

1. Definitions

- 1.1. "Contract" means any agreement to supply the Goods to the Customer. A Contract may arise in different ways such as when Westland issues a purchase order confirmation to the Customer or when the Customer accepts a sales quotation submitted by Westland.
- 1.2. "Customer" means the Customer named in any Contract with Westland. If the Customer is more than one person, the obligations upon the Customer in these Terms shall apply to all such persons, jointly and severally.
- 1.3. "Goods" means the goods that are the subject of a Contract.
- 1.4. "Intellectual Property" means Westland's proprietary interests in the Goods, whether arising under statutory or common law, including without limitation: Westland's brands; its patents and patent applications; know-how; specifications; manufacturing methods; formulations; research and development; quality control procedures; technical documentation; and trade secrets.
- 1.5. "LEADR" is an acronym for "Lawyers Engaged in Alternative Dispute Resolution", P.O. Box 10991, Wellington. Tel: 64-4-470-0110 Fax: 64-4-470-0111 E-mail: <leadrnz@xtra.co.nz>. LEADR provides a professional mediation service.
- 1.6. "Terms" means these Terms of Trade.
- 1.7. "Westland" means Westland Dairy Company Limited, Hokitika, New Zealand.

2. General

- 2.1. All sales by Westland to the Customer shall be subject to these Terms. These Terms supersede any other terms and conditions in conflict therewith, including those on the Customer's purchase order form, if any. However, any special conditions contained in a Contract shall supersede these Terms. The Customer's receipt of the Goods shall constitute its acceptance of these Terms. To modify these Terms, both parties must sign an agreement to that effect.
- 2.2. Westland's agents and representatives have no authority to make any oral representations, statements, warranties, conditions or agreements that conflict with these Terms. Any such unauthorised representations, statements, warranties, conditions or agreements shall not bind Westland nor shall they form a part of the Contract.
- 2.3. These Terms incorporate any appendices attached and should be read in conjunction with such appendices. Likewise, if these Terms are appended to another document, they shall be deemed a part of such other document. The specific terms of any Sales Confirmation, Sales Quotation or Invoice to which these Terms are attached, or incorporated by reference, shall prevail in the event of a conflict.

3. Price

- 3.1. Unless otherwise stated, all prices are in US dollars and the parties shall transact their business in US dollars. Westland reserves the right to change its prices at any time prior to acceptance of an order. Unless otherwise stated in the Contract, the price does not include any applicable taxes, duties, freight and insurance.

4. Payment

- 4.1. Westland's standard payment terms are cash before delivery. Westland shall notify the Customer when the Goods are ready for delivery. Westland will not load the Goods for shipment until it receives payment in full. The payment terms in any sales quotation or confirmation shall override Westland's standard payment terms, but only in respect to that order.
- 4.2. If Westland requires the Customer to post security for payment (eg. irrevocable letter of credit), the Customer must post such security before the Goods are loaded for shipment. Refer to Westland's preferred format for a Documentary Credit. If not attached as an appendix to these Terms, request a copy from Westland. Westland and its bank must approve all documentary credits before the Goods are loaded for shipment. Unless otherwise agreed, a letter of credit shall provide for payment on sight of the shipping documents.
- 4.3. If the Customer does not post security for payment, Westland's standard payment terms, as stated in clause 4.1, shall then apply.
- 4.4. The Customer shall effect payment by wire transfer to the account nominated by Westland. In the event of late payment, or if the Customer fails to post security by the required date, Westland shall impose a charge upon the Customer equivalent to the bank indicator lending rate applicable to Westland plus 7%.
- 4.5. The Customer shall not withhold payment, make deductions or apply off sets unless it obtains Westland's written consent beforehand. In the event that the Customer disputes a

charge on an invoice, it shall file a claim for credit with Westland. The Customer shall furnish Westland with all relevant information to enable Westland to evaluate such claim. Upon receipt of such information, Westland shall promptly evaluate such claim and shall act with all due diligence and fairness. Westland shall issue a credit to the Customer if Westland accepts the claim. If Westland does not accept the claim, it shall nonetheless negotiate in good faith with the Customer to resolve the claim. In the interim, the Customer shall not withhold payment on an invoice pending resolution of such claim.

