

# Terms and Conditions of Sale NZ

## 1 Interpretation

These terms and conditions of sale (as amended from time to time) (“terms and conditions”), apply to and govern the supply of all goods by SBFNZ to the Customer. All orders received by SBFNZ from the Customer will constitute an offer by the Customer to acquire the goods on these terms and conditions. A contract is made only on acceptance (in whole or part) of the order by SBFNZ. In these terms and conditions, the term “Customer” means the person, firm, company or entity buying the goods from SBFNZ; “goods” means packaged beverages and other products supplied by SBFNZ and includes all the goods described in invoices issued by SBFNZ to the Customer; “Supplier” and “SBFNZ” means Suntory Beverage & Food New Zealand Limited; “CGA” means Consumer Guarantees Act 1993; and “Guarantor” means the person guaranteeing payment in full should the Customer not 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 SBFNZ in writing, including in SBFNZ’s standard terms of trade. For the avoidance of doubt, the conduct of SBFNZ or any of its employees or representatives will not constitute acceptance by SBFNZ of any existing or subsequent terms and conditions provided to SBFNZ). These terms and conditions may only be varied by the agreement of SBFNZ in writing.

## 3 Price

3.1 Unless expressly agreed otherwise by SBFNZ, the purchase price of the goods is the price specified in the current price list at the date of the order of the relevant goods. The Customer shall pay the price indicated on the invoice, current price list or other similar document issued by SBFNZ (and where there is a conflict, the Customer shall pay the price indicated on the current price list).

3.2 The Customer acknowledges and agrees that prices are subject to increase due to exchange rate fluctuations or increases in SBFNZ’s costs beyond SBFNZ’s reasonable control. SBFNZ 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.

3.4 Unless otherwise specified, SBFNZ’s prices are stated exclusive of all taxes (including any goods and services tax payable under the Goods and Services Tax Act 1985), tariffs, duties or impositions of a similar nature imposed by any government or other authority. Where applicable, such amounts shall be added to the invoice issued to the Customer, and the Customer shall be required to pay such amounts at the same time as paying the prices for the goods.

## 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. The Customer is responsible for unloading the goods at the delivery point and must do so promptly on arrival of the goods at the delivery point.

4.2 Any time which SBFNZ quotes for delivery is an estimate only and is subject to SBFNZ’s suppliers’ stock levels and/or order production schedules and/or shipping dates, and accordingly SBFNZ reserves the right to alter delivery dates. The time agreed for delivery of the goods is not an essential term of any contract, unless expressly acknowledged and agreed to be by SBFNZ in writing before the order is fulfilled.

4.3 No goods are offered on a sale or return basis and SBFNZ's representatives 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 SBFNZ, on such terms as SBFNZ may specify. SBFNZ may cancel any order if it determines that it will be unable to deliver the goods within a reasonable time.

4.5 SBFNZ will use reasonable commercial endeavours to meet any estimate for delivery, but will not be liable for, nor may the Customer cancel any order, withhold payment, refuse delivery or reject performance, or make a claim against SBFNZ for any losses caused to the Customer as a result of, any delay in delivery or performance.

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

4.7 SBFNZ will only allow a credit for shortages 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 SBFNZ 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 SBFNZ within 30 days of delivery of the goods to which the delivery docket relates.

## 5 Payment

5.1 The Customer must pay in full all amounts due to SBFNZ upon, or prior to delivery unless the Customer has a credit account. If the Customer has a credit account, the Customer must pay in full all amounts due to SBFNZ on or before the 20th of the month following the date of the invoice or as otherwise agreed in writing between the Customer and SBFNZ.

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

5.3 If the customer has not paid in full by the due date, SBFNZ 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% per annum, calculated on a daily basis from the date payment is due until the date payment in full (including accrued interest) is received by SBFNZ;
- (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 SBFNZ;
- (c) recover from the Customer the costs and expenses (including legal costs on a solicitor and own client basis) incurred by SBFNZ in recovering any overdue monies or in pursuing any action in respect of the overdue monies; and
- (d) without any prior notice or demand, set-off or deduct any amounts owing (or to become owing) by SBFNZ to the Customer in order to reduce any payment due (or to become due) by the Customer to SBFNZ.

