

TRADE OCEAN SHIPS AGENCY (PTY) LTD



TRADE OCEAN GROUP COMPANY STANDARD TRADING TERMS AND CONDITIONS

These Terms and Conditions shall apply to all transactions between the Principal and TOSA and shall be deemed to be incorporated in the appointment of TOSA by the Principal.

1. INTERPRETATION

- 1.1 In these Terms and Conditions, unless clearly inconsistent with or otherwise indicated by the context:
- 1.1.1 **"Agreement"** shall mean the Order read with these Terms and Conditions;
- 1.1.2 **"Agency fees"** shall mean the fees charged by TOSA to the Principal for Agency Services rendered by TOSA to the Principal;
- 1.1.3 **"Agency Services"** shall mean such services as may from time to time be required by the Principal to be rendered by TOSA in respect of the Vessel and shall include, without limitation, to the following:-
- 1.1.3.1 arranging berths for the Vessel;
- 1.1.3.2 providing for the entry and clearance of the Vessel;
- 1.1.3.3 providing for the payment of port charges and any dues payable in respect of the Vessel;
- 1.1.3.4 arranging for the supply of fuel, water, provisions and deck and engine room stores;
- 1.1.3.5 arranging for any repairs required to be done to the Vessel;
- 1.1.3.6 taking charge of and arranging solicitation and booking of cargo for the Vessel;
- 1.1.3.7 issuing bills of lading and other similar documents to shippers in the form prescribed by the Principal;
- 1.1.3.8 arranging for stevedoring and other cargo handling operations;
- 1.1.3.9 arranging for the delivery of cargo in accordance with the bills of lading issued by, or on behalf, of the Principal;
- 1.1.3.10 taking charge of and arranging solicitation of passengers for the Vessel;
- 1.1.3.11 arranging the embarkation and disembarkation of passengers and their baggage;
- 1.1.3.12 issuing passenger tickets;
- 1.1.3.13 attending to all matters pertaining to the deployment of the crew on the Vessel, including, engaging, signing on, signing off and repatriating crew; and
- 1.1.3.14 performing all such other activities and duties in connection with the foregoing functions as may be necessary.
- 1.1.4 **"Business day"** means any day of the week excluding Saturdays, Sundays and/or public holidays in the Republic of South Africa;
- 1.1.5 **"Cargo supervision fee"** means the service fee charged by TOSA to supervise cargo operations on behalf of the Principal;
- 1.1.6 **"Facility fee"** means the fee charged to cover the costs of disbursing incurred by TOSA on behalf of the Principal;
- 1.1.7 **"Finance fee"** means the fee charged to cover the costs of financing incurred by TOSA on behalf of the Principal;
- 1.1.8 **"Goods"** means, *inter alia*, any machinery, equipment, apparatus, or other goods and/or related accessories required for TOSA's performance of the Agency Services;
- 1.1.9 **"Order"** shall mean any order, whether verbal or in writing, received by TOSA from the Principal, its agents, representatives, servants or employees for the provision of Agency Services, which order has been accepted by TOSA and which order is governed by these Terms and Conditions;
- 1.1.10 **"Parties"** means the Principal and TOSA and **"Party"** means either of them as the context indicates;
- 1.1.11 **"Prime Rate"** shall mean the prime rate of interest quoted publicly by Standard Bank of South Africa Limited from time to time, which rate may be proved by a certificate signed by any officer of that bank, whose appointment and authority it shall not be necessary to prove, and which certificate shall constitute *prima facie* proof of the contents thereof;
- 1.1.12 **"Principal"** shall mean the person who places an Order for the provision of Agency Services, irrespective of whether the Order is placed by the person for whom Agency Services are to be rendered, or by such person's employees, servants or agents;
- 1.1.13 **"Standard tariff"** means TOSA's predetermined fees applicable to all services rendered by it, as revised annually and/or amended from time to time;
- 1.1.14 **"Supplier"** shall mean any person with whom TOSA transacts any business for purposes of rendering the Agency Services to the Principal, and shall include, but not be limited to: ship chandlers, vendors of all types of goods, repairers, suppliers of goods and services of whatsoever nature in respect of the Vessel, other ships' agents or brokers, importers and exporters, and port and other authorities in the Republic of South Africa;
- 1.1.15 **"Terms and Conditions"** shall mean the terms and conditions recorded herein.
- 1.1.16 **"Vessel"** shall mean a ship owned, operated, managed or chartered by the Principal and includes the Principal, the Principal's representatives and the Master of the Vessel;
- 1.1.17 **"TOSA"** shall mean Trade Ocean Ships Agency (registration number 2015/172468/07) a private company with limited liability, duly incorporated in accordance with the company laws of the Republic of South Africa.
- 1.2 Where applicable, the provisions of 1.1 shall impose substantive obligations on the Parties as provided in the provision concerned.
- 1.3 In these Terms and Conditions words and expressions importing the masculine gender shall include the feminine and neuter genders and *visa versa*; the singular shall include the plural and *visa versa*, and natural persons shall include artificial persons and *visa versa*.

