

## TERMS AND CONDITIONS OF FREIGHT FORWARDING SERVICES

### 1. DEFINITIONS

1.1. In these terms and conditions, unless the context otherwise requires:

- a) "Carriage" includes carriage to, beyond or within New Zealand;
- b) "Carrier" means any person who is engaged by the Freight Forwarder on behalf of the Customer to undertake any part of the Carriage of the Goods;
- c) "Contract" means these terms together with the terms of any quotation, order or other arrangement to which these terms apply and any consignment note in respect of the Goods and, if the Carriage includes airfreight or seafreight, the terms of such freight provided to the Customer by the Freight Forwarder;
- d) "Containers" includes any container, trailer, transportable tank, flat or pallet, or any similar article of transport used to consolidate goods;
- e) "Contractor" means any person who is engaged or appointed by the Freight Forwarder on behalf of the Customer to undertake any part of the Handling of the Goods;
- f) "Customer" means the person who instructs the Freight Forwarder to undertake Freight Forwarding Services and who may be the consignee or the consignor of the Goods, or the person acting on behalf of any such person;
- g) "Dangerous Goods" includes any "hazardous substance" or "new organism" (as defined in the Hazardous Substances and New Organisms Act 1996) and any noxious, explosive, inflammable liquids or materials, poisons, corrosive substances and liquids, compressed gases, acids, radioactive substances, and any other goods, substances or liquids which in the opinion of the Freight Forwarder could cause damage or injury to other goods or to property or persons, or any goods harbouring or likely to harbour or encourage vermin, borer, an "unwanted organism" (as defined in the Biosecurity Act 1993) or other pests;
- h) "Freight Forwarder" means **Toll Networks (NZ) Limited trading as Express Logistics** and, where appropriate, also includes all other persons entitled to the benefit of these terms and conditions;
- i) "Freight Forwarding Services" includes the whole of the operations and services to be performed by the Freight Forwarder (including any incidental part of the Handling of the Goods) in connection with implementing the On-Forwarding Instructions and procuring or otherwise making the arrangements for the Carriage and Handling of the Goods;
- j) "Goods" means the goods or other cargo accepted by, or which are the subject of instructions issued to, the Freight Forwarder from or on behalf of the Customer, and including any Container not supplied by or on behalf of the Freight Forwarder;
- k) "Incidents" includes unloading, packing, storage, trans-shipment, unloading, loading, handling, delivery and any other incidental services;
- l) "On-Forwarding Instructions" means any instructions given by or on behalf of the Customer to the Freight Forwarder in respect of the Carriage and Handling of the Goods;

"Owner" includes the Customer, consignee, receiver of the Goods, any person now or hereafter owning or entitled to possession of the Goods, and all other persons who are or may hereafter become otherwise interested in the Goods (other than the Freight Forwarder);

"Valuables" includes currency, bonds, bullion, coins, precious stones, jewellery, watches and works of art as relevant to the Carriage of the Goods, including his contract and other obligations and need for insurance;

1.2. References to the masculine gender shall include feminine gender and the neuter and vice versa.

1.3. Headings are inserted for convenience only and shall not affect the interpretation of these terms and conditions.

1.4. A reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated.

1.5. A reference to legislation includes any regulations promulgated under that legislation and any amendments to such legislation and regulations from time to time and to any replacement legislation.

### 2. CONSUMER GUARANTEES ACT 1993

2.1. The provisions of the Consumer Guarantees Act 1993 are hereby expressly excluded (and shall not apply) where Freight Forwarding Services are acquired for the purposes of a business.

2.2. Where (in any other circumstances) the Consumer Guarantees Act 1993 applies, this Contract shall be read subject to the application of that Act and, in the case of any conflict or inconsistency, the provisions of that Act will apply.

