



# **PORT OTAGO LIMITED**

## **STANDARD TERMS AND CONDITIONS**

**(These Terms and Conditions do not take precedence over any other Terms and Conditions which Port Otago Limited may agree with individual parties)**

**Section Headings**

- 1. Parties..... 4
- 2. Introduction ..... 4
- 3. Price schedule ..... 4
- 4. Payment for services/Credit Policy ..... 4
- 5. Obligations as to shipping ..... 5
- 6. Berthage ..... 5
- 7. Obligations as to Cargo..... 6
- 8. Liability regime ..... 8
- 9. User Environmental Warranties..... 13
- 10. General ..... 14
- 11. Force majeure ..... 16
- 12. Variation of terms ..... 16
- 13. Contracts Privity Act 1982 ..... 16
- 14. Termination ..... 16
- 15. Definitions ..... 17
- 16. Interpretation ..... 18

## **Standard Terms and Conditions**

### **1. Parties**

- 1.1 Port Otago Limited, Fiordland Pilot Services Limited and other Port Otago companies, referred to collectively as "Port Otago"
- 1.2 The USER as defined. See clause 15.11.

### **2. Introduction**

- 2.1 Port Otago Limited owns and operates wharves, berths, waterways, plant and equipment at Port Chalmers, Dunedin, and Fiordland Pilot Services Limited operates cruise ship pilot services in Fiordland.
- 2.2 The User wishes to use the services which Port Otago provides.
- 2.3 The provision of those services by Port Otago required by the User will be upon the terms and conditions which follow (the "Terms").

### **3. Price schedule**

- 3.1 Unless otherwise agreed in writing, and at the expiry of any negotiated contracts, the charges for services provided will be those in Port Otago's Price Schedule in force at the time of actual provision of service. The User acknowledges that particulars of such Price Schedule are available upon request, and may be amended by Port Otago from time to time. The current version is available online at [www.portotago.co.nz](http://www.portotago.co.nz).

### **4. Payment for services/Credit Policy**

- 4.1 Unless otherwise agreed to in writing prior to provision of the services requested, the terms of payment for services will be cash in full in advance of the service being rendered or of the Cargo being released or of the vessel departing.
- 4.2 If the User has been granted credit, then payment for services rendered under these Terms will be by 20th of the month following invoice.
- 4.3 Port Otago reserves the right entirely at its discretion to apply a default charge of 2.5% per month on overdue accounts that have not been paid in full by the 20<sup>th</sup> of the month following the date of invoice.
- 4.4 The User shall be liable for all costs, expenses or fees reasonably incurred by Port Otago (including costs on a solicitor client basis) in recovering overdue accounts, including any costs incurred by Port Otago in selling any goods under clause 7.7.

## 5. **Obligations as to shipping**

- 5.1 Access to Port Otago controlled waterways, berths, wharves, equipment and facilities is subject to the User warranting the following:
- a. that the User and the User's employees, agents or representatives have complied and will continue to comply with the provisions of all applicable laws, orders, regulations, or other requirements of the New Zealand Government and all other local or governmental authorities whatsoever in all respects, and shall comply with best industry practice;
  - b. that the User's vessel is in all respects seaworthy; and
  - c. that the User will not take any steps which will or might place the User or the User's employees, agents or representatives in breach of any applicable laws, orders, regulations, or other requirements of the New Zealand Government and all other local or governmental authorities whatsoever or which will or might render the User's vessel unseaworthy while the User is using Port Otago's facilities pursuant to these Terms.
- 5.2 The User will use such tug power as Port Otago deems necessary for vessels arriving, departing or shifting at a Port Otago wharf or facility.
- 5.3 The User will use the number of line handlers Port Otago determines for a vessel arriving, departing or shifting at a Port Otago wharf or facility.
- 5.4 The User will use such utilities as Port Otago may deem necessary when the vessel is berthed at a Port Otago wharf or facility.