- 4.6. If the Customer does not effect payment in accordance with this Contract, then Westland is entitled to take such of the following steps (in addition to all other rights and remedies at it may have at law): (a) To cancel the Contract and to cancel any future orders by the Customer; and/or (b) To treat all sums due under the Contract (along with any other sums that may be due to Westland) as a liquidated debt payable at law; and/or (c) To institute such proceedings as Westland may deem fit for the immediate recovery of all sums due to Westland, whether by way of statutory demand, litigation, or otherwise as Westland may think fit; and/or (d) To recover all of the costs incurred in effecting cancellation and/or making demand and taking action to recover monies or repossess Goods, or both.

5. Shipping

- 5.1. Westland's standard shipping terms are free alongside ship, Port of Lyttelton (i.e. FAS Lyttelton). The shipping terms in any sales quotation or confirmation shall override Westland's standard shipping terms, but only in respect to that order.
- 5.2. If Westland arranges freight and insurance for the Customer, Westland shall do so strictly for the risk and account of the Customer and such accommodation shall not alter the agreed shipping terms. Westland shall have the right to inspect the Customer's marine insurance where the Customer makes its own freight and insurance arrangements.
- 5.3. The rights and obligations of Westland and the Customer in respect to FAS shipping terms (or in respect to such other shipping terms as the parties may agree), shall be as stated in *Incoterms 2000*, which the parties hereby incorporate by this reference. Under FAS shipping terms, the Customer is responsible for all taxes, freight, insurance, duties and customs clearance procedures at the port of entry. Risk of loss or damage to the Goods shall pass from Westland to the Customer in accordance with *Incoterms 2000*.

6. Purchase Order Confirmation

- 6.1. From time to time, Westland shall notify the Customer of Westland's ordering procedures. Westland shall not supply Goods to the Customer unless Westland has received a purchase order from the Customer complying with Westland's ordering procedures and Westland has confirmed in writing such purchase order. Such written confirmation may be sent by facsimile or email.
- 6.2. In its confirmation, Westland may specify an estimated delivery date. It is understood, however, that this is an estimate only. Time is not of the essence unless expressly stated in the order and confirmed by Westland. Orders once confirmed cannot be changed except by mutual agreement.
- 6.3. If Westland confirms, in writing, an order to supply Goods, such confirmation only represents a commitment by Westland to supply Goods pursuant to such order. Such confirmation does not impose an obligation upon Westland to confirm any subsequent order or re-order for the supply of Goods. No ongoing commitment to supply shall be implied from the confirmation of one or more orders or from the previous business dealings of the parties. Westland reserves the right to refuse to confirm an order submitted by a Customer in Westland's sole and absolute discretion.
- 6.4. Westland shall not be deemed to have entered into a long-term commitment with any Customer for the supply of Goods, whether expressly or by implication, absent a formal written agreement to that effect signed by a duly authorised officer of both parties. Without limiting the generality of the foregoing, communications between a representative of Westland and a Customer, whether by fax, email, telephone or otherwise, shall not be deemed to create a long term commitment for the supply of Goods, whether expressly or by implication, absent a formal written agreement to that effect signed by a duly authorised officer of both parties.

7. Packaging

- 7.1. The Customer shall advise Westland of any special packaging and labelling requirements at the time that the Customer places its order. Absent such advice, Westland shall use its standard packaging and labelling, as detailed in the product specifications.

8. Delays

- 8.1. Upon the Customer's request, Westland may agree to delay the shipment of an order. Westland may also delay the shipment of an order pursuant to clause 4.1 or clause 4.2. If Westland holds the Goods for more than 30 days, the Customer shall pay such fee as Westland reasonably determines to cover storage costs, inventory financing charges, container charges, insurance, the cost of preparing new export documentation and such other charges incurred by Westland and relating to the Goods. If such delay continues for more than 60 days, Westland may, in its discretion and without prejudice to its other rights, cancel the Contract.

9. Force Majeure

- 9.1. Westland shall not be liable for any failure or delay in delivery resulting from circumstances beyond its direct and reasonable control. Without limitation, it is specifically provided that such circumstances include: delays or failures by suppliers; refusal or failure by suppliers to provide sufficient supplies of raw milk for production; unavoidable delays in production; delays caused by seasonal factors affecting supply and/or raw milk production; shortages of raw materials; delays or failures by the Customer; strikes and labour unrest; shipping delays; delays in procuring any reasonably required import/export documentation; acts of war; acts of terrorism; government intervention; fire; flood; accident; natural disaster; and/or any other event commonly referred to as an "Act of God".
- 9.2. In the event that Westland invokes force majeure, then the following provisions will apply: (a) Insofar as the circumstances permit, then Westland shall take all reasonable steps to end the circumstances causing the force majeure and to mitigate any losses; and (b) Westland is entitled to cancel and terminate any order for product in whole or part, and in that event, then neither party shall be liable to the other; and (c) Westland is not liable for any losses which result from the force majeure or the cancellation referred to in clause (b) hereof.