5.4 The Customer must pay SBFNZ in full and on time 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 SBFNZ. All payments must be made in New Zealand dollars.

5.6 The Customer must pay to and indemnify SBFNZ against all costs and expenses incurred (including legal costs on a solicitor and own client basis) by SBFNZ 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 SBFNZ 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 or deemed delivery in accordance with clause 4.1.

## 7 Title

7.1 Until SBFNZ has received full payment in cleared funds for the goods and all other monies due and payable to SBFNZ by the Customer:

- (a) property in the goods shall remain with SBFNZ and title in them will not pass to the Customer;
- (b) the Customer shall store the goods in a way that clearly indicates SBFNZ'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 SBFNZ to the extent of all amounts owing by the Customer to SBFNZ. The authority granted under this clause may be revoked by SBFNZ at any time and is automatically revoked upon the occurrence of an event described in clause 8 below.

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

7.4 SBFNZ may bring an action for an amount owing in relation to goods sold even where ownership of the goods may not have passed 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 SBFNZ 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 SBFNZ against all claims arising out of the entry by SBFNZ 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 SBFNZ within two (2) days of delivery. SBFNZ 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 SBFNZ'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 SBFNZ from time to time.

## 10 Warranty and liability

10.1 With respect to each good supplied by SBFNZ to the Customer under these terms and conditions of sale, SBFNZ warrants to the Customer that, subject to clause 10.2, the good is, at the date of delivery, fit for the purpose for which goods of the type in question are commonly supplied (“fit for purpose”). If, in the opinion of SBFNZ, the good is not fit for purpose, SBFNZ will, at its option, replace the good 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 not 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 SBFNZ or a cause beyond the control of SBFNZ;
- (b) unless a written claim (other than a claim covered by clause 9, which will be dealt with under clause 9) is received by SBFNZ within 30 days after the date of delivery of the relevant good and SBFNZ 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) SBFNZ 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 SBFNZ 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 SBFNZ; and
- (e) indemnify SBFNZ against all losses, costs, damages or liabilities which SBFNZ 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, representations or conditions whether implied by law, trade, custom or otherwise are, and all other liability of SBFNZ (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 SBFNZ may be liable notwithstanding clause 10.5(a), to the extent permitted by law, the total liability of SBFNZ 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 SBFNZ’s obligations to the Customer is, to the extent permitted by law, limited, at SBFNZ’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, SBFNZ 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 SBFNZ 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 day 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 SBFNZ and the Customer for the supply of goods by SBFNZ.

12.2 The Customer acknowledges that neither SBFNZ nor anyone purporting to act on its behalf has made any representation 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 SBFNZ 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 SBFNZ may assign or transfer any of its rights or obligations under this Agreement, including any part of the Customer's indebtedness to SBFNZ. Each of SBFNZ's assignees and transferees shall have the same rights and remedies against the Customer as SBFNZ has under these terms and conditions. The Customer must not assign its rights or obligations under or in connection with these terms and conditions without the prior written consent of SBFNZ. A change in the effective management or control of the Customer or any parent company of the Customer will be deemed to be an assignment for the purpose of these terms and conditions, requiring SBFNZ's prior written consent. Any permitted assignment, transfer or sub-contracting will not relieve the Customer of the Customer's responsibility for due performance 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 SBFNZ in the course of performing its obligations under these terms and conditions or otherwise in the manufacture of the goods shall remain

SBFNZ'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 SBFNZ.

13.2 The Customer shall keep confidential and shall not, without the prior consent of SBFNZ, 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 SBFNZ.

13.3 In the event that the Customer becomes aware of or suspects any infringement of SBFNZ's intellectual property, the Customer shall immediately notify SBFNZ and shall at the request of SBFNZ provide SBFNZ with such co-operation and assistance as may be reasonably required by SBFNZ in taking any action against any such infringement or suspected infringement.

13.3 The provisions of this clause 13 will survive any termination or expiry of these terms and conditions.

#### **14 Force Majeure**

14.1 Notwithstanding any other provision of these terms and conditions, non-performance by either SBFNZ 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, SBFNZ 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 SBFNZ and the Customer submit to the jurisdiction of the Courts of New Zealand.

#### **17 Consumer Promotions**

SBFNZ 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 SBFNZ and the Customer.

#### **18 Packaging**

The Customer shall follow all requirements of SBFNZ relating to the packaging of the goods, as advised by SBFNZ 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 To secure payment by the Customer to SBFNZ of the amount owing, the Customer grants to SBFNZ a security interest in the goods and the proceeds of such goods. These terms and conditions constitute a Security Agreement creating a Purchase Money Security Interest in those goods and the proceeds of such goods.

19.3 The Customer undertakes:

- (a) promptly to do all things, sign any further document and/or provide any information that SBFNZ may reasonably require to ensure SBFNZ is paid all sums due to SBFNZ and otherwise to protect the interests of SBFNZ under these terms and conditions (including by registration of a financing statement and ensuring that SBFNZ has a first ranking perfected Security Interest in the goods and the proceeds of the goods); and
- (b) to give SBFNZ (addressed to the financial controller or equivalent) not less than 14 days' prior written notice of any proposed change in the Customer's name and/or any other changes in the Customer's details (including changes to the Customer's address, facsimile, email, trading name or business practice).

19.4 The Customer waives its right to receive a verification statement under section 148 of the PPSA in respect of any financing statement relating to a Security Interest.

19.5 To the extent permitted by law, the Customer and SBFNZ contract out of:

- (a) section 114(1)(a), 133 and 134 of the PPSA; and
- (b) the Customer's rights referred to in sections 107(2)(a),(c), (d), (h) and (i) of the PPSA.

19.5 Each Security Interest is a continuing security, notwithstanding any intermediate payments, settlement of accounts or anything else, and each Security Interest shall continue until SBFNZ gives the Customer a final release.

19.6 Nothing in these terms and conditions is to be construed as an agreement that a Security Interest under these terms and conditions attaches at a later time than the time specified in section 40(1) of the PPSA.

19.7 SBFNZ may allocate amounts received from the Customer in any manner SBFNZ determines, including in any manner required to preserve a Purchase Money Security Interest it has in the Goods.

19.8 The Customer and/or Guarantor must provide SBFNZ with information and any associated documentation reasonably requested by SBFNZ from time to time relating to the Customer and/or Guarantor's financial status.

19.9 If at any time SBFNZ considers that the financial status of the Customer and/or Guarantor is unsatisfactory, SBFNZ may require the Customer and/or Guarantor to grant additional Security Interests as security for the amount owing and SBFNZ may suspend or cancel further deliveries of goods to the Customer until the Customer and/or Guarantor has provided such Security Interest.

19.10 The Customer will not, without SBFNZ's prior written consent, enter into any Security Agreement that permits any other person to register any Security Interest in respect of the goods or their proceeds.

19.11 To the maximum extent permitted by the PPSA, the Customer agrees that:

- (a) the provisions of Part 9 of the PPSA that are for the benefit of the Customer or that place obligations on SBFNZ will apply only to the extent that they are mandatory or SBFNZ agrees to their application in writing; and
- (b) where SBFNZ has rights in addition to those in Part 9 of the PPSA, those additional rights will continue to apply.

19.12 For the purposes of sections 71 and 72 of the PPSA, these Terms secure future advances.

## **20 Severability**

If any provision of these terms and conditions is illegal, invalid or unenforceable then:

- (a) where that provision can be modified to give it a valid and enforceable operation of a partial nature, it must be modified to the minimum extent necessary to achieve that result; and
- (b) in any other case, that provision will be considered to be severed from these terms and conditions and in which event the remaining provisions of these Terms operate as if the severed provision had not been included.