- 1.4 The clause headings in these Terms and Conditions have been inserted for convenience only and shall not be taken into account in its interpretation.
- 1.5 Words and expressions defined in any sub-clause shall, for the purposes of the clause of which that sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.
- 1.6 No provision of these Terms and Conditions shall be construed against or interpreted to the disadvantage of any Party hereto by reason of such Party having, or being deemed to have, structured or drafted such provision.
- 1.7 The *ejusdem generis* rule shall not apply and whenever the term "including" is used followed by specific examples, such examples shall not be construed so as to limit the meaning of that term.
- 1.8 When these Terms and Conditions prescribe any number of days, such days must be reckoned exclusively of the first and inclusively of the last day. If the last day falls on a day that is not a business day, it will be deemed to fall on the next business day.
- 1.9 These Terms and Conditions shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa and the Principal consents to the jurisdiction of the High Court.

2. APPOINTMENT

- 2.1 The Principal hereby appoints TOSA to act as its agent in the Republic of South Africa for purposes of performing the Agency Services, and TOSA hereby accepts such appointment, on the Terms and Conditions contained herein.
- 2.2 The Order and these Terms and Conditions constitute a binding agreement between the Principal and TOSA, and this Agreement shall terminate upon both parties having discharged all their obligations in terms of this Agreement, unless otherwise provided for in terms hereof.
- 2.3 The Principal accepts and agrees to be bound by these Terms and Conditions on placing an Order with TOSA for the Agency Services.

3. SCOPE OF TOSA'S AUTHORITY

- 3.1 TOSA shall provide such Agency Services as are required by the Principal in terms of the Order and TOSA may provide such additional Agency Services as TOSA in its sole and absolute discretion deems necessary, expedient and in the interests of the Principal.
- 3.2 All Agency Services provided by TOSA as contemplated by 3.1, and the terms and conditions upon which such Agency Services are provided, shall, at all times, be deemed to have been specifically authorised and approved by the Principal.
- 3.3 The Principal's instructions to TOSA shall be precise, unambiguous and comprehensive in all respects. Instructions given by the Principal to TOSA shall be recognised by TOSA as valid only if given timeously and in writing. Oral, standing and general instructions and instructions which are not given timeously, even if such instructions are received by TOSA without comment, shall not, in any way, be binding upon TOSA, provided that TOSA may act on such instructions as TOSA, in its sole and absolute discretion, deems fit.
- 3.4 Notwithstanding anything to the contrary contained in these Terms and Conditions, if at any time TOSA considers it to be in the Principal's interests, or in the public interest, to depart from any of the Principal's instructions (or any part thereof), TOSA shall be entitled, insofar as such departure is reasonable, to depart therefrom and shall not incur any liability in consequence of doing so.
- 3.5 TOSA shall be entitled to engage the services of a Supplier to perform the Agency Services (or any part thereof) and any such Supplier shall be deemed to be an independent contractor appointed by the Principal, and not a servant of TOSA.

4. DURATION

The agreement recorded in these Terms and Conditions shall commence on the date of acceptance of the Order by TOSA and shall, unless terminated earlier in accordance with the provisions of 2.2, 15 or 17, endure indefinitely.

5. REMUNERATION OF TOSA

5.1 Fees

- 5.1.1 The Principal shall pay to TOSA the Agency fees (and/or Facility fee and/or Finance fee and/or Cargo Supervision fee, whichever is applicable) as set out in TOSA's Standard Tariff (as amended from time to time) or otherwise agreed between TOSA and the Principal, for the Agency Services rendered by TOSA. In the event of there being no written confirmation as to the Agency fees (and/or Facility fee and/or Finance fee and/or Cargo Supervision fee) to be charged by TOSA, or in the event of a particular Agency Service not being provided for in these Terms and Conditions or otherwise, the Principal shall pay to TOSA the fees contained in TOSA's Standard Tariff, as amended from time to time.