## 6. **Berthage**

Port Otago will provide berthage for the User's vessels at the port subject to the following:

- 6.1 Port Otago reserves the right to nominate the wharves at which the vessel will be berthed.
- 6.2 Berthage will be subject to the absolute right of Port Otago to require a vessel berthed at any wharf to be moved or relocated to another berth in the Port, or to vacate the allocated berth and to anchor at sea as directed and any such requirement will be carried out immediately by the User through the Master of the relevant vessel.
- 6.3 Port Otago will use reasonable endeavours to provide a berth for the User's vessel on a date convenient to the User's sailing schedules. Port Otago reserves the right at its sole discretion to deny access to berthage to any User who fails to comply with statutes, security, traffic, health and safety management plans or any other rule implemented by Port Otago and notified to the User. Port Otago excludes all liability for any loss, damage, loss of profits or revenue, or other liability whatsoever suffered by the User (whether direct or indirect) if for any reason Port Otago does not provide berthage as requested by the User.

## 7. **Obligations as to Cargo**

Port Otago will provide Cargo handling and storage services and facilities subject to the following:

- 7.1 The User will adhere to the Cargo Operations Procedures that govern the receipt and handling of Cargo through the Port. This procedural document outlines such aspects as hours of operation and documentation. Copies are available on request.
- 7.2 The User will ensure that all Cargo and Containers received at or delivered from Port Otago operational areas are properly packed and labelled, are in every way safe for carriage by sea or road or rail, do not exceed their rated gross capacity, are in a fit and proper condition to be handled or otherwise dealt with in the normal course of business and will comply with all applicable laws, orders, regulations, or other requirements of the New Zealand Government and all other local or governmental authorities whatsoever.
- 7.3 The User will comply with any rules and directions made from time to time by Port Otago in respect of the handling of dangerous, hazardous and noxious goods and will also comply with any statute, statutory regulations or other legal requirement that may be in force whether presented by the New Zealand Government or any international agency or institution and also with rules, requirements or procedures set by owners of Cargo as appropriate and in addition comply with all such procedures and rules as are good operating practice.
- 7.4 All activities to be undertaken on Port Otago wharves and land must have the prior written approval of the Port General Manager or his representative. Port Otago has established procedures in respect of operations. Port Otago agrees to use its best endeavours to keep the User informed of such procedures. To the extent that Port Otago's procedures are documented, copies of the same can be viewed at Port Otago's offices at Port Chalmers. The User agrees to comply with all Port Otago procedures as advised to the User. In particular, but without limiting the foregoing:
  - a. The User will notify Port Otago on or before the arrival at the wharf of dangerous, hazardous or noxious export Cargo or other export Cargo requiring special care.
  - b. The User will give Port Otago at least 48 hours advance notice prior to the vessel's arrival of dangerous, hazardous or noxious import (including transshipment) Cargo or other import (including transshipment) Cargo requiring special care.
  - c. If Port Otago does not have knowledge of the arrival of Cargo of an inflammable, explosive, or dangerous nature or character, Port Otago shall not be liable and such Cargo can be destroyed or removed or rendered harmless without compensation to the User and the User shall indemnify Port Otago against all loss, damage or expense arising out of such Cargo being tendered for services for Port Otago.

