnify the Company against all claims, liability, loss, damage, penalties and expense which the Company may suffer or incur. If the Goods are found to be explosive, flammable, noxious or otherwise dangerous, hazardous or likely to cause damage without having been described to the Company as provided above, the Goods may be destroyed or otherwise dealt with by, and at the sole discretion of, the Company or any other person in whose custody they may be at the relevant time without compensation to the Client and without prejudice to the Company's right to freight and charges. If such Goods are accepted under the arrangements previously made in writing, they may nevertheless be destroyed or otherwise dealt with if they become dangerous to any person, other goods or property.

Delay

23. The Company may make an additional charge in respect of any delay in connection with loading or unloading where the Company considers that the delay is unreasonable given the nature and position of the Goods and any other relevant circumstances and where the delay arises otherwise than from the default of the Company, such delay period commencing upon the Company reporting for loading or unloading. Labour for loading and unloading shall be the responsibility, and at the expense of, the Client..

Lien

24. The Company shall have a general and particular possessory lien upon all Goods (which in this clause includes any documents relating to those Goods) of the Client whatsoever which are or which come into the possession or under the control of the Company until all accounts or other sums due to the Company by the Client, consignee or owner of such Goods are paid in full (including all interest, costs and expenses incurred by the Company in recovering or enforcing payment of such accounts). The Company is entitled to detain any Goods and may decline to effect delivery even where accounts are not overdue for payment. The Company may sell all or any of the Goods by public auction or private treaty without notice to the Client and apply the proceeds of sale in satisfaction of the unpaid accounts (including all costs of detaining and selling the Goods). The lien claimed by this clause is in addition to and not in substitution for any other rights or remedies available to the Company by law or statute.

Freight and Charges

25. After any Services whatsoever have been rendered by the Company or any Subcontractor in respect of the Goods, freight shall be considered earned and shall be payable in full, without deduction or set-off, whether or not the Goods are delivered to the addressee and whether damaged in any way. Under no circumstances will any freight be refunded.
26. Any dates or times specified for departure or arrival at the point of collection or delivery are estimates only and shall not bind the Company
27. All Services shall be invoiced to the Client in accordance with the Company's tariff and charges in force from time to time or as agreed. Where any Services are to be carried out on a "cash sale" basis, the Client shall make payment in advance and the Company will not provide any Services until the Client has done so.
28. Where the Company agrees to provide Services to any Client without requiring payment in advance, the Client must:
- (a) Pay the full amount of any disbursements incurred by the Company on the Client's behalf, within seven days of receiving the Company's invoice detailing the same; and
- (b) Pay the balance of the account no later than the 20th day of the month following the date of the invoice.
29. If any payment is not made when due the Client shall, whether or not any demand has been made, pay to the Company interest on the amount outstanding at a rate of 1.5% per month calculated daily from the due date of the payment until payment is made in full. The Company's right to receive interest is in addition to all other rights which it has in respect of the Client's default. The Client shall indemnify the Company against all costs, charges and expenses, including legal fees on a solicitor / client basis, that the Company incurs in recovering any debt owed by the Client.
30. The Client shall remain responsible for all payments, charges and disbursements whatsoever in connection with the Carriage of the Goods notwithstanding that some other person may have agreed or be liable to pay those sums. Any special rates quoted are available only to the person receiving the quotation and are not transferable. The Carrier is authorised to accept at the Client's risk cheques in payment of 'C.O.D.' collections and accepts no responsibility or liability in respect of such acceptance.
31. If the Company is requested by the Client to perform or undertake Carriage but that request is cancelled before the Carriage has been substantially performed, the Company may require the client to pay all proper costs incurred by the Company prior to the cancellation of the Carriage request.
32. Quotations do not constitute a binding offer by the Company and lapse forthwith and without notice if, in the opinion of the Company, there has been a change in the circumstances in which the quotation was given. All quotations may be revised by the Company. All quotations are conditional on the Goods having been fully and properly and not misleadingly or deceptively described to the Company. In the event that the Goods are in any way not accurately described, the Company may at any time withdraw the quotation whether or not the offer contained in it has been accepted. In the event that the Company is held liable for any loss or damage to any person, property or goods as a result of a misdescription, the Client shall indemnify the Company in respect of such liability.
33. Unless otherwise stated, no quotation will include the cost of crane hire, road tax, permits, toll, escort and detention, demurrage and storage charges, fuel surcharges imposed by any airline, shipping company or other transport operator and any other additional costs and expenses incurred by the Company in the course of or in connection with the Carriage of the Goods (including charges for any additional advice, assistance or services not reasonably foreseen or contemplated by the Company at the time the quotation was made), all of which shall be charged in addition to the quoted sum.

