

General conditions of contract relating to foreign currency transactions and the collection of foreign cheques

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**FIRSTRAND**  
Banking Group

**1. INTRODUCTION**

- 1.1 The terms and conditions set out in this document are those applicable to all foreign currency transactions between the Bank and its clients in respect of which these terms and conditions have been incorporated by reference. These terms and conditions do not cover derivatives, letters of credit, guarantees and are in addition to the terms and conditions covered by the FNB International Banking Electronic Products Agreement.
- 1.2 The Bank reserves the right to amend these terms and conditions at any time and such amended terms and conditions will only apply to the transactions into which they have been incorporated by reference.

**2. INTERPRETATION**

- 2.1 The headnotes to the clauses are inserted for reference purposes only and shall in no way govern or affect the interpretation hereof.
- 2.2 Unless inconsistent with the context, the expressions set forth below shall bear the following meanings:

“Bank”	FirstRand Bank Limited (acting through its Rand Merchant Bank Division)
“Business day”	Any day on which a transaction may be settled through normal banking channels in the countries in which the principal market for dealing in the currencies which are the subject matter of a transaction are located
“Client”	A legal and natural person who has entered into a transaction with the Bank in respect of which these terms and conditions have been incorporated by reference

“Foreign cheque”	A cheque payable in a foreign currency
“Foreign currency”	The lawful currency of any country other than South Africa
“LIBOR”	Unless otherwise agreed in writing between the Bank and the client, LIBOR shall be the rate certified by the Bank to represent the London Inter Bank Offer Rate as published on Reuters as being the British Bankers Association Interest Settlement rate
“Net asset value”	The excess of a party's assets over its liabilities, as determined from its most recent financial statements: provided a party's liabilities exceeds its assets, its net asset value will be deemed to be zero
“Prime rate”	Means the interest rate (percent, per annum, compounded monthly) from time to time published by FirstRand Bank Limited as being its prime overdraft rate, as certified by any manager of that bank whose appointment and designation need not be proved
“Rand”	The legal currency of South Africa
“Trade date”	A date upon which a transaction is concluded
“Transaction”	A foreign currency transaction concluded between the parties and comprising of a spot, forward or swap transaction, as the case may be
“Value date”	The agreed date of settlement of a transaction (provided that if any such value date occurs on a

day other than a business day then the value date for such transaction shall be the next business day) or, in the case of a spot transaction for which no date of Value is provided, the second business day after the trade date

2.3 Unless inconsistent with the context, an expression which denotes any gender includes the other genders, a natural person includes an artificial person and vice versa and the singular includes the plural and vice versa.

2.4 References to "writing", "written notice", "written instructions" and the like shall exclude telefaxes and electronic communications which may be printed, such as telexes and e-mails.

### **3. EXCHANGE RATE**

Where foreign currency is sold by the client to the Bank, the agreed exchange rate will be settled on the basis of delivery by S.W.I.F.T. or by telegraphic transfer, for the value date. If delivery is in any other form, such as the negotiation of sight or usance bills, the rate will be adjusted on the value date by the Bank by the difference between the Bank's telegraphic transfer rate and the appropriate sight or usance rate.

### **4. CONFIRMATION**

4.1 All transactions are concluded between the Bank and the client telephonically, which are recorded. A confirmation in respect of each transaction shall be made by the Bank to the client promptly on the trade date.

4.2 Written confirmation of Forward Exchange Contract will be communicated to the client by telefax, electronic mail or electronic dealing system. Written confirmation of a Spot transaction will be communicated to the client by telefax, electronic mail or electronic dealing system only on request from the client.

4.3 The failure by the Bank to make a confirmation as provided for shall not invalidate the transaction concerned.

4.4 A confirmation which has been provided by the Bank shall constitute prima facie proof of the subject matter of the transaction concerned unless the client notifies the Bank in writing (which may be sent by telefax) or by telephone, that it disputes the confirmation, before 16h00 on the business day following receipt of such confirmation. Where notification is by telephone, the client must confirm the telephonic notice, in writing or by telefax within 24 hours of giving the telephonic notice.