- 5.1.2 The Principal shall be liable for, and shall pay to TOSA, all costs and expenses incurred by TOSA, including the fees referred to in 5.1.1, in providing the Agency Services at the request or on the instruction of the Principal itself, the master of the Vessel, the office of the Principal or its agents, nominees, representatives or servants, howsoever communicated to TOSA and notwithstanding the fact that any such persons may have exceeded their authority in requesting or instructing the provision of the Agency Services
- 5.1.3 The Principal shall reimburse TOSA for all costs and expenses incurred by TOSA in respect of the receipt of currency from the Principal, or the remittance of currency to, or on behalf of, the Principal.
- 5.1.4 TOSA shall be entitled to withhold performance of the Agency Services for as long as the Principal is in default of the provisions of these Terms and Conditions.

5.2 Disbursements

- 5.2.1 TOSA shall not be obliged to make any disbursement whatsoever on behalf of TOSA until such time as:
- 5.2.2 TOSA has been paid all amounts then due by the Principal to TOSA in respect of the provision of the Agency Services by TOSA; and
- 5.2.3 TOSA has received sufficient funds for purposes of paying the particular disbursement and shall not be in default of its obligations by failing to make such payment.

5.3 Security

TOSA may, at any time, require the Principal to furnish security for the payment of such amounts as are, or will become, due to TOSA by the Principal in connection with the performance of the Agency Services, and for the due reimbursement of disbursements made, or to be made, by TOSA on behalf of the Principal.

5.4 Joint and several liability

In the event of TOSA providing Agency Services at the request of both the owner and the charterer of a Vessel, the owner and charterer shall incur joint and several liability in respect of the remuneration of TOSA as contemplated by this 5.4 on the basis set out in 5.1.1. Similarly, if any charterparty applicable to the Vessel provides that the agent appointed by the charterer of the Vessel is the Vessel's agent, the charterer and the owner of the Vessel shall be jointly and severally liable to TOSA for the payment of TOSA'S fees and any costs and expenses incurred by TOSA on their behalf, as if each of them were a Principal under these Terms and Conditions, and TOSA shall be entitled to claim from either the charterer or the owner or both, as TOSA, in its sole and absolute discretion, deems fit.

5.5 Credit facilities

TOSA reserves the right, at any time, to summarily cancel any credit facilities granted to the Principal pursuant to the performance of the Agency Services. In the event of TOSA exercising its rights in terms of this 5.5, all amounts then due and owing to TOSA by the Principal shall immediately become due and payable on demand.

6 PAYMENT BY PRINCIPAL

- 6.1 Unless otherwise specifically agreed between the Principal and TOSA in writing, the Principal shall pay to TOSA in cash and immediately upon presentation of invoice, all sums due to TOSA.
- 6.2 Notwithstanding the provisions of 6.1 above, TOSA shall at its sole discretion be entitled to request the Principal to make an advance payment(s) to TOSA for the provision of any Agency Services, such which TOSA may at its sole discretion set off against any invoices subsequently issued to the Principal.
- 6.3 All payments made by the Principal to TOSA in terms of these Terms and Conditions shall be made free of set-off, bank charges, bank exchange charges, foreign bank charges when effecting payment to TOSA from a foreign bank account, commission or any other deduction, and the Principal shall not have the right to defer, adjust or withhold any payment due to TOSA in terms of or arising out of these Terms and Conditions, or to obtain deferment of judgment for such amounts or any execution of such judgment by reason of any set-off or counterclaim of whatsoever nature or howsoever arising.
- 6.4 All and any monies received by TOSA from the Principal shall be appropriated by TOSA, in its sole and absolute discretion, to any indebtedness owing by the Principal to TOSA, notwithstanding that the Principal may, when making payment, seek to appropriate the payment so made to any particular debt or portion of a debt.
- 6.5 Notwithstanding the provisions of 6.1 and 6.2 above, TOSA shall at its sole discretion be entitled to extend credit terms to the Principal.
- 6.6 Save to the extent otherwise provided, all amounts due by the Principal to TOSA (including damages) in terms of or arising out of the Order and/or these Terms and Conditions shall, unless paid on due date, bear interest from the due date to date of final payment. Such interest shall be:
- 6.1.1 calculated at the Prime Rate plus 6% (six per centum) per annum; and
- 6.1.2 capitalised monthly in arrears on the balance due.