### 3. WARRANTIES BY THE CUSTOMER

3.1. The Customer hereby represents and warrants that:

- a) he has full and exclusive legal and beneficial title to the Goods or is the authorised agent of the person with such title;
- b) he is authorised to accept and is accepting these terms and conditions not only for himself but also as agent for and on behalf of the Owner;
- c) he is competent and has all necessary knowledge of the matters affecting the conduct of his business as relevant to the Carriage of the Goods, including his contract and other obligations and need for insurance;
- d) all marks, weights, numbers, brands, contents, descriptions, values and other particulars or information given to the Freight Forwarder with respect to the Goods are accurate and complete;
- e) the Goods are fit to be carried and stored in the condition and packaging in which they are tendered to the Freight Forwarder (or in accordance with the Customer's instructions, if the Goods are tendered with instructions that the Freight Forwarder arrange packaging);
- f) the Customer and the Owner have complied with all applicable laws and obligations and have obtained all necessary consents and authorisations in respect of the Goods and the Handling, packing and Carriage of the Goods;
- g) the Customer hereby indemnifies the Freight Forwarder on demand against all claims, losses, costs and expenses, penalties and fines, or any other liability arising in consequence of a breach of any warranty or representation set out in clause 3.1.

### 4. FORWARDING AGENT

4.1. The Freight Forwarder is providing the Freight Forwarding Services as agent of the Customer and not as a common carrier. The Freight Forwarder reserves the right to refuse to perform its services for any person, or to arrange Carriage, storage, packing or Handling for any class or particular consignment of goods.

4.2. The Freight Forwarder shall not be liable as a forwarding agent (and shall not procure or arrange Carriage and Handling of the Goods to be undertaken by other persons on behalf of the Customer).

4.3. Where, in any circumstances, the Freight Forwarder enters into a contract with any other person for the Carriage or Handling of the Goods, the Freight Forwarder does so as an agent for and on behalf of the Customer. Any such contract shall be a direct contract between the Customer and the third party.

4.4. The Carriage and Handling of the Goods by any Carrier or Contractor are and shall be regarded as operations and services distinct from the Freight Forwarding Services provided by the Freight Forwarder.

### 5. SUBCONTRACTING

5.1. The Freight Forwarder and any subcontractor shall be entitled to subcontract on any terms part or all of the Freight Forwarding Services.

5.2. The Customer undertakes that no claim or allegation shall be made by the Customer or the Owner against any persons (other than the Freight Forwarder) by whom (whether as subcontractor, agent or otherwise) the Freight Forwarding Services or any part thereof are performed or undertaken which imposes or attempts to impose upon any such person any liability whatever in connection with the Goods whether or not arising out of negligence on the part of such person and if such claim or allegation should nevertheless be made to indemnify the Freight Forwarder against such claim or allegation is made against the consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the Freight Forwarder as if such provisions were expressly for his benefit and in entering into this Contract the Freight Forwarder is and shall be deemed to be acting as agent and trustee on behalf of and for the benefit of all such persons and each of them shall to this extent be deemed to be parties to this Contract.

### 6. FREIGHT FORWARDING SERVICES

6.1. The Freight Forwarder shall be entitled to enter into and vary contracts on behalf of the Customer for:

- a) the Carriage of Goods by any route, means and carrier;
  - b) the Handling of the Goods by any person at any place and for any length of time; and
  - c) any other matter the Freight Forwarder considers necessary or desirable in respect of the performance of this Contract, and the Customer authorises the Freight Forwarder to undertake all such other acts as it may in its absolute discretion consider necessary or incidental thereto. The Freight Forwarder may depart from the On-Forwarding Instructions in any respect if in the opinion of the Freight Forwarder it is necessary or desirable to do so.
- 6.2. The Customer hereby expressly appoints the Freight Forwarder as his forwarding agent and authorises it to do so. The Freight Forwarder shall be deemed to be acting as agent and trustee on behalf of and for the benefit of all such persons and each of them shall to this extent be deemed to be parties to this Contract.

6.3. The Customer agrees that the Carriage and Handling of the Goods will be subject to (and the Customer will be bound by) the terms, conditions, stipulations and limitations, arising at law in connection with the Carriage and Handling of the Goods, or contained in any documents issued by or customarily relied upon by a Carrier or Contractor including without limitation any consignment note, air waybill or other contractual document, or conditions of carriage (in each case, irrespective of whether such document is signed by the Customer or not). In the event of any inconsistency between these terms and another document forming part of the Contract, the Freight Forwarder shall determine which document shall take precedence.

