

## **1. Interpretation**

In these terms and conditions of sale (as amended from time to time) ("terms and conditions"), the term "Customer" means the person, firm, company or entity buying the goods from the Supplier, "goods" means packaged beverages and other products supplied by the Supplier and includes all the goods described in invoices issued by the Supplier to the Customer, "Supplier" and "Frucor" means Frucor Suntory New Zealand Limited; "CGA" means Consumer Guarantees Act 1993; and "Guarantor" means the person guaranteeing payment in full should the Customer to pay, as specified in the Customer's application.

## **2. Conflict**

In the event of any conflict between these terms and condition of sale and the terms of any other document (including, without limitation, any invoices) these terms and conditions shall prevail (except as expressly agreed otherwise by Frucor in writing, including in Frucor's standard terms of trade. For the avoidance of doubt, the conduct of Frucor or any of its employees or representatives will not constitute acceptance by Frucor of any existing or subsequent terms and conditions provided to Frucor). These terms and conditions may only be varied by the agreement of the Supplier in writing.

## **3. Price**

3.1 The Customer shall pay the price indicated on the invoice, current price list or other similar document issued by the Supplier (and where there is a conflict, the Customer shall pay the price indicated on the current price list).

3.2 The Supplier may vary the price of goods supplied to the Customer by giving written notice of variation.

3.3 The variation will not apply to goods ordered before the date of receipt by the Customer of written notice of variation.

## **4. Order Processing and Delivery**

4.1 Delivery of the goods will be considered to have been made when the goods arrive at the delivery point agreed with the Customer regardless of whether the Customer accepts delivery or, if the Customer is to arrange delivery of the goods, when the goods are available for collection by the Customer.

4.2 Any time which the Supplier quotes for delivery is an estimate only and time for delivery shall not be made of the essence by notice.

4.3 No goods are offered on a sale or return basis and Frucor's representative are not authorised to accept orders for goods to be supplied on a sale or return basis.

4.4 Cancellations or variations to an order may be accepted at the sole discretion of the Supplier, on such terms as the Supplier may specify. The Supplier may cancel any order if it determines that it will be unable to deliver the goods within a reasonable time.

4.5 The Customer shall have no claim against the Supplier if the Supplier cancels the order or fails to deliver (for any reason) the goods, or if there is a delay in delivery of the goods.

4.6 The quality, quantity and condition of the goods must be checked at the time of delivery.

4.7 The Supplier will only allow a credit for shortage if the shortage has been noted on the delivery docket at the time of delivery and the relevant claim is made in accordance with clause 9. An endorsement "subject to check" (or similar) noted on the delivery docket will not be accepted by the Supplier as sufficient noting of the delivery docket in accordance with this clause.

4.8 Any request for a copy of a delivery docket must be made to the Supplier within 30 days of delivery of the goods to which the delivery docket relates.

## **5. Payment**

5.1 The Customer must pay for the goods on or before the 20th of the month following the date of the invoice or as otherwise agreed in writing between the Customer and Supplier.

5.2 The Supplier may require the Customer to pay cash in full prior to delivery if in the Supplier's opinion the credit worthiness of the Customer becomes unsatisfactory.

5.3 If the customer has not paid in full by the due date, the Supplier may:

- a) charge the Customer interest on the overdue monies from the date of delivery of the goods until paid in full. The interest rate shall be at a rate equal to the prevailing cost of funds to the company plus 5%;
- b) pursue an action for the price of the goods for which payment has not been made, even though property in the goods remains with the Supplier;
- c) recover from the Customer the costs and expenses (including legal costs on a solicitor and own client basis) incurred by the Supplier in recovering any overdue monies or in pursuing any action in respect of the overdue monies.

5.4 The Customer must pay the Supplier in full for the goods delivered even if:

- a) there was a delay in delivery of the goods;
- b) the Customer disputes the quality, quantity or condition of the goods delivered.

5.5 The Customer may not deduct or withhold any amount (whether by way of set off, counterclaim or otherwise) from any money owing to the supplier. All payments must be made in New Zealand dollars.