7 QUOTATIONS AND ESTIMATES

- 7.1 TOSA shall be entitled, at any time and on 48 (forty-eight) hours written notice to the Principal, to cancel or resile from the Agreement in circumstances where it becomes impracticable or uneconomical for TOSA, in its sole and absolute discretion, to perform in terms of the Agreement at the quoted or estimated rate, and the Principal shall have no claim whatsoever against TOSA for any loss that the Principal may incur as a result of TOSA cancelling or resiling from the Agreement.
- 7.2 Without in any way limiting the provisions of 7.1, all quotations or estimates in respect of enquiries by the Principal or a prospective Principal are subject to revision on 48 (forty-eight) hours' written notice, having regard to changes in currency exchange rates and increases in amounts payable by, or on behalf of, or at the instance of TOSA to third Parties including, without limitation: freight, surcharges, insurance premiums, equipment rental and labour charges, where such changes and increases take place after quotation. Any revision of a quotation or estimate in respect of enquiries by the Principal or a prospective Principal shall be commensurate with the change in the currency exchange rate or the increase in the amounts payable (as the case may be). Any such change and/or increase shall, failing agreement between the Parties, be determined by the auditors for the time being of TOSA, or any other suitably qualified auditors nominated by TOSA, who, in such determination, shall act as experts and not arbitrators, and whose decision shall be final and binding on the Parties.

8 APPLICABLE LEGISLATION

- 8.1 If TOSA is obliged, in the execution of any of its duties and/or responsibilities to comply with any common law or statutory law ("the law") of any nature whatsoever, then TOSA by complying therewith, shall not be deemed to waive nor abandon any of its rights in terms of these Terms and Conditions. In addition thereto, in complying with the law, TOSA shall not be deemed to have assumed any onus, obligation, responsibility or liability in favour of the Customer.

The Customer agrees to abide by TOSA's Safety, Health and Environmental Rules, if applicable.

- 8.2 If any of the terms of these Terms and Conditions are 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 Terms and Conditions.

9. GUARANTEES BY TOSA

If TOSA, by reason of legislation or the requirement of a competent authority, is obliged to guarantee or secure the fulfilment of the Principal's obligations, the Principal hereby indemnifies TOSA, in accordance with the provisions of 13, in respect of such guarantee or security and the Principal shall, prior to the furnishing of such guarantee or security by TOSA, pay the estimated amounts to TOSA, calculated on the maximum amount of any loss TOSA may sustain where any such guarantee or security is acted upon.

10. LIABILITY OF TOSA

- 10.1 TOSA shall not be liable for any consequential loss and shall only be liable in respect of any direct damage or loss incurred by the Principal and/or a Supplier as a result of a default by TOSA in providing the Agency Services where:
- 10.1.2 such damage or loss has been caused by the willful default or gross negligence of TOSA; and
- 10.1.3 such claim arises at a time when the Goods in question are in the custody of TOSA and under its control.
- 10.2 In the event that TOSA elects not to refer any claim by the Principal, which claim TOSA disputes, to arbitration for determination and, in the further event of the Principal failing to prosecute the claim as envisaged in Section 15(1) of the Prescription Act 68 of 1969 within one year from the date on which the damage or loss occurred, such claim shall be deemed to have been extinguished by effluxion of time.
- 10.3 Notwithstanding anything to the contrary contained in these Terms and Conditions, the liability of TOSA to the Principal shall, at all times, be limited to payment of R10 000.00 (ten thousand rand) in respect of any one voyage undertaken by the Vessel.
- 10.4 TOSA shall under no circumstances be liable for damage to or loss of Goods delivered to it by the Principal for the purpose of forwarding, clearing or safe keeping.
- 10.5 TOSA shall not be responsible for any money paid or remitted by it on behalf of the Principal to any person pursuant to any request or instruction given to TOSA by the Principal, its servants, employees, agents or representatives.
- 10.6 All delivery dates specified in the Order placed by the Principal ("the Delivery Date/s") are estimates only and TOSA shall not be responsible for any costs, expenses, losses or damages suffered by the Principal, either directly or indirectly arising where the Goods or services are not delivered by the Delivery date. The Principal must accept or pay for Goods and services despite any delay in delivery or dispatch thereof.