6.4. The Customer will not seek (and will ensure that the Owner will not seek) to impose on any Carrier or Contractor any liability greater than that accepted or undertaken by virtue of the contract entered into by the Freight Forwarder and agrees that any liability so imposed shall be invalid to the extent of any excess.

6.5. The Freight Forwarder shall not be obliged to make any declaration as to the nature or the value of any goods, or as to any other matter or things unless required by law or expressly required by the Customer or not).

6.6. The Freight Forwarder shall not be obliged to arrange for the Goods to be carried, stored or handled separately from other goods or cargo.

6.7. The Customer undertakes not to tender any Dangerous Goods, Valuable Goods, livestock, plants or perishable Goods for Carriage, except pursuant to a special

arrangement previously agreed in writing. If the Customer, without such agreement, delivers any such goods to the Freight Forwarder, then the Customer shall be liable for all loss or damage whatever (whether direct, indirect or consequential) caused by the Customer or in connection with any such goods however caused or arising and the Owner shall, on demand, indemnify the Freight Forwarder from and against all penalties, claims, demands, damages, costs and expenses whatever arising in connection therewith which are imposed upon, or suffered or incurred by, the Freight Forwarder.

6.8. Any livestock, plants or Dangerous Goods which are not the subject of a special arrangement previously agreed in writing may be destroyed or otherwise dealt with in accordance with the sole discretion of the Freight Forwarder or any other person in whose custody any such goods may be at the relevant time. If such goods are accepted by special arrangement previously agreed in writing they may nevertheless be destroyed or otherwise dealt with if it is deemed necessary or prudent to do so in the sole and absolute discretion of the Freight Forwarder or any other person in whose custody they may be at the relevant time.

### 7. CHARGES

7.1. The Freight Forwarder's charges shall be deemed to be fully earned on receipt of the Goods by the Freight Forwarder and are payable on a non-refundable basis irrespective of whether the Goods are delivered to the consignee.

7.2. The Freight Forwarder may fix its charges by weight, measurements or value, and may at any time re-weigh, re-measure or re-value or require the Goods to be re-weighed, re-measured or re-valued and may adjust its charges accordingly.

7.3. All quotations given by the Freight Forwarder are based on costs prevailing at the date of the quotation in respect of freight, insurance and other charges, rates of exchange or currency conversion, taxes, duties and other imposts, and on the latest available quotations from carriers utilised by the Freight Forwarder. Any increase at any time in costs or imposts or in any of the foregoing shall be to the Customer's account and that price payable by the Customer shall be increased accordingly. The Customer is not entitled to a refund if there is a decrease in such costs or if the actual cost for such matter is less than the amount accepted by the Customer.

7.4. The Freight Forwarder's charges, and any other amounts payable to the Freight Forwarder, shall be paid on or before the due date for payment without deduction or deferment on account of any claim, counterclaim or setoff. The due date for all amounts payable to the Freight Forwarder is the date or dates communicated by the Freight Forwarder in writing and shall be strictly observed (time being of the essence).

7.5. Notwithstanding any direction that part or all of the Freight Forwarder's charges shall be payable by any particular person, the Customer shall remain liable to the Freight Forwarder for all of the Freight Forwarder's charges.

7.6. Should payment of the Freight Forwarder's charges not be made by the due date, the Customer shall pay default interest on all monies outstanding at a rate equal to 4% above the Freight Forwarder's bank's indicator lending rate from time to time (as stated by the Freight Forwarder) calculated on a daily basis from such date until the date on which payment is actually received by the Freight Forwarder but the Freight Forwarder's right to claim interest pursuant to this clause shall be without prejudice to the Freight Forwarder's other rights and remedies in respect of the default in making payment by the due date.

7.7. If at any time payment of the Freight Forwarder's charges is in arrears, any subsisting obligations of the Freight Forwarder may be suspended and the Freight Forwarder shall not be under any liability to the Customer or the Owner during any such period of suspension.

7.8. Unless otherwise stated, the Freight Forwarder's charges are exclusive of any GST. To the extent that any GST is payable, such amount shall be payable by the Customer to the Freight Forwarder at the same time as the payment to which it relates is due.

### 8. DISBURSEMENTS AND EXPENSES

8.1. The Freight Forwarder may, at its discretion pay, and the Customer shall on demand reimburse and indemnify the Freight Forwarder for, any duties, taxes and other charges, costs or disbursements paid, or any expenses incurred (including penalties and other costs arising as a result of the Customer failing to pay such amounts), by the Freight Forwarder in connection with the performance of the Freight Forwarding Services.

8.2. All costs, expenses or charges incurred by the Freight Forwarder in respect of any arrangement made, or any contract entered into or any other form of liability shall be recoverable from the Customer pursuant to clause 8.1, notwithstanding that any such arrangement, contract or liability was not known or contemplated by the Customer. To the extent that any time entering into this Contract or the date of the On-Forwarding Instructions.

8.3. Notwithstanding clauses 8.1 and 8.2, the Freight Forwarder shall be under no obligation to incur and pay any costs, expenses or charges except where the Customer has put the Freight Forwarder in sufficient funds so as to meet the same.

### 9. INSURANCE

9.1. The Freight Forwarder will be under no obligation to arrange insurance on the Goods as the agent of the Customer unless the Customer gives the Freight Forwarder express written instructions to do so (in which case the Freight Forwarder will arrange such insurance as agent of the Customer).

9.2. The Freight Forwarder may, in its discretion, effect separate insurance cover the type of which policy shall be at the Freight Forwarder's discretion, including (without limitation) an open or general policy.

9.3. All such insurances shall be at the expense of the Customer and will be subject to the usual exemptions and conditions of the policies of the insurer or underwriter accepted by the Freight Forwarder. The Freight Forwarder shall be under no obligation to incur and pay any costs, expenses or charges except where the Customer has put the Freight Forwarder in sufficient funds so as to meet the same.

### 10. RETENTIONS OF BROKERAGES AND REMUNERATIONS

10.1. The Customer hereby acknowledges that the Freight Forwarder may have a pecuniary interest in any contract entered into by the Freight Forwarder as agent for or on behalf of the Customer or the Owner pursuant to the provisions of these terms and conditions.

10.2. The Freight Forwarder shall be entitled to receive, be paid and retain, and the Customer hereby expressly consents to the receipt by the Freight Forwarder of, all brokerages, commissions, discounts, rebates, bonuses, deduction, allowances and other remunerations customarily received or retained by or paid to forwarding agents.

10.3. The Freight Forwarder shall not be bound to disclose to the Customer or the Owner the nature or amount of any such remunerations received or receivable by the Freight Forwarder.

### 11. LIEN

11.1. The Freight Forwarder shall have the right of detention of, and a particular and general lien on, the Goods and any other goods (and any documents relating thereto) of the Customer or the Owner in the possession or control of the Freight Forwarder at any time for all sums payable to the Freight Forwarder in respect of the Goods or for any particular transaction or general balance due from the Customer or the Owner. If any monies due to the Freight Forwarder are not paid forthwith after notice has been given to any person from whom the monies are due that the Goods or any other goods of the Owner are being detained, they may be sold by auction or otherwise at the sole discretion of the Freight Forwarder and at the expense of such persons, and the net proceeds of sale applied in or towards satisfaction of such indebtedness. Failing the giving of any such notice, the Freight Forwarder shall have the right to sell any such goods by auction or otherwise after the Freight Forwarder has informed or made reasonable endeavours to inform the Customer that it will dispose of the goods and apply the proceeds as mentioned. Any such sale or disposition shall not prejudice or affect the Freight Forwarder's right to recover from such persons any balance due or payable to the Freight Forwarder hereunder in respect of services provided hereunder or the costs of any such detention and sale or other disposition.

### 12. STORAGE OF PERISHABLE GOODS ON SITE

12.1. Clauses 12.2 to 12.5 apply to all perishable goods which may at any time be held or stored at the Freight Forwarder's premises.

12.2. All perishable goods are held, handled and stored at the Customer's and the Owner's risk.

12.3. The Freight Forwarder shall be entitled to refuse to handle any perishable goods which in its opinion are unfit for storage and may, if any perishable goods subsequently become unfit for storage, have such goods removed from the premises at the Customer's expense and, where appropriate, dispose of them in accordance with clause 13.1(b).

12.4. The Customer warrants and represents that any perishable goods stored by the Freight Forwarder shall be free from any detectable and/or objectionable matter, substance or odour which may soil, contaminate or otherwise prejudicially affect other goods in the store.

12.5. The Customer hereby indemnifies the Freight Forwarder, on demand, from and against all claims, losses, costs and expenses, penalties and fines, or any other liability arising in the consequence of a breach of the warranty set out in clause 12.4.

### 13. SALE AND DISPOSAL OF GOODS

13.1. The Freight Forwarder shall be entitled at the expense of the Customer to sell or dispose of:

a) on 21 days notice in writing to the Customer or where the Customer cannot be traced, after such goods have been held by the Freight Forwarder for 90 days, all goods which in the opinion of the Freight Forwarder cannot be delivered, either because they are insufficiently or incorrectly addressed or because they are not collected or accepted by the consignee or for any other reason;

b) without notice to the Customer or the Owner, any perishable goods which are not taken up immediately after delivery and which are insufficiently or incorrectly addressed or marked or otherwise are not readily identifiable, or which in the opinion of the Freight Forwarder appear to be deteriorating or would be likely to perish during the course of the Carriage and Handling of the Goods.

13.2. Any goods which the Freight Forwarder is, in accordance with this Contract, entitled to sell or dispose of may be sold by auction or otherwise at the discretion of the Freight Forwarder. All charges and expenses in connection with the sale or disposal of such goods shall be paid by the Customer and payment or tender of the net proceeds of the sale or disposal, after deduction of all such charges and expenses and any other indebtedness of the Customer to the Freight Forwarder, shall be

equivalent to delivery. Any such sale or disposal shall not prejudice or affect the Freight Forwarder's rights to recover from any person any balance due or payable to the Freight Forwarder in respect of any services provided by it or any costs associated with the detention and sale of the goods.

### 14. LIABILITY OF THE FREIGHT FORWARDER

14.1. Where, and to the extent that, the provisions of the Carriage of Goods Act 1979 (hereinafter called "the Act") apply to this Contract, the Contract shall be "at limited carrier's risk" as that term is defined by the Act, unless any consignment note in respect of the Goods provides that the Contract is "at owner's risk" in accordance with the Act (in which case the Contract shall be "at owner's risk" (as defined in the Act)). The provisions of sections 18, 19 and 20 of the Act are hereby excluded and all other sections from 1 to 27 of the Act shall apply only to the extent that such provisions are not inconsistent with this Contract.

14.2. Subject to clause 2.2 and the provisions of the Act (as modified or excluded by clause 14.1) imposing liability on the Freight Forwarder in respect of loss or damage to the Goods, the Freight Forwarder shall not be under any liability whatever and however caused or arising and (without limiting the generality of the foregoing) whether caused by or arising as a result of negligence or breach of contract on the part of the Freight Forwarder or otherwise for:

a) any damage to or loss, deterioration, contamination, mis-delivery, delay in delivery or non-delivery of the goods;

b) any loss of or damage to perishable goods due to any failure or breakdown of machinery or plant, shortage of power or labour, or pilferage, theft or burglary (or any attempt of the same) whether by a servant of the Freight Forwarder or any other person;

c) any loss or damage caused by any failure to carry out or in carrying out the On-Forwarding Instructions;

d) any failure to perform or in performing the Freight Forwarding Services, including any failure in connection with any instruction, advice, information or service given or provided to any person whether in respect of the Goods or any other matter or thing;

e) any direct, indirect or consequential loss or damage or opportunity costs however arising of the Customer, Owner or any other person;

f) any loss or damage caused by or arising from delay, loss of market or loss of or damage to the Goods, or otherwise however;

g) any loss or damage to the extent resulting from any act or omission of the Customer or Owner or resulting from an event outside the Freight Forwarder's control;

h) the Freight Forwarder shall be under no liability to the Customer, Owner or consignee whatever unless:

(a) written notice of any claim, giving full particulars of the events giving rise to the claim and any alleged damage or loss, is received by the Freight Forwarder within fourteen days after delivery of the Goods or, in the case of non-delivery or loss or destruction of the Goods, within fourteen days of the date on which the Goods should have been delivered, and in any other case within fourteen days of the event giving rise to the claim; and

(b) an action shall have been commenced by the Customer in a New Zealand court of competent jurisdiction within six months of delivery or, in the case of non-delivery, within six months and fourteen days of the date of despatch.

14.4. Any claim which has not been made strictly in accordance with the provisions of clause 14.3 shall be deemed to be waived and absolutely barred.

14.5. The Freight Forwarder's liability under this Contract is limited to the lesser of revenue received by the Freight Forwarder in respect of the particular Goods or Freight Forwarding Services in respect of which the liability has arisen or \$1,500.

### 15. INDEMNITY

15.1. Without prejudice to clauses 3.2, 5.2, 6.7 and 12.5 the Customer shall on demand indemnify the Freight Forwarder from and against all duties, taxes, penalties, fines, payments, claims, demands, costs and expenses, and other liabilities of whatever kind, whether or not arising out of negligence of the Freight Forwarder, its servants or agents, which are imposed on, or suffered or incurred by the Freight Forwarder and which arise directly or indirectly from or in connection with the performance of the Freight Forwarding Services, the implementation of the On-forwarding Instructions, the procurement of the Carriage and Handling of the Goods, or otherwise, including any liability to indemnify any other person against claims made against such other person by the Customer or the Owner.

### 16. NOTICES

16.1. Any notice to be given under this Contract will be deemed to have been properly served if delivered or sent by registered post or facsimile transmission to the registered office of the party to receive it or the usual or last known residence or place of business of such party.

16.2. Any notice sent by registered post will be deemed to have been properly served two days after the date upon which it was posted. Any notice sent by facsimile will be deemed to have been properly served on the date of transmission or, if the transmission was made after 5.00pm or on a day other than a normal working day, then on the next working day following the date of transmission. Any notice delivered to the appropriate address will be deemed to have been properly served on the date upon which the notice was so delivered.

### 17. MISCELLANEOUS MATTERS

17.1. To the extent that any provision of this Contract is contrary to law (including the Fair Trading Act 1986), it shall be void but any such provision shall remain in full force and effect to the extent that it is not contrary to law and the invalidity of any such provision or part thereof shall not affect the validity and enforceability of any other provision of this Contract.

17.2. No servant, agent or representative of the Freight Forwarder has any authority to alter, amend, modify or waive any provision of this Contract unless such alterations, amendment, modification or waiver is in writing and signed by a duly authorised representative on behalf of the Freight Forwarder.

17.3. All of the rights, immunities and limitations of liability in this Contract shall continue to have their full force and effect in all circumstances and notwithstanding any breach of contract or of any of these terms and conditions by, or any negligence on the part of, the Freight Forwarder or any other person entitled to the benefit of any of the provisions of this Contract.

17.4. Nothing in this Contract shall evidence or create a partnership or fiduciary relationship between the parties.

17.5. Where the Customer has entered into this Contract for and on behalf of the Owner, the Owner agrees that it is jointly and severally liable for all the obligations, undertakings, warranties and indemnities of the Customer.

### 18. GOVERNING LAW

18.1. This Contract, and any act or contract to which it applies, shall be governed by, and interpreted in accordance with, the laws of New Zealand and the parties hereby submit to the non-exclusive jurisdiction of the New Zealand courts in respect of any dispute, matter or thing arising in respect of this Contract.