10. Cancellation

- 10.1. Orders once confirmed are non-cancellable by the Customer. The Customer may request cancellation in which case Westland may grant or deny such request in its sole and absolute discretion.
- 10.2. Westland may cancel the order if: (a) The Customer breaches any provision in the Contract; (b) The Customer breaches any provision in these Terms; or (c) The Customer seeks relief under any insolvency or bankruptcy law.
- 10.3. In the event that the order is cancelled, whether pursuant to clause 8.1, clause 10.1 or clause 10.2, the Customer shall reimburse Westland for any costs incurred as a consequence thereof, including without limitation, packaging and re-packaging costs, storage costs, financing costs and any diminution in the value of the Goods due to price movements. In the event that the order is cancelled pursuant to clause 10.2, Westland may also recover lost profits and it may pursue such other rights and remedies as it may have at law.

11. Retention of Title

- 11.1. The Customer acknowledges that the purpose of this clause is to protect Westland if the Customer commits an act of insolvency or default in payment. Westland retains title to the Goods, pending receipt of payment, to the maximum extent permitted by law. Notwithstanding such retention of title until receipt of payment in full, the Customer shall be responsible for risk of loss or damage to the Goods according to the relevant shipping terms. Westland reserves all rights and remedies it may have under applicable law to recover the Goods sold and delivered to the Customer if the Customer does not pay for such Goods by the payment due date. This includes the right to divert Goods on the water, or to enter upon the Customer's premises and remove such Goods. Such rights are cumulative and not in substitution for any other rights that Westland may have in the circumstances.

12. Warranty

- 12.1. Westland warrants that the Goods shall conform to their product specifications. Upon request, Westland shall furnish the Customer a certificate of assay showing that the Goods conform to their product specifications.
- 12.2. The Customer shall forthwith inspect each shipment immediately upon sight of the shipping documents or the ship's arrival into port, whichever shall be the latter, and the following shall apply: (a) The Customer's right of reasonable inspection of each shipment must be exercised forthwith in accordance with this clause 12.2; and (b) The Customer must notify Westland within 14 days after sight of the shipping documents or the ship's arrival into port, whichever shall be the latter, in the event that the Customer considers any Goods do not conform to the Product specification therefor.
- 12.3. In the event that the Customer notifies Westland that it does not consider the Goods conform to their specification, whether by reason of defect, or quantum, or packaging damage, then the following provisions shall apply: (a) The Customer

shall provide full details of any damage or failure to conform to the Product specifications, quantity or of any packaging damage as the case may be, and must assist Westland by the provision of such particulars, statements and access to the Goods as will enable Westland to investigate the subject matter of any notification; (b) Westland may, in its absolute discretion decide whether or not to accept any notification that Goods do not conform to their specification, by reason of defect, quantity, or packaging; (c) Westland, in its absolute discretion, may determine whether to reject a notification claim or to accept such claim and issue a credit to the Customer for such quantum of the purchase price as it deems fit; (d) In the event that Westland accepts a claim, then the Customer shall dispose of the Goods in such manner as Westland shall direct.

- 12.4. If the parties are not able to agree upon how to resolve a warranty claim, Westland shall refer the dispute to an independent testing laboratory in New Zealand.
- 12.5. Westland's warranty does not cover damage to the Goods occurring after risk of loss passes from Westland to the Customer. The Customer is responsible for proper storage and handling of the Goods in accordance with best industry practice.
- 12.6. The above warranty is in place of all other warranties, whether express or implied. Specifically, and without limiting the generality of the foregoing, Westland hereby excludes any express warranty concerning product efficacy or implied warranties of merchantability or fitness for a particular purpose. Westland does not warrant that the Goods are fit for a particular purpose, even if so advised of such purpose. It is the Customer's responsibility to determine the suitability of the Goods for its own use. The Customer shall not rely upon any oral opinions, interpretations, statements, assurances or representations given by Westland.
- 12.7. The Customer is solely liable for any representations or warranties that it may give to its Customers.