- 7.5 If any User fails to remove any Containers or Cargo from the wharves within the time allotted as detailed in Port Otago's applicable Price Schedule then Port Otago may at its sole and unfettered discretion handle, remove, warehouse or otherwise deal with such Containers and Cargo at the entire risk and expense of the User. If any Containers or Cargo are unclaimed for a reasonable period of time, or whenever in Port Otago's opinion the Cargo will become deteriorated, decayed or worthless, Port Otago may at its discretion and without notice to the User, and without prejudice to any other rights which it may have under these Terms or at law and without any responsibility attaching to Port Otago, sell abandon, or otherwise dispose of such Cargo or Containers solely at the risk and expense of the User.
- 7.6 The storage business facilities operated by Port Otago are managed by Port Otago's R&D office. Access to and use of these storage areas requires that receiving and delivery be undertaken by Port Otago or its authorised nominee.
- 7.7 In addition to any liens Port Otago may have at law (including under the Carriage of Goods Act 1979) all goods and other property of the User shall, immediately when they come into possession of Port Otago or any subcontractor, be subject to a particular and general lien and right of detention for all monies due to Port Otago by the User or the consignee, consignor or owner, whether in respect of such goods or otherwise. If any moneys due to Port Otago are not paid within fourteen (14) days after notice has been given to the person from whom the moneys are due that such goods are being detained, then these goods may be sold by auction or otherwise at the sole discretion of Port Otago and at the expense of such person, and the net proceeds applied in or towards the satisfaction of any such indebtedness. If on such sale the goods or proceeds fail to cover the amount due and the costs incurred then Port Otago shall be entitled to recover the deficit from the User out of all cargo and containers presented to Port Otago by the User in future. Any such sale shall be without prejudice to any other rights and remedies Port Otago may have under these Terms or at law. If at any time payment from the User to Port Otago shall be in arrears, any subsisting obligation of Port Otago shall be suspended and Port Otago shall not be under any liability to the User during such period.
- 7.8 Port Otago shall be entitled to retain possession of and prohibit from leaving its wharves any Cargo or vessel until payment of all charges in respect of any Cargo or Vessel, or any previous Cargo or Vessel owned by the same person has been paid. For the purposes of this clause, cargo or vessels owned by a receiver of the owner or an associated person of the owner (as defined in Subpart YB of the Income Tax Act 2007) shall be deemed to be owned by the User.
- 7.9 As between Port Otago and the persons liable to pay charges, Port Otago's lien and right to detain goods or vessels at law and under these Terms shall apply notwithstanding that such goods may have left or never have been in Port Otago's possession.
- 7.10 The User hereby agrees to indemnify Port Otago in respect of all and any liability which Port Otago might incur pursuant to all applicable laws, orders, regulations, or other requirements of the New Zealand Government and all other local or governmental authorities whatsoever (including the Hague Rules as set out in the Fifth Schedule to the Maritime Transport Act 1985) as a result of the operation of these Terms.

- 7.11 Port Otago shall be entitled to release the User's goods to any person holding a delivery order (whether in conventional or electronic or any other customary form) entitling it to uplift the User's goods. Port Otago shall not be responsible for verifying such delivery order and excludes all liability for any loss suffered by the User in the event that the delivery order is subsequently shown to be incorrect or fraudulent.
- 7.12 The User shall indemnify Port Otago against all liability for duty, sales tax, penalties or other charges in respect of the Cargo and/or Containers and against all costs and expenses incurred in connection with any such liability or claim.

## 8. Liability regime

### 8.1 Liabilities of Port Otago

Subject to the provisions of clause 8.2 (Maximum Liabilities of Port Otago), clause 8.4 (Users Liability), clause 8.5 (Exclusions of Liability) and clause 8.7 (Notifications of Claims) Port Otago will only be liable for physical loss or damage (but not for indirect, special or consequential loss or damage or lost profit or revenue) caused by the negligence of Port Otago, its employees, agents or subcontractors to:

- a. The User's vessel and/or equipment.
- b. Containers.
- c. Cargo.
- d. Ancillary equipment (including clip-on refrigeration units, refrigeration towers, generators, trailers and chassis) owned by the User or any other persons.

### 8.2 Maximum Liabilities of Port Otago

- a. Notwithstanding any other clause in these Terms the maximum liability of Port Otago and its employees, agents and subcontractors (together) to the User or any person claiming through the User together ("Maximum Liability") is the "Maximum Liability" set out in the Liability Table below.
- b. The maximum aggregate liability of all claims for loss or damage by whomsoever made arising out of any one event ("Maximum Aggregate Liability") is the "Maximum Aggregate Liability" set out in the Liability Table below.
- c. The excess of any claim which sum will be deducted from the amount payable by Port Otago for any loss or damage will be in accordance with the Liability Table (below).
- d. All amounts of loss and damage referred to in this clause 8.2 including the Liability Table are in New Zealand dollars and are GST inclusive.