11 INSURANCE

- 11.1 Should the Principal require insurance against damage or loss where TOSA'S liability for such damage and/or loss is excluded by these Terms and Conditions, TOSA shall procure such insurance for the Principal, on the Principal's behalf and at the Principal's expense, provided that the Principal's request for such insurance is made in writing and an insurance cover note is issued and taken up by the Principal prior to the delivery of the Agency Services.
- 11.2 Notwithstanding TOSA'S compliance with any request made under 11.1, TOSA shall under no circumstances be liable for any errors or omissions on its part in arranging such insurance on behalf of the Principal.

12 WARRANTIES AND REPRESENTATIONS BY TOSA

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

13 INDEMNITIES BY PRINCIPAL

- 13.1 Without prejudice to any rights TOSA may have under these Terms and Conditions or otherwise in law, the Principal hereby indemnifies and holds TOSA, its servants, agents, representatives and nominees harmless against all liabilities, damages, costs and expenses of whatsoever nature incurred or suffered by TOSA arising, directly or indirectly, from or in connection with the provision of the Agency Services and, in particular, but without limitation, in respect of any liability whatsoever which may be incurred by reason of:
- 13.1.2 claims by a Supplier in respect of any Goods provided to the Principal at TOSA's instance and request in accordance with 3.5;
- 13.1.3 payment of any taxation which may be levied on passenger earnings or freight earned on cargo loaded in the absence of reciprocal intergovernmental taxation agreements;
- 13.1.4 payment of any costs and expenses incurred by TOSA in the performance of the Agency Services;
- 13.1.5 any claims arising out of a guarantee furnished by TOSA pursuant to the provisions of 9; and/or
- 13.1.6 any claims arising out of a breach of 14 by the Principal.
- 13.2 The Principal hereby undertakes, at any time prior to, during or after the provision of the Agency Services and on receipt of a written request from TOSA, to place TOSA in sufficient funds, or to furnish TOSA with security to the satisfaction of TOSA, in order to ensure the due fulfilment by the Principal of its obligations under the indemnity contained in 13.1.

14 WARRANTIES BY PRINCIPAL

- 14.1 The Principal warrants that:
- 14.1.2 it is either the owner, or the authorised agent of the owner, of any Goods in respect of which the Principal instructs TOSA, and that each such person is bound by these Terms and Conditions and accepts that TOSA shall have the right to enforce against any such persons, jointly and severally, any liability of the Principal under these Terms and Conditions, or to recover from any such persons any sums to be paid by the Principal to TOSA which, upon proper demand, have not been paid;
- 14.1.3 all information and instructions supplied, and to be supplied, by it to TOSA are and shall, at all times, be accurate, true and comprehensive and, in particular, without derogating from the generality of the foregoing, the Principal shall be deemed to be bound by and warrants the accuracy of all descriptions, values and other particulars furnished to TOSA for customs, consular and other purposes, and the Principal warrants further that it will not withhold any necessary or pertinent information from TOSA, and indemnifies TOSA against all claims, losses, penalties, damages, expenses and fines whatsoever, whensoever and howsoever arising as a result of a breach by the Principal of the warranties contained in this 14; and
- 14.1.4 Goods will be properly, adequately and appropriately prepared, packed, stowed, labelled and marked, having regard, inter alia, to the implementation by or on behalf of TOSA of the agreement between TOSA and the Principal in respect of Goods concerned, and the characteristics of the Goods concerned shall be capable of withstanding the normal hazards inherent in the implementation of such agreement and shall comply with all legislative requirements.
- 14.2 The Principal agrees that each of the warranties referred to in this 14 shall be deemed to be representation of fact inducing TOSA to enter into these Terms and Conditions unless the contrary is proved, and that each of the warranties referred to in this 14 shall be assumed to be a material warranty unless the contrary is proved.
- 14.3 All matters referred to in this 14, save where context clearly indicates the contrary, and shall be warranted as such for the duration of these Terms and Conditions.

15 AGENT'S LIEN

All Goods and documentation pertaining thereto, including, without limitation, bills of lading and import permits, as well as all refunds, repayments, claims and other recoveries or currency received by TOSA from, or on behalf of, the Principal, shall be held by TOSA subject to a general lien and right of retention *in lieu* of any monies due to TOSA by the Principal for any reason whatsoever. If any monies due to TOSA are not paid and/or the lien is not satisfied within 14 (fourteen) calendar days of written notice to the person from whom the monies are due that such goods or documents are being detained, or should the Agreement be terminated without TOSA having been paid all amounts owing to it by the Principal:

- 15.1 TOSA shall be entitled and the Principal hereby authorises TOSA and without first obtaining an order of court, to sell all or any of the Goods by public auction, private treaty or otherwise on reasonable notice to the Customer, such notice which need not exceed 14 (fourteen) calendar days. The net proceeds of any such sale, after deducting therefrom all costs, charges and expenses incurred by TOSA, shall be applied in reduction or discharge as the case may be, of the Principal's obligations to TOSA in respect of such Goods, without prejudice to TOSA's rights to recover from the Principal any balance which may remain owing to TOSA after the exercise of such rights. Should the total amount collected by TOSA, after deducting therefrom all costs, charges and expenses incurred by TOSA in respect thereof, exceed the full amount of the Principal's obligations to TOSA in respect of such Goods, TOSA shall be obliged to refund such excess to the Principal.

16 FORCE MAJEURE

- 16.1 If any Party to these Terms and Conditions is prevented or restricted, directly or indirectly, from carrying out all or any of its obligations under these Terms and Conditions by reason of strike, lock-out, fire, explosion, floods, riot, war, accident, act of God, embargo, legislation, shortage of or a breakdown in transportation facilities, civil commotion, unrest or disturbances, cessation of labour, government interference or control, or any other cause or contingency beyond the control of that Party, the Party so affected shall be relieved of its obligations under these Terms and Conditions during the period that such event and its consequences continue, but only to the extent so prevented and shall not be liable for any delay or failure in the performance of any obligations hereunder or any loss or damages, whether general, special or consequential, which the other Party may suffer due to or resulting from such delay or failure, provided always that written notice shall forthwith be given of any such inability to perform by the affected Party.
- 16.2 Any Party invoking *force majeure* in accordance with this 16 shall upon termination of an event giving rise thereto, forthwith give written notice of such cessation to the other Party. If such *force majeure* continues for a period of more than 90 (ninety) days, then either Party shall be entitled forthwith to cancel these Terms and Conditions in respect of any obligations still to be performed hereunder, and neither Party shall have any claim against the other.

17 BREACH

- 17.1 If either Party to these Terms and Conditions:
- 17.1.1 breaches any of the provisions of this Agreement and, where such breach is capable of remedy, the defaulting Party fails to remedy the breach for a period of 10 (ten) calendar days after receipt of notice from the aggrieved Party calling upon the defaulting Party to remedy its breach;
- 17.1.2 commits any other breach of the terms of this Agreement which is incapable of being remedied;
- 17.1.3 takes steps or has steps taken against it for its winding-up, sequestration or liquidation (whether voluntary or otherwise), or commits any act of insolvency in terms of the Insolvency Act 24 of 1936;
- 17.1.4 being a company or close corporation, ceases to be controlled by the person(s) that control(s) it at the date of commencement of these Terms and Conditions as contemplated in 4; and/or
- 17.1.5 fails to contest or discharge any final judgment taken against it in any court of competent jurisdiction for a period of 10 (ten) days or longer; and/or
- 17.1.6 ceases to carry on business for any reason whatsoever; then such defaulting Party shall be deemed to be in breach of its obligations in terms of these Terms and Conditions.

- 17.2 If either Party is in breach of these Terms and Conditions, or is deemed to be in breach of these Terms and Conditions in terms of 17.1, and provided the aggrieved Party has given the defaulting Party 10 (ten) calendar days written notice to remedy such breach and the defaulting Party fails to timely remedy such breach after receiving such written notice, the aggrieved Party shall be entitled, but not obliged, in addition to any other rights which it may have or remedies which may be available to it in terms of these Terms and Conditions or otherwise in law, to –
- 17.2.1 cancel these Terms and Conditions forthwith, with or without claiming damages
- 17.2.2 obtain an order against the defaulting Party for a specific performance, with or without claiming damage; and/or without claiming damages; and/or
- 17.2.3 claim such damages as it may have suffered in lieu of specific performances, together with all amounts owing under, or in terms of these Terms and Conditions, whether or not such amounts have become due for payment.