## **5. SETTLEMENT OF TRANSACTIONS**

5.1 Payments to the client in terms of a transaction will be made to the account for the currency concerned specified by the client in terms of standard settlement instructions provided by the client to the Bank and accepted by the Bank or, if no such instructions have been provided, to the account specified by the client when the transaction is entered into, and recorded in the settlement confirmation, or as otherwise agreed. If no account is so specified, and accepted or recorded, and if no other arrangement has been agreed, the client will be obliged to advise the Bank in writing of the account to which the payment must be made by no later than two business days prior to the value date, and failure to do so will entitle the Bank:

5.1.1 to cancel the transaction concerned, and any loss or profit arising on such cancellation (as determined by the Bank in accordance with its standard procedures) will be for the account of the client; or

5.1.2 to take whatever action is required to ensure that settlement of the transaction takes place (but without obligation on the Bank to do so) which will include, but not be limited to, payment of rand to the client's principal demand deposit account maintained with the Bank (if any).

5.2 Payment of foreign currency to the Bank in terms of a transaction must be made to the Bank's relevant Nostro account, depending on the currency concerned.

5.3 In the event of the client not giving timeous valid instructions to the Bank to debit a particular rand account with amounts due by the client to the Bank in respect of

any transaction, the Bank will be entitled, but not obliged, to debit any such amounts to the client's principal demand deposit account maintained with the Bank (if any). The foregoing shall not prejudice any rights which the Bank may have as a result of the client's failure to pay amounts due to the Bank.

**6. CANCELLATIONS, PARTIAL SETTLEMENTS, EARLY DRAWDOWNS AND EXTENSIONS OF TRANSACTIONS**

6.1 In the event of the client wanting to:

6.1.1 cancel a transaction in whole or in part;

6.1.2 effect partial settlement of a transaction;

6.1.3 make an early drawdown of a transaction; or

6.1.4 extend the value date of a transaction;

it shall instruct the Bank, at least two business days prior to the then existing value date or the proposed new earlier value date of the transaction, as the case may be, to effect such variation. Such instructions shall be by electronic dealing system or in writing, by telefax or by telephone. Where the instruction is by telephone, the client must confirm the telephonic instruction, in writing or by telefax within 24 hours of giving the telephonic instruction.

6.2 Any loss or profit arising on a variation contemplated in 6.1 (as determined by the Bank in accordance with its standard procedures) will be for the account of the client and will be payable at the time of such variation, or on the originally agreed value date for the transaction, as determined by the Bank.

**7. DISPUTE RESOLUTION**

7.1 If the client disputes the contents of a confirmation in terms of 4.4 then the parties shall forthwith meet to resolve such dispute and endeavour jointly to agree upon their respective indebtedness to each other thereunder. Where the parties elect to use the provisions of this clause and if, however, they fail to reach agreement

thereon by the close of business on the business day after receipt by the Bank of the dispute notice under 4.4, the Bank will, unless the parties agree otherwise in writing or by telefax, terminate the disputed transaction by no later than close of business on the next business day (by entering into an equal and opposite transaction at then current rates) and if a loss arises on such termination, debit the client's account with the amount of such loss. Either party shall be entitled thereafter to refer the dispute for resolution by an arbitrator selected by agreement between the parties or, failing agreement, an impartial arbitrator appointed by the chief executive for the time being of The Banking Council South Africa. Such arbitration shall be held in accordance with the provisions of the Arbitration Act, 1965, save that it shall be informal and the arbitrator shall have full and free discretion to determine the procedure to be adopted. The decision of the arbitrator in any such arbitration proceedings shall be final and binding on each of the parties, will be carried into effect and may, at the instance of either party, be made an order of court.