5.6 The Customer must pay to and indemnify the Supplier against all costs and expenses incurred

(including legal costs on a solicitor and own client basis) by the Supplier in connection with:

- a) default by the Customer under these terms and conditions;
- b) the recovery of any monies due and payable but unpaid by the Customer; and
- c) the exercise or attempted exercise by the Supplier of any power conferred on it by these terms and conditions.

## **6. Risk**

The risk of loss or damage to the goods shall pass to the Customer on delivery.

## **7. Title**

7.1 Until the Customer has paid for the goods in full and also paid all other monies due and payable to the Supplier by the Customer:

a) property in the goods shall remain with the Supplier;

b) the Customer shall store the goods in a way that clearly indicates the Supplier's title to the goods.

7.2 The Customer may sell the goods in the ordinary course of its business, provided that if the Customer sells the goods to its customers before ownership has passed to the Customer, all proceeds of sale shall be received and held by the Customer in trust for the Supplier to the extent of all amounts owing by the Customer to the Supplier. The authority granted under this clause may be revoked by Frucor at any time and is automatically revoked upon the assurance of an event described in clause 8 below.

7.3 This clause shall apply even though the Supplier may give credit to the Customer.

### **8. Right of Entry and Resale**

If the Customer:

a) (being a natural person) commits an act of bankruptcy;

b) (being a company) does anything which entitles anyone to apply to liquidate the Customer or an administrator or receiver or receiver and manager of the Customer is appointed; or

c) breaches any of these terms and conditions, then the Customer irrevocably authorises the Supplier to use reasonable force to enter premises where the goods may be located, without notice directly or by its

agents to take possession of and resell the goods. The Customer indemnifies the Supplier against all claims arising out of the entry by the Supplier to premises to take possession of the goods.

### **9. Return of Goods**

All claims for delivery of an insufficient quantity of goods or for delivery of the wrong goods or for goods damaged in transit must be made to the Supplier within two (2) days of delivery. The Supplier will only accept claims under this clause if, as applicable:

a) the damaged or wrong goods are returned within two (2) days of delivery); and

b) the returned goods are accompanied by details of the Supplier's original invoice number in respect of such goods; and

c) in respect of goods damaged in transit, the damage was noted on the delivery docket at the time of delivery; and

d) in respect of delivery of the wrong goods or an insufficient quantity of goods, the fact that the wrong goods or an insufficient quantity of goods were delivered was noted on the delivery docket at the time of delivery; and

e) the claim is made in accordance with any other procedures advised by the Supplier from time to time.

### **10. Warranty and Liability**

10.1 With respect to each good supplied by the Supplier to the Customer under these terms and conditions of sale, the Supplier warrants to the Customer that, subject to clause 10.2, the good is, at the date of delivery, fit for purpose for which goods of the type in question are commonly supplied ("fit for purpose"). If, in the opinion of the Supplier, the good is not fit for purpose, the Supplier will, at its option, replace the goods with

an identical or similar good or provide a refund of any money paid for the good.

10.2 The warranty in clause 10.1 will apply:

- a) if the failure of the good is due to an act or default or omission of, or any representation made by, any person other than the Supplier or a cause beyond the control of the Supplier;
- b) unless a written claim (other than a claim covered by clause 9, which will be dealt with under clause 9) is received by the Supplier within 30 days after the date of the delivery of the relevant good and the Supplier is given the opportunity to inspect the relevant good immediately after the failure is discovered;
- c) if the good has been modified or incorrectly handled or stored.

10.3 If the Customer is a consumer under the CGA:

- a) and is acquiring or holding itself out as acquiring the goods for the purposes of a business, the CGA will not apply and the Customer agrees that this clause is reasonable in the context of these terms and conditions; and
- b) the Supplier does not undertake that facilities for repair and parts for the goods are available.