13. Technical Advice

- 13.1. Where Westland gives technical advice, it does so to provide helpful suggestions only. Westland has not inquired, nor does it know, all of the Customer's unique circumstances to make a professional judgement. Westland assumes no obligation or liability for any technical advice so given. The Customer accepts such technical advice entirely at its own risk. The Customer shall use its own judgement and not rely upon Westland's.
- 13.2. Westland's technical documentation comprises its Intellectual Property. The Customer shall not alter such documentation for any purpose whatsoever unless the Customer obtains Westland's prior written consent.

14. Compliance with Law

- 14.1. The Customer shall comply with all applicable laws and regulations in the countries where the Customer intends to use or market the Goods. Specifically, and without limiting the generality of the foregoing, the Customer shall comply with all health and safety requirements, labelling requirements, registration and approval requirements, dating requirements, warranty requirements, truth in advertising requirements and country of origin marking requirements.
- 14.2. At the time the Customer places its order, it shall advise Westland of any such legal requirements to the extent they relate to the product specifications, manufacturing process, labelling, packaging, or export documentation. If Westland is able to do so, it shall comply with such requirements. Westland reserves the right to increase the price to cover the reasonable cost of complying with any such requirements.
- 14.3. The Customer acknowledges that Westland shall be relying entirely upon the Customer to convey any specific requirements that the Customer may have in respect to the Goods, including any legal requirements that apply in the Customer's markets. Westland shall not be responsible for failing to satisfy any such requirements unless the Customer advised Westland of such requirements, in writing, on or prior to the date of the Contract.

15. Liability

- 15.1. The Customer assumes responsibility for any claims relating to the Goods, excepting only claims that the Goods do not conform to their specifications at the time of shipment. The Customer shall carry appropriate insurance against claims for which it assumes responsibility, including products liability insurance.
- 15.2. Westland's liability under any circumstance shall not exceed the purchase price received by Westland for the Goods supplied by Westland to which the claim relates.
- 15.3. Westland shall not be liable for special, indirect or consequential damages.

16. Indemnity

- 16.1. The Customer shall indemnify, and hold Westland harmless, against any claims of whatever nature that arise from its processing and/or marketing of the Goods, including without

limitation: Claims arising from death or personal injury, false efficacy claims, breach of warranty claims and claims arising from health and safety violations. The foregoing indemnity shall not apply in the event that the Goods do not conform to their specifications at the time of shipment. The Customer shall further indemnify, and hold Westland harmless, against any claims of whatever nature that arise from Westland's use of the Customer's brands, artwork, packaging, formulations and specifications to produce the Goods.

17. Intellectual Property

17.1. The Customer hereby acknowledges Westland's ownership of the Intellectual Property. The Customer disclaims any interest in the Intellectual Property. The Customer shall not challenge the validity of the Intellectual Property. The Customer shall not take any action prejudicial to the Intellectual Property.

18. Mediation

18.1. The parties shall endeavour to resolve any dispute between them by means of professional mediation. The parties shall mutually agree upon the professional mediator. If the parties are unable to so agree, they shall abide by the recommendation of LEADR as to a suitable provider of such mediation services. The place of mediation shall be Christchurch, New Zealand. The parties shall share equally the fees of the professional mediator. The parties shall enter into professional mediation in good faith with the objective being to settle their dispute. The professional mediator shall have 30 days within which to facilitate an accord between the parties. If despite their good faith, the parties cannot reach an accord within such 30-day period, either party may then pursue its reme-

dies in court.

19. Governing Law

19.1. New Zealand law shall govern all transactions between the Customer and Westland. The Customer submits to the jurisdiction of New Zealand courts.

20. Waiver

20.1. No failure by Westland to insist upon strict performance of the Contract, including any of these Terms, or any delay in exercising any of its rights or remedies, shall constitute a waiver or variation of the Contract or a waiver of any such right or remedy.

21. Assignment

21.1. The Customer shall not assign its rights under any Contract without Westland's consent, not to be unreasonably withheld.

21.2. Westland shall have the right to assign its rights under any Contract without the consent of the Customer.

22. Validity

22.1. In the event that any clause in these Terms is invalid or unenforceable under the laws of the relevant jurisdiction, such clause shall be amended, but only to the extent necessary to make it valid and enforceable under such laws. If amendment is not possible, such clause shall be stricken from these Terms. However, the balance of these Terms shall continue in full force and effect.

22.2. Westland reserves the right to change these Terms. Westland shall notify the Customer of any such changes whereupon they shall apply to all subsequent orders.

Thank you for choosing Westland as your premium supplier of dairy products. We shall do everything possible to retain your goodwill.