- 7.2 In the event of a dispute which has not been resolved by the value date of the transaction, and the transaction in respect of which the dispute exists has not been terminated, as contemplated in 7.1, each of the parties shall be obliged to settle the transaction concerned pending resolution of the dispute pursuant to 7.1 by effecting the payment due as reflected in the confirmation; provided that if either party alleges that no transaction was entered into at all, then neither party shall be obliged to effect payment. Immediately after the giving of a ruling by an arbitrator pursuant to the provisions of 7.1, each of the parties shall be obliged to put the other party in the same position as that in which it would have been in had the ruling been made on the date of the original value date of the transaction.

## **8. RECORDING**

- 8.1 It is the Bank's practice to record all telephone conversations with the Bank's dealing room with regard to transactions. The Bank may use the recording of and/or a transcript thereof in any disputes.
- 8.2 Notwithstanding 8.1, the Bank has no obligation to the client to:

8.2.1 retain its practice of recording telephone conversations;

8.2.2 retain such recordings for any period of time; or

8.2.3 to ensure that its recording equipment is in a working condition

and any failure to have a recording for any of the aforementioned reasons (or any other reason) will not give rise to an adverse inference against the Bank.

**9. INTEREST ON ARREARS**

9.1 Interest shall accrue on the outstanding balance from time to time of each foreign currency amount or each rand amount due and payable, but unpaid, by any party to the other. The interest rate will be the relevant overnight LIBOR rate, plus 2 percentage points for any foreign currency amount and the prime rate, plus 2 percentage points for any rand amount.

**10. BREACH**

10.1 Should:

10.1.1 either party fail, for any reason whatsoever, to make payment due by it under any transaction, within two business days after notice of that non-payment has been given to it by the other party; or

10.1.2 either party breach any other provision of a transaction and fail to remedy such breach within seven days after receipt of a notice from the other party requiring it to do so; or

10.1.3 either party be placed under provisional or final sequestration or liquidation, provisional or final judicial management or be unable to pay its debts as they fall due, or attempt to compromise with its creditors, or enter into an arrangement, compromise or a composition with or for the benefit of its creditors, or commit an act of insolvency, as defined in the Insolvency Act, 1936; or

10.1.4 either party fail to pay any amount(s) due to any other person(s)

whomsoever and from whatsoever cause in an amount(s) in aggregate in excess of 3% of the defaulting party's net asset value and, as a result of such failure the other person(s) become(s) entitled to demand payment of an amount(s) that was/were otherwise not yet due; or

10.1.5 should the client be in breach of any agreement between it and the Bank, and the Bank becomes entitled to exercise its right to accelerate payments due or claim damages under such other agreement, or to cancel such other agreement as a result of such breach

then, in any of the aforesaid events, the other party shall, without prejudice to any rights which may thereupon be available to it in terms hereof (which include, without limitation, the right to demand specific performance, the right to cancel any or all transactions and the right to claim damages) and/or any other agreement between the parties or at law, be entitled to stipulate an early termination date with regard to all transactions then in existence, by written notice to the defaulting party.

10.2 Upon the occurrence of an early termination date all then existing transactions will terminate and the amount payable will be:

10.2.1 The net of the settlement amounts in respect of each terminated transaction (the settlement amount being the amount determined by the non-defaulting party in good faith on the basis of at least two quotations obtained from financial institutions active in the foreign exchange market in Johannesburg as being the rand amount that such financial institution would either pay to, or charge, the non-defaulting party to assume the rights and obligations of the defaulting party under the relevant transaction on the early termination date had the transaction not terminated). If an amount would be payable by the non-defaulting party to such financial institutions, such amount will be a positive amount and if an amount would be payable to the non-defaulting party by such financial institutions, such amount will be a negative amount; plus

10.2.2 all amounts in respect of terminated transactions (other than those taken

into account in clause 10.2.1) owed by the defaulting party to the non-defaulting party (which, if not denominated in rand will be converted to rand at the rate at which the non-defaulting could, in good faith, purchase rand with the currency concerned); less

10.2.3 all amounts in respect of terminated transactions (other than those taken into account in clause 10.2.1) owed by the non-defaulting party to the defaulting party (which, if not denominated in rand will be converted to rand at the rate at which the non-defaulting could, in good faith, purchase rand with the currency concerned).

10.3 Should the amount determined, on the basis of clause 10.2, be a positive amount, such amount will be payable by the defaulting party to the non-defaulting party and if the amount is a negative amount, the absolute value thereof will be payable by the non-defaulting party to the defaulting party.

10.4 The amount determined pursuant to clause 10.3 will be payable as of the early termination date.

10.5 Notwithstanding anything to the contrary contained herein or any other agreement between the parties (whenever entered into), it is agreed that, in the event the client:

10.5.1 being in breach of the terms of this or any other agreement between the parties; or

10.5.2 being sequestrated or put into liquidation, placed under judicial management or being wound up, whether provisionally or finally or being placed under curatorship

the Bank will not be obliged to pay any amounts or to perform any obligations due to the client until all amounts owed and all performances due by the client and any affiliates of the client to the Bank and its affiliates, have been paid in full or fully performed.

- 10.6 For purposes of 10.5, affiliate, in relation to a party, means any subsidiary of such party, any holding company of such party or any other subsidiary of such holding company, as those terms are defined in the Companies Act, 1973.

## **11. CERTIFICATION OF INDEBTEDNESS**

A certificate signed by any manager of the Bank (whose appointment and designation need not be proved) as to any indebtedness of the client in terms of any transaction/s, or as to any other fact, shall be prima facie evidence of the client's indebtedness to the Bank, or of such other fact, for the purpose of any application or action, judgement or order, or for any other purpose whatsoever.

## **12. AUTHORISED PERSONS**

12.1 If the client provides to the Bank a list of persons who are authorised to provide instructions, notices, requests or to acknowledge confirmations the Bank reserves the right to rely on such instructions, requests, notices or acknowledgements which the Bank believes are given or made by any person who is or who is believed by the Bank to be a person who is authorised or entitled under the said list to give or make such instructions, notices, requests or confirmations on the clients behalf, provided that in doing so the Bank acts in good faith. The Bank shall not be required to enquire as to the authority or entitlement of any such person to give such instructions, notices, requests or confirmations.

12.2 If the client does not provide a list of the type contemplated in 12.1 to the Bank, the Bank is entitled to assume that any instruction, notice, request or confirmation (whether in writing or not and however communicated to the Bank) has been properly authorised by the client if they are given or purported to be given by an individual or person who is or purports to be and is reasonably believed by the Bank to be a director or employee of the client, or the client's authorised agent.

## **13. WARRANTIES**

13.1 Each transaction shall be subject to and conditional upon compliance with any relevant law, including, without derogating from the generality of the foregoing,

the South African Exchange Control Regulations, the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004, and any rulings, laws, rules, regulations and directives of any competent authority in force at the time of entering into any transaction or which may come into force thereafter but be applicable to any transaction already entered into.

13.2 The client warrants to the Bank that each transaction shall accord with approvals or permissions granted to the client by the South African Reserve Bank and that the client shall not be in contravention of any of the rules, laws, regulations or directives referred to in 13.1 in respect of any transaction. In particular, the client warrants that:

13.2.1 no other foreign exchange cover exists for the obligations covered by transactions entered into, and none will be applied for whilst any such transaction subsists; and

13.2.2 transactions entered into are required to cover a firm and ascertained exchange receipt or commitment (as the case may be) and that the period for which such transactions are entered into will not extend beyond the date upon which such receipt, or commitment (as the case may be), is due.

13.3 The Bank warrants that it is an authorised dealer in foreign currency as envisaged in the South African Exchange Control Regulations.

13.4 In the event of the warranties made by the client not being and remaining true and correct while any transaction remains outstanding, the Bank will be entitled to take such action as it considers necessary to ensure that it is in or becomes in compliance with its obligations as an authorised dealer, which will include, but not be limited to, terminating any non-compliant transactions in accordance with then current exchange control rulings. The foregoing is without prejudice to any other rights which the Bank may have as a result of such incorrect warranty being given.

#### **14. COLLECTION OF FOREIGN CHEQUES**

- 14.1 The client will be entitled to request the Bank to collect foreign cheques payable to the client, which are deposited by the client in its account.
- 14.2 The client acknowledges that it is fully aware of all risks associated with the acceptance of a foreign cheque and, more specifically, that foreign cheques may be returned by drawee banks at any time after the date of deposit, due to any of the following reasons:
- 14.2.1 forged, fraudulent alteration of the cheque, signature or endorsement or missing endorsement;
- 14.2.2 any other forged, false, fraudulent or missing information on the back of the cheque, which has been accepted or printed by the collecting bank or any other party; or
- 14.2.3 any alteration on the back of the cheque.
- 14.3 The client, with full knowledge of the risks referred to in 14.2, authorises the Bank to collect foreign cheques for deposit for the client's account.
- 14.4 The client undertakes to indemnify and hold harmless the Bank against all and any damages and losses sustained by the Bank and expenses incurred by the Bank as a result of the Bank carrying out the client's instruction to collect the foreign cheque and the client hereby waives any claim it may have against the Bank and indemnifies the Bank in respect of any loss or damage, of whatsoever nature, which the Bank may suffer as a result of collecting the foreign cheque, as aforesaid.

## **15. INDEMNITY**

The client will indemnify the Bank against any losses or damages arising from claims by any third party, and waives any claims which it may have against the Bank from whatsoever cause arising, including but not limited to errors or delays in transmission of communications or payments, misinterpretation of communication on receipt, or failure to identify properly the person or persons mentioned in any communication, unless such loss or damage was caused by the Bank's wilful default or negligence.

**16. NOTICES**

16.1 All notices, demands or communications intended for the Bank shall be made or given to the Bank as follows:

**THE BANK:** Rand Merchant Bank  
1 Merchant Place  
Cnr Fredman Drive & Rivonia Road  
Sandton  
2196  
Telefax: (011) 269 9230

16.2 The client will be deemed to have elected either its registered address or its most recent physical address (as well as its most recent telefax number) advised to the Bank, at the option of the Bank, as its address for notices etc. and as its domicilium.

16.3 Any party shall be entitled to change its domicilium from time to time, provided that any new domicilium selected by it shall be an address other than a post box number, and any such change shall only be effective upon receipt of notice in writing by the other party of such change.

16.4 A notice sent by one party to the other shall be deemed to have been received on the same day, if delivered by hand or sent by telefax and on the fifth day after posting, if sent by prepaid registered post.

16.5 Notwithstanding anything to the contrary contained herein a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

**17. GENERAL**

17.1 These terms and conditions and the confirmations of transactions into which these terms and conditions are incorporated by reference set out the entire agreement and understanding between the parties in connection with the subject matter. No party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded herein or in any other document recording the transaction.

17.2 No indulgence which either of the parties (“the grantor”) may grant to the other of them (“the grantee”) shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which might have arisen in the past or which might arise in the future.

17.3 Save as otherwise agreed to and provided for in writing between the parties, no party shall be entitled to cede or assign its rights or obligations in terms of any transaction to any third party without the consent of the other party.

**18. LAW TO APPLY**

All transactions shall be governed and construed in all respects in accordance with the laws of the Republic of South Africa as constituted from time to time.

**19. JURISDICTION**

Subject to the provisions of 7, the parties consent to the jurisdiction of the Witwatersrand Local Division of the High Court of South Africa in respect of any dispute arising from a transaction.