

1. Definitions

- 1.1 “EMC” shall mean Espresso Machine Company Limited its successors and assigns or any person acting on behalf of and with the authority of Espresso Machine Company Limited.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by EMC to the Client.
- 1.3 “Guarantor” shall mean that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Goods” shall mean machines, consumables and sundries supplied for the purposes of sale by EMC to the Client (and where the context so permits shall include any supply of Services and/or Equipment as hereinafter defined) and are as described on the invoices, quotation, request to supply Goods or any other forms as provided by EMC to the Client.
- 1.5 “Services” shall mean all Services undertaken by EMC and includes any advice or recommendations (and where the context so permits shall include any supply of Goods and/or Equipment as defined above).
- 1.6 “Equipment” shall mean machines supplied for the purposes of rental by EMC to the Client (and where the context so permits shall include any supply of Goods and/or Services as defined above) and is as described on the invoices, quotation, rental agreement, or any other authorisation forms as provided by EMC to the Client.
- 1.7 “Price” shall mean the Price payable for the Goods and/or Equipment as agreed between EMC and the Client subject to clause 3 of this contract.
- 1.8 “Minimum Rental Period” shall mean the Minimum Rental Period as described on the invoices, quotation, rental agreement, or any other forms as provided by EMC to the Client.

2. Acceptance

- 2.1 Any instructions received by EMC from the Client for the supply of Goods and/or Equipment and/or the Client's acceptance of Goods and/or Equipment supplied by EMC shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of EMC.
- 2.4 The Client shall give EMC not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by EMC as a result of the Client's failure to comply with this clause.
- 2.5 Goods and/or Equipment are supplied by EMC only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- 2.6 The Client acknowledges that they enter into this agreement for commercial/business purposes only and not for any consumer or personal purpose.

3. Price And Payment

- 3.1 At EMC's sole discretion the Price shall be either:
 - (a) as indicated on the invoices and/or Rental Agreement provided by EMC to the Client in respect of Goods and/or Equipment supplied; or
 - (b) for repair work, EMC shall levy a minimum charge on all items left for repair. Any additional work required after diagnosis of the fault shall be at EMC's estimated Price (subject to clause 3.2) which shall not be deemed binding upon EMC as the actual Price can only be determined upon completion of the repair. EMC undertakes to keep the Client informed should the actual Price look likely to exceed the original estimate; or
 - (c) EMC's quoted Price (subject to clause 3.2) which shall be binding upon EMC provided that the Client shall accept EMC's quotation in writing within thirty (30) days.
- 3.2 EMC reserves the right to change the Price in the event of a variation to EMC's quotation or Rental Agreement and any variation from the plan of scheduled works or specifications of the Goods and/or Equipment (including, but not limited to, any variation as a result of delays caused in the procurement of products or parts, variation in freight costs or as a result of variations in currency exchange rates) will be charged for on the basis of EMC's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 3.3 Unless specifically stated otherwise in writing, the Price excludes installation and freight costs.
- 3.4 At EMC's sole discretion a non-refundable deposit may be required.
 - (a) At EMC's sole discretion payment shall be due on delivery of the Goods and/or Equipment; or
 - (b) payment for approved Clients shall be due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices.
- 3.5 Client's are required to pay rental charges for the on-going use of the Equipment. The charges payable for the duration of the Rental Period are stipulated and are due and payable as per EMC's quotation. EMC may adjust the Price from time to time (as per clause 3.2) upon one (1) month's written notice to the Client.
- 3.6 Time for payment shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 3.7 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to three percent (3%) of the Price), or by direct credit, or by any other method as agreed to between the Client and EMC.
- 3.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

4. Delivery of the Goods and/or Equipment

- 4.1 At EMC's sole discretion delivery of the Goods and/or Equipment shall take place when the Client takes possession of the Goods at EMC's address.
- 4.2 The failure of EMC to deliver shall not entitle either party to treat this contract as repudiated.

4.3 EMC shall not be liable for any loss or damage whatsoever due to failure by EMC to deliver the Goods and/or Equipment (or any of them) promptly or at all, where due to circumstances beyond the control of EMC.

5. Security And Charge

5.1 Despite anything to the contrary contained herein or any other rights which EMC may have howsoever:

- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to EMC or EMC's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that EMC (or EMC's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- (b) should EMC elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify EMC from and against all EMC's costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint EMC or EMC's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 5.1.

6. Client's Disclaimer

6.1 The Client hereby disclaims any right to rescind, or cancel any contract with EMC or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Client by EMC and the Client acknowledges that the Goods are bought relying solely upon the Client's skill and judgment.

7. Defects

7.1 The Client shall inspect the Goods and/or Equipment on delivery and shall within five (5) days of delivery (time being of the essence) notify EMC of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford EMC an opportunity to inspect the Goods and/or Equipment within a reasonable time following delivery if the Client believes the Goods and/or Equipment are defective in any way. If the Client shall fail to comply with these provisions the Goods and/or Equipment shall be presumed to be free from any defect or damage. For defective Goods and/or Equipment, which EMC has agreed in writing that the Client is entitled to reject, EMC's liability is limited to either (at EMC's discretion) replacing the Goods and/or Equipment or repairing the Goods and/or Equipment.

7.2 Goods will not be accepted for return other than in accordance with 7.1 above.

8. Consumer Guarantees Act 1993

8.1 This agreement is subject to the provisions of the Consumer Guarantees Act 1993 in all cases except where the Client is contracting within the terms of a trade/business (which cases are specifically excluded).

9. Intellectual Property

9.1 The Client warrants that all designs or instructions to EMC will not cause EMC to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify EMC against any action taken by a third party against EMC in respect of any such infringement.

9.2 The Client agrees that EMC may use any documents, designs, drawings or Goods and/or Equipment created by EMC for the purposes of advertising, marketing, or entry into any competition.

9.3 EMC retains, exclusively, all intellectual property rights associated with documents, designs, drawings, Goods, Equipment, patents, registered designs, trademarks, or domain names purchased or created by EMC. Where EMC has provided this intellectual property to the Client for the sole purpose of this agreement, EMC retains ownership of the intellectual property, but grants the Client a non-exclusive and non-transferable licence for its use (solely in relation to this agreement). The Client shall have no right to use any of the intellectual property outside the scope of this agreement, and EMC shall be entitled to compensation from the Client, where it is shown that the Client has failed to adhere to this clause.

10. Default & Consequences Of Default

10.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at EMC's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

10.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by EMC.

10.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify EMC from and against all costs and disbursements incurred by EMC in pursuing the debt including legal costs on a solicitor and own client basis and EMC's collection agency costs.

10.4 Without prejudice to any other remedies EMC may have, if at any time the Client is in breach of any obligation (including those relating to payment) EMC may suspend or terminate the supply of Goods and/or Equipment to the Client and any of its other obligations under the terms and conditions. EMC will not be liable to the Client for any loss or damage the Client suffers because EMC has exercised its rights under this clause.

10.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.

10.6 Without prejudice to EMC's other remedies at law EMC shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to EMC shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to EMC becomes overdue, or in EMC's opinion the Client will be unable to meet its payments as they fall due; or

- (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

11. Cancellation

- 11.1 EMC may cancel any contract to which these terms and conditions apply or cancel delivery of Goods and/or Equipment at any time before the Goods and/or Equipment are delivered by giving written notice to the Client. On giving such notice EMC shall repay to the Client any sums paid in respect of the Price. EMC shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 11.2 In the event that the Client cancels delivery of the Goods and/or Equipment the Client shall be liable for any loss incurred by EMC (including, but not limited to, any loss of profits) up to the time of cancellation.
- 11.3 Cancellation of orders for Goods and/or Equipment made to the Client's specifications or non-stocklist items will definitely not be accepted, once the order has been processed.

12. Privacy Act 1993

- 12.1 The Client and the Guarantor/s (if separate to the Client) authorises EMC to:
 - (a) collect, retain and use any information about the Client and/or Guarantors, for the purpose of assessing the Client's and/or Guarantors creditworthiness or marketing products and services to the Client and/or Guarantors; and
 - (b) disclose information about the Client and/or Guarantors, whether collected by EMC from the Client and/or Guarantors directly or obtained by EMC from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client and/or Guarantors.
- 12.2 Where the Client and/or Guarantors are an individual the authorities under clause 12.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 12.3 The Client and/or Guarantors shall have the right to request EMC for a copy of the information about the Client and/or Guarantors retained by EMC and the right to request EMC to correct any incorrect information about the Client and/or Guarantors held by EMC.

13. Unpaid Seller's Rights

- 13.1 Where the Client has left any item with EMC for repair, modification, exchange or for EMC to perform any other Service in relation to the item and EMC has not received or been tendered the whole of the Price, or the payment has been dishonoured, EMC shall have:
 - (a) a lien on the item;
 - (b) the right to retain the item for the Price while EMC is in possession of the item;
 - (c) a right to sell the item where an invoice due for payment remains unpaid after sixty (60) days.
- 13.2 The lien of EMC shall continue despite the commencement of proceedings, or judgement for the Price having been obtained.

14. General

- 14.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 14.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of Auckland, New Zealand.
- 14.3 EMC shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by EMC of these terms and conditions.
- 14.4 In the event of any breach of this contract by EMC the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price.
- 14.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by EMC nor to withhold payment of any invoice because part of that invoice is in dispute.
- 14.6 EMC may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 14.7 EMC reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which EMC notifies the Client of such change.
- 14.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 14.9 The failure by EMC to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect EMC's right to subsequently enforce that provision.

Terms Applicable to Goods Only

15. Risk – Goods

- 15.1 If EMC retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 15.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, EMC is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by EMC is sufficient evidence of EMC's rights to receive the insurance proceeds without the need for any person dealing with EMC to make further enquiries.

16. Title – Goods

- 16.1 EMC and Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid EMC all amounts owing for the particular Goods; and
 - (b) the Client has met all other obligations due by the Client to EMC in respect of all contracts between EMC and the Client.

- 16.2 Receipt by EMC of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then EMC's ownership or rights in respect of the Goods shall continue.
- 16.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until EMC shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from EMC to the Client EMC may give notice in writing to the Client to return the Goods or any of them to EMC. Upon such notice being given the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Client is only a bailee of the Goods and until such time as EMC has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to EMC for the Goods, on trust for EMC; and
 - (d) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that EMC will be the owner of the end products; and
 - (e) if the Client fails to return the Goods to EMC then EMC or EMC's agent may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Goods are situated and take possession of the Goods, and EMC will not be liable for any reasonable loss or damage suffered as a result of any action by EMC under this clause.

17. Goods On Consignment

- 17.1 Where Goods are supplied on consignment the following provisions apply specifically to those Goods:
- (a) the Goods shall be at the Client's risk from the time of delivery and the Client shall be responsible for insuring the Goods.
 - (b) the Client may retain possession of the Goods until the Client sells them or EMC requires re-delivery of them to EMC, whichever first occurs.
 - (c) if EMC requires re-delivery of the Goods such re-delivery shall be at the Client's cost.
 - (d) the Client shall notify EMC on a fortnightly basis of all consignment Goods sold during that fortnightly period and shall within seven (7) days of that fortnightly advice pay EMC for the Goods sold.

18. Personal Property Securities Act 1999 ("PPSA")

- 18.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all Goods previously supplied by EMC to the Client (if any) and all Goods that will be supplied in the future by EMC to the Client.
- 18.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which EMC may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, EMC for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register a financing change statement or a change demand without the prior written consent of EMC; and
 - (d) immediately advise EMC of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 18.3 EMC and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 18.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 18.5 Unless otherwise agreed to in writing by EMC, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 18.6 The Client shall unconditionally ratify any actions taken by EMC under clauses 18.1 to 18.5.

19. Warranty – Goods

- 19.1 For Goods not manufactured by EMC, the warranty shall be the current warranty provided by the manufacturer of the Goods. EMC shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 19.2 To the extent permitted by statute, no warranty is given by EMC as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. EMC shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

Terms Applicable to Equipment Only

20. Licence to Use

- 20.1 EMC grants to the Client a personal, non-exclusive, non-transferable, limited licence to use the Equipment, provided that:
- (a) the Client ensures the Equipment is serviced (every twelve (12) months) and any consumable parts (including, but not limited to, filters and seals) are changed (every six (6) months) exclusively by EMC, which shall be additionally charged to the Client; and
 - (b) any consumables and sundry items (including, but not limited to, cleaning products for the Equipment) which are to be utilised in conjunction with the Equipment are purchased exclusively from EMC.
- 20.2 Where the Client fails to adhere to clause 20.1, EMC may (at their sole discretion) terminate the rental agreement or apply penalty charges to the Client's account, the amount immediately becoming due and payable.
- 20.3 Under no circumstances shall rental of the Equipment by the Client be subject to a trial period of that Equipment.

21. Equipment Substitution

21.1 EMC reserves the right at any time during the rental period to either permanently or temporarily replace or substitute any Equipment with equivalent Equipment, provided at all times that the replacement Equipment is capable of performing or functioning to the same minimum specifications as the Equipment which is being replaced.