## **Liability Table**

---

Loss/Liability/ Damage	Maximum Liability	Maximum Aggregate Liability	Excess
User's Vessels & Equipment	Lesser of reasonable cost of repair or market value	\$1,000,000	\$200,000
Containers	Lesser of reasonable cost of repair or market value or:		
	(i) Refrigerated \$7,500	\$100,000	\$300
	(ii) Insulated \$4,000	\$100,000	\$300
	(iii) Other \$1,000	\$100,000	\$300
Cargo	(i) In a closed or sealed Container \$5,000	\$ 75,000	\$300
	(ii) On board a vessel \$750 per manifest tonne or part thereof	\$ 50,000	\$300
	(iii) Elsewhere \$1,000 per tonne or part thereof	\$ 50,000	\$300
Ancillary Equipment (cl8.1d)	Lesser of reasonable cost of repair or market value or \$7,000	\$ 40,000	\$300

- e. Port Otago will in no circumstances whatsoever be liable to pay any costs, charges, expenses, damages, compensation or any other monies whatsoever for any injury or loss or liability caused in any manner whatsoever to any person or property, in respect of the sum claimed or the aggregate of sums claimed under any cause of action or entitlement including the negligence of Port Otago, its employees, agents or sub-contractors in respect of any one event or interconnected series of events, beyond the maximum aggregate sum of NZ \$2,000,000.

### 8.3 Towage and Pilotage

- a. Towage: The United Kingdom Standard Conditions for Towage and Other Services (as revised 1986 and amended 2008, and as further amended from time to time) ("Towage Conditions") apply where any tug, towage, lineboat or similar services are provided to the User by Port Otago. The expression "whilst towing" as defined in the Towage Conditions shall also include any time where any tug (or lineboat or other such vessel) operated by Port Otago is alongside the User's vessel, whether or not that tug is in a position to receive orders direct from the User's vessel to commence pushing, holding, moving, escorting or guiding the User's vessel or to pick up ropes or lines. The User is deemed to be familiar with the Towage Conditions, however Port Otago will make a copy available on request.



- b. Pilotage: Where pilotage services are provided by Port Otago, pilots shall cease to be the employees of Port Otago and shall be engaged as an agent of the owners of the vessel receiving the pilotage services, and shall be under the control of the master of that vessel. Port Otago will not be liable for neglect or want of skill of the pilot. Pilotage services include any services or advice provided by the pilot while on board the vessel to be piloted, from on board the pilot launch, from on board any other vessel involved in the pilotage, and from ashore.

#### 8.4 User's Liability and Indemnity

- a. General: The User will reimburse and indemnify Port Otago in respect of any loss, liability or damage caused by the breach of these Terms by, or the fault or negligence of, the User, its employees, agents or sub-contractors.
- b. Indemnity against Joint and Several Liability: In this clause:
  - i. a reference to "Maritime Performing Party Articles" is a reference to Article 19 and/or Article 20 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the "Rotterdam Rules"), or statutory or contractual provisions of similar effect;
  - ii. "liability in relation to goods" includes, without limitation, liability for loss of, damage to, or delay in delivery of goods, and liability for any cost of defending claims, actions or demands alleging such liability (whether or not such liability is proven); and
  - iii. terms otherwise have the same meanings as in the Rotterdam Rules.

The User shall indemnify Port Otago against all liability in relation to goods except:

- i. if Maritime Performing Party Articles do not apply in relation to such liability; or
- ii. to the extent that the User can prove that Port Otago would have had such liability even if Maritime Performing Party Articles did not apply.

The indemnity provided under this clause 8.4b is in addition to and not in substitution for any indemnity to which Port Otago may be otherwise entitled at law or by these Terms or any other contract.

#### 8.5 Exclusions of Liability

Notwithstanding clauses 8.1. and 8.2. Port Otago and its employees, agents and subcontractors will not be liable in any circumstances whatsoever:

- a. Where any loss, damage, expense, accident or injury to any property or person has been caused wholly or principally by the failure of the User to comply with any of these conditions; or
- b. For any demurrage, delay or other costs of transportation of any kind howsoever caused including by the negligence of Port Otago, its employees, agents or subcontractors but Port Otago will make every reasonable endeavour by liaison with Users, their carriers and others to achieve the orderly transportation of Cargo and Containers to or from the Port; or
- c. To pay any costs, charges, expenses, damages, compensation or any other monies whatsoever for any injury or loss arising out of a failure by any person, whether or not an agent, employee, or subcontractor of Port Otago to properly and adequately secure any Cargo or Container on any rail or road vehicle, or on any other form of transport; or
- d. For any costs, charges, expenses, damages, compensation or any other monies whatsoever for any injury or loss arising from any failure to inspect Containers, any failure to note or to report damage thereto (whether apparent damage or not), or any failure to take steps necessary to protect the contents of any Container. Port Otago undertakes no responsibility to inspect Containers for damage or to report any damage to the User but will make every reasonable endeavour to refer all apparent damage to Containers to the User and to take any appropriate step necessary to protect the contents of any Container noted to be damaged; or
- e. For indirect, special or consequential loss or damage or lost profits or revenue howsoever caused including the negligence of Port Otago, its employees, agents or sub-contractors; or
- f. For any direct or indirect consequences of Port Otago's inability to provide services or facilities or facilities or equipment on demand; or
- g. Where the Towage Conditions so provide; or
- h. Where liability might otherwise be attributable to Port Otago but New Zealand law excludes Port Otago's liability, or imposes liability on another party or parties (including, without limitation, circumstances in which Port Otago provides pilots); or
- i. Where any loss, damage, expense, accident or injury to any property or person has arisen or resulted from unseaworthiness caused by want of due diligence on the part of the User to make its vessel seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and all other parts of the vessel in which Cargo is carried fit and safe for their reception, carriage and preservation in accordance with the provisions of the Hague Rules as set out in the Fifth Schedule to the Maritime Transport Act 1985.

#### 8.6 User Indemnifies Port Otago Where Liability Excluded or Liability is in Excess of Limits

The User hereby holds Port Otago, its employees, agents and subcontractors free and indemnified from and against all claims, suits, costs, charges, expenses (including all legal and court expenses of Port Otago), damages, compensation or other monies whatsoever ("the Amount") in respect of all loss, liability, damage, expense, accident or injury (whether direct, indirect, special or consequential) to the extent that the liability of Port Otago or its employees, agents or subcontractors for the Amount has been excluded under clause 8.4 and clause 8.5 or any other clause hereof and to the extent that the Amount exceeds the Maximum Liability, Maximum Aggregate Liability, or Overall Limit on Liability under clause 8.2.

#### 8.7 Notification of Claims

- a. For loss of or damage to Cargo, Port Otago may only be held liable under these Terms if notice in writing of any loss or damage is given to Port Otago by the User within 10 days after the delivery of the Cargo or the date when the Cargo should have been delivered to the consignee.
- b. For all other loss, damage, expense, accident or injury Port Otago may only be held liable under these Terms if notice in writing is given to Port Otago by the User within 30 days after the date when the loss, damage, expense, accident or injury occurred.
- c. If no such notice is given within the above periods any claim will be deemed waived and absolutely barred.

#### 8.8 Benefits of Bills of Lading and Establishment of Bills of Lading

- a. Without prejudice in any manner to the provisions and limitations contained in these Terms, the User agrees that it will incorporate in its bills of lading or other contracts of carriage to be issued on its Cargo, or Cargo carried or to be carried on any of the User's vessels, a clause to the effect that Port Otago, its employees, agents or sub-contractors will have the benefit of the provisions of any bill of lading or other contract of carriage and any limitation of liability provided therein, and Port Otago for itself, its employees, agents and sub-contractors hereby accepts such benefit.
- b. Where any Cargo or Container is received at or delivered from Port Otago operations areas prior to the establishment of a bill of lading or other contract of carriage the benefit of the intended bill of lading or contract of carriage (and in particular as set out in sub-clause 8.8a above) will apply in all respects and will bind all persons interested in the Cargo or Container as though such bill of lading or contract of carriage had then been established.

#### 8.9 User Responsible for Safe Management

- a. Nothing in these Terms contained or implied will affect the User's responsibility for the safe navigation and proper management of the vessel including, without prejudice to the generality of the foregoing, her stowage,

trim and stability and the operations of berthing, mooring, unmooring and unberthing.