Claims

34. Any claim for loss or damage must be notified in writing to the Company within three (3) days of delivery of the Goods or the date upon which the Goods should have been delivered, failing which the Company shall be discharged of all liability howsoever arising. Time shall be of the essence of this clause. An endorsement on a freight note, delivery docket or similar does not constitute notice in writing for the purposes of this clause.
35. The Company shall be discharged from all liability unless suit is filed and served on the Company within nine months after completion of the Services, delivery of the Goods or the date when the Goods should have been delivered, whichever occurs first. The Company hereby expressly contracts out of the operation of section 19 of the Carriage of Goods Act 1974, including without limitation, the operation of section 19(4) of that Act, which shall be of no application whatsoever.

Brokerage etc

36. The Company may be paid and retain all brokerages, commissions, allowances and other remunerations customarily retained by or paid to customs, shipping and forwarding agents and insurance brokers, whether declared or otherwise, and no such brokerage, commission, allowance or other remuneration shall be payable or allowable to the Client. The Client acknowledges and agrees that the Company is under no obligation to separately identify any brokerage, commission, allowance or other remuneration or to disclose the same at any time.

Personal Property Securities Act 1999

- 37.1 Without limiting anything else in these terms and conditions, Client acknowledges that:
- (a) these terms and conditions create, in favour of the Company, a security interest in all present and after acquired Goods (being, for the avoidance of doubt, all the Client's present personal property and after-acquired property except for any item of personal property which has not or which is exclusively the proceeds of any item of personal property which has not) been supplied by the Company to (or for the account of) the Client) to secure the payment by the Client to the Company of the any amount owing by the Client to the Company; and
- (b) these terms and conditions will apply notwithstanding anything, express or implied, to the contrary contained in any purchase order (or its equivalent, whatever called) of the Client; and
- (c) the security interest shall continue until the Company gives the Client a final release.
- 37.2 The Client undertakes to:
- (a) promptly do all things, sign any further documents and/or provide any information which the Company may reasonably require to enable the Company to perfect and maintain the perfection of its security interest (including by registration of a financing statement);
- 37.3 The Client waives its right to receive a verification statement in respect of any financing statement relating to the Security interest.
- 37.4 To the extent permitted by law, the Client and the Company contract out of:
- (a) section 114(1)a of the PPSA; and
- (b) the Client's rights referred to in sections 107(2) (c), (d), (h) and (i) of the PPSA.
- 37.5 The Client agrees that the security interest has the same priority in relation to all amounts forming part of the amount owing, including future advances.
- 37.6 If an event of default occurs:
- (a) take possession of any Goods; and/or
- (b) sell or otherwise dispose of any Goods,
- In each case in such manner and generally on such terms and conditions as it thinks fit, and, in each case, otherwise do anything the Client could do in relation to those Goods. Section 109(1) of the PPSA is contracted out of in respect of particular Goods if, and only for so long as, the Company is not the secured party with priority over all other secured parties in respect of those Goods. As the Clients agent, the Company (and its employees and agents) may, without prior notice, enter any land or premises where the Goods are kept in order to take possession of and/or remove them, without being responsible for any damage caused in doing so. The Client agrees to procure all other rights (including consents) necessary to enable, and to indemnify the Company (and its employees and agent's) against any liability incurred in connection with, such entry, taking of possession and removal. The Company may resell any of the Goods and apply the proceeds of sale in reduction of the Amount Owing.

Law and Jurisdiction

These terms and conditions and all contracts of Carriage are subject to the laws of New Zealand and any claim or dispute arising under them shall be solely determined by the courts of New Zealand.