10.4 If the Customer is acquiring the goods for the purpose of resupplying them in trade, the Customer will:

- a) include in its conditions of sale with its customers a clause to the effect that the CGA will not apply where the Customer's customer acquires or holds itself out as acquiring the goods for the purposes of a business and the Customer acknowledges that such clause is reasonable;
- b) notify its customers of the effect of clause 10.4(a);
- c) take reasonable action to notify its customers at or before the time the goods are supplied to such customers that the Supplier does not undertake that repair facilities and parts will be available for the goods;
- d) not make any representations or give any express warranties to its customers relating to the goods unless authorised in writing to do so by the Supplier; and
- e) indemnify the Supplier against all losses, costs, damages or liabilities which the Supplier may incur or be liable to pay arising out of the Customer's failure to take the action required under this clause 10.4.

10.5 Subject to clause 10.6:

- a) all warranties (other than the warranty contained in clause 10.1), descriptions, representation or conditions whether implied by law, trade, custom or otherwise are, and all other liability of the Supplier (other than the liability under clause 9), whether in tort (including negligence), contract, under statute or otherwise is, expressly excluded to the fullest extent permitted by law;
- b) insofar as the Supplier may be liable notwithstanding clause 10.5(a), to the extent permitted by law, the total liability of the Supplier whether in tort (including negligence), contract, under statute or otherwise for any

loss, damage or injury arising directly or indirectly from any defect in any good or any breach of the Supplier's

obligations to the Customer is, to the extent permitted by law, limited, at the Supplier's option, to:

- i) the price of the good complained of;
  - ii) the cost of replacing the defective good; or
  - iii) the actual loss or damage suffered by the Consumer;
- c) except where statute expressly requires otherwise, the Supplier will not be liable in any event for any loss of profits or any consequential, indirect or special damage, loss or injury of any kind suffered by the Customer or any other person.

10.6 Subject to clause 10.3, nothing in these terms and conditions of sale will affect any rights a consumer may have under the CGA.

## **11. Notice**

11.1 Any notice to be given by the Supplier or the Customer to the other must be in writing and may be given by email, post or hand delivered to the other's business address as last known to the party giving it.

11.2 A Notice:

- a) given by email shall be deemed to be given on the business days of successful transmission (or the immediately following day if transmitted after 5pm);
- b) sent by pre-paid post shall be deemed to be given on the business day following the day on which it was posted;
- c) delivered by hand shall be deemed given when delivered.

## **12. Entire Agreement, Amendments and Assignment**

12.1 These terms and conditions constitute the entire agreement or contract between the Supplier and the Customer for the supply of goods by the Supplier.

12.2 The Customer acknowledges that neither the Supplier nor anyone purporting to act on its behalf has made any representative or given any promise or undertaking which is not expressly set out in writing, whether as to the fitness of the goods for any particular purpose or any other matter.

12.3 The Supplier may alter these terms and conditions:

- a) without notice if done so at the request of the Customer, or the Customer is in default of any of these terms and conditions;
- b) in any other case, on given seven (7) days prior written notice to the Customer.

12.4 Frucor may assign or transfer any of its rights or obligations under this Agreement including any part of your indebtedness to Frucor. Each of Frucor's assignees and transferees shall have the same rights and remedies against you as Frucor has under these terms and conditions.

12.5 The parties each agree, for the purposes of section 5D of the Fair Trading Act 1986 (FTA) that they are contracting out of sections 9, 12A and 13 of the FTA in respect of all matters covered by this Agreement, provided that this clause shall only apply if the Customer is acquiring the goods in trade. The parties each had

the opportunity to receive advice from a lawyer prior to entering into the terms and conditions and agree that this clause is fair and reasonable in the context of those terms and conditions.

### **13. Intellectual Property Rights & Trademarks**

13.1 Any intellectual property rights created by Frucor in the course of performing its obligations under these terms and conditions or otherwise in the manufacture of the goods shall remain Frucor's property. Nothing in these terms and conditions shall be deemed to give the Customer a licence or any other right to use any of the intellectual property rights of or licensed to Frucor.

13.2 The Customer shall keep confidential and shall not, without the prior consent of Frucor, in writing, disclose to any third party, or otherwise make public the conditions or existence of these terms and conditions or any other confidential or sensitive information of Frucor.