22. Charges / Rental Period

22.1 Charges shall commence from either the time the Equipment is:

- (a) collected by the Client from EMC's premises; or
- (b) the date specified on EMC's Rental Agreement (whichever first occurs).

22.2 Rental charges shall be paid on a monthly basis, (except where the rental is less than one (1) month), the first payment falling due on the date EMC accepts the agreement, with subsequent payments due on the same date in each monthly period. Except when renting for a period of less than one (1) month, the Client must give EMC not less than one (1) months notice of termination. The rental will then terminate on the last day of the notice period. If the Client does not terminate the rental at the end of the Rental Period, payments will continue at the same amount and frequency until notice is received.

22.3 If the Client wishes to terminate the agreement prior to the expiration of the Rental Period, the Client must pay to EMC the remaining rental charges, which would otherwise have been payable to EMC during the Rental Period.

22.4 No allowance whatever can be made for time during which the Equipment is not in use for any reason, unless EMC confirms special prior arrangements in writing.

23. Risk – Equipment

23.1 All risk for the Equipment passes to the Client on collection from EMC's premises.

23.2 The Client accepts full responsibility for the safekeeping of the Equipment and indemnifies EMC for all loss, theft, or damage to the Equipment, howsoever caused, and without limiting the generality of the foregoing, whether or not such loss, theft, or damage is attributable to any negligence, failure, or omission of the Client.

23.3 The Client will insure, or self insure, EMC's interest in the Equipment against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property arising out of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.

23.4 The Client accepts full responsibility for, and shall keep EMC indemnified, against all liability in respect of all actions, proceedings, claims, damages, costs and expenses in respect of any injury to persons, or damage to property, arising out of the use of the Equipment during the Rental Period, however arising, and whether or not arising from any negligence, failure or omission of the Client or any other persons.

24. Title – Equipment

24.1 The Equipment is and will at all times remain the absolute property of EMC.

24.2 If the Client fails to return the Equipment to EMC, then EMC, or EMC's agent, may enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Equipment is situated as the invitee of the Client and take possession of the Equipment, without being responsible for any damage thereby caused.

24.3 The Client is not authorised to pledge EMC's credit for repairs to the Equipment, or to create a lien over the Equipment in respect of any repairs.

25. Client's Responsibilities

25.1 The Client shall:

- (a) notify EMC immediately by telephone of the full circumstances of any mechanical breakdown or accident. The Client is not absolved from the requirements to safeguard the Equipment by giving such notification;
- (b) satisfy itself at commencement that the Equipment is suitable for its purposes;
- (c) operate the Equipment safely, strictly in accordance with the law and in accordance with any manufacturer's instruction whether supplied by EMC or posted on the Equipment;
- (d) ensure that all persons operating the Equipment are suitably instructed in its safe and proper use;
- (e) comply with all occupational health and safety laws relating to the Equipment and its operation;
- (f) on termination of the Rental Period, deliver the Equipment complete with all parts and accessories, clean and in good order as delivered, fair wear and tear accepted, to EMC;
- (g) keep the Equipment in their own possession and control and shall not assign the benefit of the agreement nor be entitled to lien over the Equipment;
- (h) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment;
- (i) employ the Equipment solely for its intended purpose and shall not permit the Equipment or any part thereof to be used by any other party for any other purpose;
- (j) not fix any of the Equipment in such a manner as to make it legally a fixture forming part of any freehold.

25.2 Immediately on request by EMC, the Client will pay:

- (a) the new list price of any Equipment that is for whatever reason destroyed, written off or not returned to EMC;
- (b) all costs incurred in cleaning the Equipment;
- (c) all costs of repairing any damage caused by the ordinary use of the Equipment up to an amount equal to ten percent (10%) of the new list price of the Equipment;
- (d) the cost of repairing any damage to the Equipment caused by the negligence of the Client or the Client's agent;
- (e) the cost of repairing any damage to the Equipment caused by vandalism, or (in EMC's reasonable opinion) in any way whatsoever other than by the ordinary use of the Equipment by the Client;
- (f) the cost of consumables provided by EMC and used by the Client.

26. Warranty – Equipment

26.1 No Warranty is provided by EMC in respect of the condition of the Equipment or its fitness for any particular purpose. The Client shall indemnify and hold harmless EMC in respect of all claims arising out of use of the Equipment.