- b. The User warrants to Port Otago, that it will at all times comply with its duties and obligations under the Health and Safety in Employment Act 1992, the Maritime Security Act 2004 and the Customs and Excise Act 1996 and any other relevant legislation (for the purposes of this clause, the "Acts", as amended or replaced from time to time) and that it will not do or omit to do anything which breaches or is likely to breach any duty or obligation under any of the Acts or which is likely to result in enforcement proceedings under any of the Acts.
- c. The User undertakes and warrants to Port Otago that it will comply fully with all directions, requirements and instructions notified to it by Port Otago in respect of health and safety or in respect of any duties or obligations of any person under the Health and Safety in Employment Act 1992 and all other relevant legislation. The User acknowledges that this may include producing, on demand, evidence that it is satisfying its obligations under the Health and Safety in Employment Act 1992.
- d. If any time the User becomes aware that it is in breach, or is likely to be in breach, of any such duty or obligation, the User agrees to immediately notify Port Otago and follow all directions to avoid, remedy or mitigate any such breach or anticipated breach.
- e. The User will ensure that its agents, subcontractors and employees are aware of these Terms and will abide by them.
- f. The User undertakes and warrants to comply fully with all directions, requirements and duties as to cleaning wharves at the conclusion of a vessels loading/unloading, placing and removal of rubbish skips on wharves, and with Port Otago's Access policy. (Copy available on request).
- g. The User shall comply with all relevant statutory and local laws and regulations which may be in force from time to time.

## 9. **User Environmental Warranties**

- 9.1 The User warrants to Port Otago that it will not do or omit to do anything or to use materials, substances or processes which breaches or is likely to breach any duty or obligation under the Resource Management Act 1991 and/or the Maritime Transport Act 1994 and the Hazardous Substances and New Organism Act 1996 or which is likely to result in the issue of an abatement order to enforcement proceedings under the Resource Management Act 1991.
- 9.2 If at any time the User becomes aware that it is in breach, or is likely to be in breach, of any of the warranties in clause 9.1, the User agrees to immediately notify Port Otago and follow all directions to avoid, remedy or mitigate any such breach or anticipated breach.

- 9.3 The User will ensure that its agents, subcontractors and employees are aware of these Terms and will abide by them.
- 9.4 The User warrants to Port Otago that it will comply with all other relevant standards, by-laws, local authority and other regulations and statutes including but not limited to regulations and statutes relating to sound environmental practice and the handling of dangerous, hazardous or noxious goods.
- 9.5 The User agrees to indemnify Port Otago from and against all losses, costs, expenses, claims, demands, liabilities, damages, actions and proceedings suffered by or commenced against Port Otago, which arise out of or in connection with the failure of the User, its agents, sub-contractors and employees to comply with the provisions of clause 8.9. and this clause 9 (including without limitation, subclause 8.9b., 8.9c., 8.9d., 8.9e., 8.9f., 9.1. and 9.4.).
- 9.6 The User acknowledges that the provisions of clauses 8.9 and 9 shall not cast on Port Otago any duty to supervise, check, or issue directions to the User and that the User is solely responsible for ensuring that the relevant laws are complied with.

## 10. **General**

- 10.1 The User will ensure that all sub-contractors employed by it will co-operate with Port Otago and will comply with the safety precautions required by Port Otago at all times. Port Otago may subcontract any of its services under these Terms.
- 10.2 The User will not directly or indirectly enter into negotiations relating to employment or labour matters with any employee or employees of Port Otago or any of Port Otago's agents or sub-contractors or with any bargaining agent or employee organisation representing or purporting to represent any such employee or employees of Port Otago. All such negotiations will be exclusively conducted by Port Otago.
- 10.3 These Terms will be governed and interpreted in all respects in accordance with the laws of New Zealand and the parties hereto submit themselves to the exclusive jurisdiction of the New Zealand High Court.
- 10.4 Any dispute or disagreement between the parties in relation to these Terms in which the amount in issue, or the value of property in issue, or a combination of the amount in issue and the value of property in issue, is \$100,000 (GST inclusive) or less will be submitted to arbitration within 30 days of notice of the dispute being given by one party to the other. The arbitration shall be by a single arbitrator, if one can be agreed upon, or in the absence of agreement within 7 days of notice of the dispute, as appointed by the President for the time being of the Otago Branch of the New Zealand Law Society or his or her nominee. The arbitration shall be carried out in Dunedin and the language of the arbitration shall be English. The Arbitration Act 1996 will apply, and the parties agree that the first and second schedules shall apply, but with the following amendments:

- a. First Schedule:

- i. To the extent that the notice provisions in these Terms are inconsistent with article 3 of that schedule, the notice provisions of these Terms shall apply;
  - ii. Article 15(3) shall not apply in relation to the replacement of an arbitrator under Article 13 of that schedule;
  - iii. The parties agree that either party may request the arbitral tribunal under Article 33(1)(b) to give an interpretation of a specific point or part of an award.
- b. Second Schedule:
  - i. Paragraphs 1 (4) and 1 (5) and Article 7 shall not apply; and
  - ii. Paragraphs 4(2)(a) and 4(2)(b) apply in the alternative, not cumulatively.

Either party may pursue its common law rights in the event of any dispute or disagreement where clause 10.4 does not apply.

- 10.5 All notices under these Terms will be given by personal delivery or by ordinary mail or facsimile transmission:
- a. To Port Otago at Port Chalmers,
  - b. To the User at any of the User's last known places of business whether in New Zealand or elsewhere, or at the address of the User's last known agent in New Zealand, and will be deemed to have been received two days after dispatch by mail or on the day of dispatch by facsimile.
- 10.6 For the avoidance of doubt, nothing in these Terms shall prejudice Port Otago's right to apply for injunctive relief or interim measures, to arrest the User's vessel or to proceed against the User's vessel "in rem" in any jurisdiction.
- 10.7 The Consumer Guarantees Act 1993 applies only to transactions where one party is in business and the other party is a consumer. Port Otago and the User agree that all goods and services provided by Port Otago under these Terms or otherwise are provided to the User for the purposes of a business, and agree that the Consumer Guarantees Act 1993 shall not apply to these Terms.
- 10.8 Where the Carriage of Goods Act 1979 applies, then, within the meaning of that Act:
- a. where Port Otago is a contracting carrier, these Terms shall be "at limited carrier's risk".
  - b. where Port Otago is an actual carrier, these Terms shall be "on declared terms".

- 10.9 Nothing in these Terms shall constitute or be deemed to constitute any relationship of employment, agency, joint venture or partnership between the parties. Neither party has authority to bind the other or act on its behalf except to the extent expressly agreed in writing.
- 10.10 The User shall not assign, transfer or otherwise dispose of its obligations under these Terms without the prior written consent of Port Otago (which consent may be subject to such conditions as required by Port Otago, but shall not be unreasonably withheld).
- 10.11 If any part of these Terms becomes legally ineffective, invalid or unenforceable, the effectiveness, validity or enforceability of the remainder of these Terms is not affected.

**11. Force majeure**

Port Otago will not be responsible for any complete or partial failure to perform or delay in performing or incorrect performance of any services, arising out of or contributed to by one or more of Act of God, storm, flood, fire or explosion, strikes, riots, civil commotions, lockouts, stoppages, restraints of labour of whatsoever nature or kind (whether actual or threatened), any other industrial or environmental action, war, civil war, hostilities, acts of terrorists, breakdown of or accident or failure of any crane or plant or machinery or equipment or other facility from any cause whatsoever, improper or insufficient or erroneous marking or addressing of any Cargo or Container, inherent vice or quality of goods, or any action or act whatsoever caused beyond the reasonable control of Port Otago.

**12. Variation of terms**

Port Otago reserves the right to vary these Terms from time to time. Any such variation will be notified on Port Otago's website [www.portotago.co.nz](http://www.portotago.co.nz) and will be deemed effective and accepted upon posting of the varied terms on the website.

**13. Contracts Privity Act 1982**

The Contracts (Privity) Act 1982 enable contracts to be enforced by nonparties who were intended to benefit under the contract. For the avoidance of doubt, Port Otago and the User agree that for the purposes of section 4 of that legislation, all clauses in these Terms conferring benefits on Port Otago are intended to be for the benefit of Port Otago, its employees, authorized agents and representatives and nothing in these Terms confer benefits on any other third parties.