### **14 Force Majeure**

14.1 Notwithstanding any other provision of these terms and conditions, non performance by either the Supplier or the Customer of their respective obligations (other than to pay money) under these terms and conditions shall be excused, without liability for non-performance, during the time and to the extent that such performance is prevented, wholly or substantially, by Force Majeure.

14.2 The party claiming the benefit of this clause shall promptly give written notice to the other party specifying the cause and extent of its inability to perform any of its obligations under these terms and conditions and the likely duration of such non performance. Such party shall take all reasonable steps to remedy or abate the Force Majeure.

14.3 Performance of any obligation affected by Force Majeure shall be resumed as soon as reasonably possible after the termination or abatement of the Force Majeure.

For the purposes of this clause 14, "Force Majeure" means an event beyond the reasonable control of a party, which results in or causes the failure of that party to perform any of its obligations under these terms and conditions, provided that lack of funds will not be considered a Force Majeure.

### **15. Territory**

The goods are intended for sale and consumption in New Zealand, if the goods are exported from New Zealand by the Customer, or any other person, Frucor does not accept any liability or responsibility for complying with any overseas statute, regulation or other legal requirement relating to labelling, permitted containers, contents, or any other matter. The Customer's right to export the goods is not in any way restricted by this clause.

### **16. Governing Law**

These terms and conditions shall be governed by and construed in accordance with the laws of New Zealand and the Supplier and the Customer submit to the jurisdiction of the Courts of New Zealand.

### **17. Consumer Promotions**

The Supplier and the Customer may from time to time agree to undertake and participate in promotional

campaigns relating to the goods. All terms relating to such promotional campaigns will be agreed in writing between the Supplier and the Customer.

### **18. Packaging**

The Customer shall follow all requirements of the Supplier relating to the packaging of the goods, as advised by the Supplier from time to time.

### **19. Personal Property Securities Act 1999 (“PPSA”)**

19.1 Terms used in this section which have a particular meaning in the PPSA, shall have the meaning ascribed in the PPSA.

19.2 The Customer agrees that:

- a) these terms and conditions of sale create a security interest in the goods as security for all the Customer’s obligations to the Supplier under these terms and conditions of sale, which is (or will be) registrable under the PPSA;
- b) the Customer must do all such things and execute all such documents as the Supplier may require to ensure that the Supplier has perfected first ranking security interest(s) in the goods under the PPSA;
- c) each security interest created by these terms and conditions notwithstanding any payments, settlement of accounts or anything else.
- d) the Supplier may register a financing statement to perfect its purchase money security interest as an unpaid seller in the goods delivered, or, to be delivered, to the Customer;
- e) the Customer will indemnify the Supplier for any costs the Supplier incurs in doing any of the above;
- f) the Customer waives its right to receive a copy of any verifications statement(s) under section 148 of the PPSA and agrees that as between the Supplier and the Customer, the Customer will have no rights under (or by reference to) sections 114(1)(a), 116, 120(2), 121, 125, 126, 127, 129, 131, 132, 133 and 134 of the PPSA; and where the Supplier has rights in addition to those in Part 9 of the PPSA, those rights shall continue to apply;
- g) in addition to any other obligation it indemnifies the Supplier for any cost it incurs in registering or maintaining, and/or in enforcing or attempting to enforce the security interest created by these terms and conditions of sale;
- h) immediately upon request by the Supplier, it will procure from any person considered by the Supplier to be relevant to its security position such agreements and waivers (including as equivalent to those above) as the Supplier may at any time require;
- i) it will immediately notify the Supplier of any change in the Customer’s name, address or contact details, and
- j) the customer acknowledge that is has received value at the date of first delivery of the goods and has not agreed to postpone the time of attachment of the security interest under these terms.

## **20. Severability**

Where any provision of these terms and conditions of sale is rendered void, unenforceable, or otherwise ineffective by operation of law, that provision will be considered to be severed from these terms and conditions and such severance shall not affect the validity, enforceability, or effectiveness of any other provision in these terms and conditions.