18 TERMINATION FOR CONVENIENCE

Either Party shall, in its sole and absolute discretion, be entitled, at any time, to terminate this Agreement on 30 (thirty) days' written notice to the other Party, subject to clauses 2.2 and 4.

19 DOMICILIUM

- 19.1 The Principal elects as their *domicilium citandi et executandi*, the address provided to TOSA in their written Application for Cash or Credit Facility form and/or the Order. Such address (not being a poste restante) shall be the *domicilium citandi et executandi* at which all processes and notices arising out of or in connection with these Terms and Conditions or a breach or termination thereof may be validly served upon and delivered to the Principal.
- 19.2 The Principal may, by notice in writing to TOSA, change its *domicilium citandi et executandi*.
- 19.3 A notice sent by TOSA to the Principal shall be deemed to be received:
- 19.3.3 On the date of delivery, if delivered by hand;
- 19.3.4 On the fourth day after posting, if sent by prepaid registered mail;
- 19.3.5 On the day after faxing, if sent by facsimile transmission;
- 19.3.6 On the date of sending, if sent by electronic mail (email).
- 19.4 Notwithstanding anything to the contrary contained in this 19, a written notice or communication actually received by the Principal from TOSA, shall be adequate written notice or communication to the Principal notwithstanding it was not sent or delivered at its chosen *domicilium citandi et executandi*.

20 ARBITRATION

- 20.1 Subject to 20.2, in the event of any dispute of whatsoever nature arising between the Parties in relation to any matter provided for in, or arising out of these Terms and Conditions, then that dispute may, at the sole election of TOSA, which election shall be communicated to the Principal in writing, be referred to arbitration to be held at Cape Town. Should TOSA elect that the dispute be referred to arbitration, such dispute shall be referred to a single arbitrator to be agreed upon by the Parties to the dispute or, failing such agreement, to be nominated by the president for the time being of the Maritime Law Association of the Republic of South Africa, and such arbitration shall be conducted in accordance with and subject to the provisions of the Arbitration Act No. 42 of 1965, or any statutory modification or re-enactment thereof for the time being in force or such rules as the Parties may agree to, in writing.
- 20.2 Should TOSA elect to proceed with arbitration in terms of 20.1, the provisions of 20.1 shall not preclude any Party from obtaining relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator

21 MISCELLANEOUS

- 21.1 **ISPS (International Ship and Port Facility Security Code)**
TOSA will exercise reasonable skill and care to file the data required for purposes of ISPS correctly and within the prescribed filing deadlines. TOSA shall not be responsible or liable for the correctness or accuracy of the information provided by the Vessel or any failure by the Vessel to provide data in a timely manner not for any technical problems or human error beyond TOSA's control. TOSA will provide the filing process as a data exchange service only. TOSA shall bear no liability of whatsoever nature irrespective of any alleged negligence or fault on the part of TOSA, arising from the filing of data or omission to file data timeously or at all and liability therefor shall rest exclusively with the Vessel. The Principal hereby indemnifies and holds TOSA harmless in respect thereof.
- 21.2 **Department of Environment, Forestry and Fisheries (DEFF)**
In the compilation and submission by TOSA to DEFF in respect of the application for any right, permit, license, exemption, permission or consent that may be required by the Vessel, TOSA will exercise reasonable skill and care to compile and submit the application to DEFF correctly and within the prescribed filing deadlines. TOSA shall not be responsible or liable for the correctness or accuracy of the information and/or documentation provided by the Vessel or any failure by the Vessel to provide the information and/or documentation in a timely manner, nor for any technical problems or human errors beyond TOSA's control. TOSA shall bear no liability of whatsoever nature irrespective of any alleged negligence or fault on the part of TOSA, arising from the submission by TOSA to DEFF of any application or omission to file such application timeously or at all and liability therefor shall rest exclusively with the Vessel. The Principal hereby indemnifies and holds TOSA harmless in respect thereof.
- 21.3 **Implementation and good faith**
- 21.3.1 The Parties to these Terms and Conditions undertake to do all such things, perform all such acts and take all steps to procure the doing of all such things and performance of all such act, as may be necessary or incidental to give or conducive to giving effect to the terms, conditions and import of these Terms and Conditions.
- 21.3.2 The Parties shall at all time during the continuance of these Terms and Conditions observe the principles of good faith towards one another in the performance of their obligations in terms of these Terms and Conditions. This implies, without limiting the generality of the foregoing, that they:

- 21.3.2.1 will at all times during these Terms and Conditions act reasonably, honestly and in good faith;
- 21.3.2.2 will perform their obligations arising from these Terms and Conditions diligently and with reasonable care; and
- 21.3.2.3 will make full disclosure to each other of any matter that may affect the execution of these Terms and Conditions

21.4 Severability

The agreements and undertakings of Parties contained in these Terms and Conditions shall each be construed as an agreement and undertaking independent of any other provision of these Terms and Conditions. The Parties hereby expressly agree that it is not the intention of either Party to violate any public policy, statutory or other applicable law, and that if any sentence, paragraph, clause or combination of the same is in violation of the law of the Republic of South Africa, such sentence, paragraph, clause or combination of the same alone shall be void in the jurisdiction where it is unlawful, and the remainder of such clause and these Terms and Conditions shall remain binding upon the Parties thereto.

21.5 Variation

No variation or alteration of these Terms and Conditions shall be binding on TOSA unless embodied in a written document signed by a duly authorised director of TOSA. Any purported variation or alteration of these Terms and Conditions otherwise than as set out herein shall be of no force or effect, whether such purported variation or alteration is written or oral or takes place before or after the receipt of these Terms and Conditions by the Principal.

21.6 Relaxation

No latitude, extension of time or other indulgence which may be given or allowed by any Party to the other in respect of the performance of any obligation hereunder, or the enforcement of any right arising from these Terms and Conditions, and no single or partial exercise of any right by any Party shall under any circumstances be construed to be an implied consent by such Party, or operate as a waiver or a novation of, or estop such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

21.7 Time of the essence

Time is of the essence for the performance by the Principal of all obligations owed to TOSA in terms of this Agreement.

21.8 Non-assignment

The Principal shall not be entitled to assign any of its rights and obligations under these Terms and Conditions without the express prior written consent of TOSA which consent TOSA may, in its sole and absolute discretion, withhold or withdraw.

21.9 Email correspondence

All electronic mail (e-mail) exchanged between TOSA and the Principal is subject to the following:-

- 21.9.1 The relevant portions of these Terms and Conditions are enforceable and binding on the recipient / addressee in terms of sections 11(1) to 11(3) of the Electronic Communications and Transactions Act 25 of 2002
- 21.9.2 All e-mail transmissions dispatched by TOSA contains confidential information, which is the property of TOSA. No person, other than the recipient (so indicated by TOSA) may use or disclose the contents of all e-mail transmissions dispatched by TOSA or attachments hereto, to any person whatsoever.
- 21.9.3 The information in all e-mail transmissions dispatched by TOSA or attachments thereto is intended for the attention and use only of the addressee. Any disclosure, copying or distribution of the contents of this e-mail transmission, or the taking of any action in reliance thereon or pursuant thereto, by any person other than the intended recipient is strictly prohibited.
- 21.9.4 The e-mail address(es) of TOSA may not be used, copied, sold, disclosed or incorporated into any database or mailing list for spamming and/or other marketing practices without the prior written consent to TOSA.
- 21.9.5 Under no circumstance shall TOSA be liable to any party for any direct, indirect, special or other consequential damages for any use of e-mail transmissions dispatched by TOSA or attachments thereto, or of any other hyper linked web site, including, without limitation, any lost profits, business interruption, loss of programs or other data or information handling systems or otherwise, even if TOSA has been expressly advised of the possibility of such damages.
- 21.9.6 No e-mail correspondence sent to TOSA shall be deemed to have been received until TOSA has responded thereto in writing. An auto reply shall not constitute such a response.
- 21.9.7 TOSA retains the copyright in all e-mail messages and attachments sent from its communications systems.

21.10 Costs

All costs (including collection fees and tracing agents), incurred by TOSA (whether partially or substantially successful) in enforcing its rights (whether action has been instituted or not) arising out of a breach of these Terms and Conditions by the Principal shall be borne by the Principal on the scale as between attorney and own client.