**14. Termination**

- 14.1 In addition to Port Otago's right to deny access to berthage under clause 6.3 of these Terms, Port Otago may suspend or terminate access to its services to the User by notice in writing to the User (which notice shall be effective on the date specified in it by Port Otago) if the User:
- a. does not fulfill any of its obligations under these Terms and either:

- i. the default is material and cannot be remedied; or
    - ii. the default can be remedied but has not been so remedied 14 days after the User receives written notice of the default;
  - b. commits an act of bankruptcy or makes any assignment or composition with its creditors;
  - c. becomes liable to be placed in liquidation, has an application for it to be placed in liquidation presented or advertised, has a liquidator appointed or passes or purports to pass a resolution for it to be placed in liquidation, or has a receiver, manager or statutory manager (or similar) appointed;
  - d. cannot pay its debts when they fall due, or is deemed not to be able to pay them in accordance with section 287 the Companies Act 1993; or
  - e. suspends payment to its creditors or ceases or threatens to cease operating or convenes a meeting of its creditors to propose a scheme of arrangement with them;
  - f. transfers or disposes of a substantial part of its assets for inadequate consideration, or threatens to do so;
  - g. has an order made against it for more than \$10,000.00 against its property or assets;
  - h. has a final judgment for more than \$10,000.00 against it which remains unpaid for 14 days; or
  - i. has a change in the effective control of that party.
- 14.2 Any suspension or termination of access to Port Otago's services to the User under these Terms will be without prejudice to the rights of either party arising prior to termination.
- 14.3 Nothing in clause 14 affects the operation of any clauses in these Terms which are expressed or implied to have effect after termination.

## 15. **Definitions**

In these Terms the following meanings will apply (unless the context will otherwise indicate):

- 15.1 "Cargo" means any goods, merchandise or other property whatsoever whether or not within a Container in respect of which Port Otago provides or is requested to provide services hereunder.
- 15.2 "Consignee" means a person, firm or Company to whom any goods are consigned.
- 15.3 "Container" means any article of transport equipment (including lift van, movable tank, flat or other similar structure) constructed to the specifications of the



International Standards Organisation and having standard ISO means of top corner lifting.

- 15.4 "Dangerous Cargo" means dangerous, hazardous or noxious Cargo as defined from time to time in the General Harbour Regulations and/or in the International Maritime Organisations Code of Dangerous Cargo and/or the Maritime Transport Act 1994 and/or any other relevant New Zealand legislation.
- 15.5 "Port Otago" means Port Otago Ltd and will include its employees, agents and sub-contractors.
- 15.6 "Port" means the wharves of Port Chalmers, Dunedin and facilities owned by Port Otago.
- 15.7 "Price Schedule" means the Port Otago Price Schedule of charges in force at the date of provision of the service.
- 15.8 "Storage" means the area of open land and sheds used to accumulate Cargo.
- 15.9 "Subcontractor" includes direct or indirect subcontractors and their respective employees and agents.
- 15.10 "Transshipment" of Cargo is when Cargo is discharged from one vessel and loaded onto another vessel at Port Otago without the Cargo leaving the port operational area.
- 15.11 "User" means any person for whom Port Otago provides or is to provide service hereunder or who requests Port Otago to provide services or any person who is or who appears on reasonable grounds to be an agent, employee, subcontractor or a representative of any one or more of the foregoing, and the obligations and liabilities under these conditions of all or any of such persons, if there be more than one, will be joint and several. Without limiting the generality of the foregoing, User will include the owner, lessee, charterer, operator or manager of any vessel, a road or rail carrier, a shipper, stevedore or a combination of any two or more of those parties.

## 16. **Interpretation**

In these Terms, unless otherwise stated or the context otherwise requires:

- 16.1 Reference in these Terms to statutes or other laws or enactments include regulations and other associated instruments, and are references to those statutes, laws or enactments as consolidated, amended, re-enacted or replaced from time to time.
- 16.2 References to any "party" mean a party to these Terms and include the successors, executors, administrators and permitted assigns (as the case may be) of that party.

16.3 References to a "person" include an individual, firm, company, corporation or unincorporated body of persons, trust, any public, territorial or regional authority, any government, and any agency of any government or of any such authority (in each case, whether or not having a separate legal personality) and, includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns.