

## **General Terms and Conditions of ERS Railways B.V.**

**dated 1 May 2009**

### **Article 1 Definitions**

<u>CIM Uniform Rules</u>	Uniform Rules concerning the Contract of International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by Protocol of 3 June 1999;
<u>Container</u>	includes any container (and any ancillary equipment attached thereto) or equivalent unit such as swapbodies, high cubes, curtain side containers, reefers, transportable tanks, flatbeds, open wagons or any comparable loading unit used to transport the Cargo, with the exception of trailers;
<u>Cargo</u>	any goods carried in (or on) the Container;
<u>ERS</u>	means the limited liability company ("besloten vennootschap") ERS Railways B.V., having its registered office in Rotterdam and registered with the Chamber of Commerce in Rotterdam under number 24288127;
<u>Customer</u>	includes the party with which ERS enters into agreements and anyone acting on behalf of that party;
<u>RID</u>	Regulation concerning the International Carriage of Dangerous Goods by Rail, Appendix C to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by Protocol of 3 June 1999;
<u>Title 8.18 CC</u>	the Dutch regulations concerning the contract of carriage of goods by rail, as laid down in Book 8, Title 18 of the Dutch Civil Code ("Boek 8, Titel 18 Burgerlijk Wetboek").

### **Article 2 General scope**

- 2.1 These general terms and conditions are applicable to all the activities of ERS. These activities consist of two main services, being in the first place the carriage of goods by rail against a certain carriage charge (the rail services) as further described in (and under the applicability of) the CIM Uniform Rules, and in the second place the provision of ancillary services related to such rail carriage. The carriage by rail of Containers is performed by ERS as railcarrier as defined in the CIM Uniform Rules. The ancillary/additional services are performed by ERS

(either directly or through its affiliates or third parties) as freight forwarder/agent for and on behalf of the Customer.

- 2.2 These general terms and conditions also apply to every offer, further negotiations or preliminary agreement in relation to the services of ERS as described above.
- 2.3 Deviations from these general terms and conditions shall only be valid if these are expressly agreed by ERS in writing.

### **Article 3 Offers and quotations**

- 3.1 Unless expressly stipulated otherwise, offers and quotations of ERS are valid for a period of 14 days. Any offer and quotation may be amended (in which case a new period of 14 days will take effect) or revoked by ERS before its acceptance. Any acceptance after the 14 days' period will only be binding on ERS upon express confirmation of such acceptance by ERS. All offers, quotations and agreements cover only those operations/services to which specific references are made. All other operations/services will be charged separately.
- 3.2 The amounts mentioned in the offers and quotations do not include VAT or any other governmental levies, surcharges (such as energy surcharges, surcharges for dangerous cargo, etc.), additional handling costs, storage costs or any other extras, unless specifically stipulated otherwise.
- 3.3 All offers made by ERS are free of obligation as long as they have not been accepted by the Customer in writing. All prices quoted and/or offered shall be based on the rates, wages, costs, prices, indexes, governmental levies, freights, energy costs, exchange rates, etc. applying at the time of quotation or offer. Upon any change in any or more of these factors the quoted or offered prices may likewise be altered in accordance therewith and retroactively to the time such change occurred.

### **Article 4 Obligations and responsibilities of ERS**

- 4.1 ERS will provide the rail services as described in article 2.1 of these general terms and conditions, which means that (unless otherwise agreed) ERS will be responsible for:
- the rail traction between the agreed rail terminals;
  - providing container wagons that are in sound and good working condition;
  - arrangement of the train composition;

- shunting of the container wagons in and out of the rail terminals;
  - organisation and operation of the transport by rail as agreed with the Customer;
  - planning of the trains, arranging time tables and train paths.
- 4.2 ERS will provide any agreed ancillary services as freight forwarder only and consequently as agent for and on behalf of the Customer.
- 4.3 ERS will exercise due care in the performance of its operations and services.

#### **Article 5 Obligations and responsibilities of Customer**

- 5.1 Unless otherwise agreed, the Customer will be responsible for:
- providing in time all data, documentation and information that is required for the proper performance of the rail carriage;
  - the Container and its Cargo to comply with all standards, rules, regulations and legislation applicable to the Container and the Cargo concerned;
  - the Container to be in sound condition, not overloaded and properly sealed, all doorhandles and tanklids properly closed and, if required, dangerous cargo labels applied to the Container;
  - the Cargo to be properly packed, stowed, lashed and secured in or on the Container in such a manner that this Cargo will safely withstand the intended carriage, including loading, handling and discharge, and that this Cargo is adequately protected against full or partial loss, against possible damage during transport, against the further risks of the carriage and against harming persons, materials or other goods;
  - loading, stowing and discharge of the Containers on or from the wagons;
  - providing ERS unhindered access to the terminals and obtaining the necessary terminal slot time;
  - offering the Container(s) to ERS in time for the intended transport;
  - providing ERS with all the necessary information in relation to the expected long and short term transportation needs, deviations and other possible changes as soon as this information comes to the knowledge of the Customer.
- 5.2 If Containers are not available or ready for loading upon commencement of the loading operations of the train, these Containers are considered not to be presented/delivered to ERS at all ("no show"), in which case the full carriage charge including possible additional charges will be due by the Customer.

- 5.3 The Customer is liable towards ERS for all costs, expenses and damages that ERS suffers as a result of Customer not complying with any of the provisions as mentioned in Article 5.1 above and (in general) with any of the provisions as mentioned in these general terms and conditions.
- 5.4 Customer shall indemnify, defend and hold ERS, its officers, directors, employees, partners, licensors and agents, as well as the third parties that ERS has entered into contracts with, harmless from and against any fines, penalties, suits, losses, claims, demands, liabilities, expenses, damages and costs (including reasonable attorney's fees) from any party that are the result of (i) Customer's use of the services, (ii) Customer's breach of any provision of these general terms and conditions or the agreement, (iii) Customer's failure to comply with applicable laws and regulations and/or (iv) any intentional wrong-doing by Customer.

#### **Article 6 Data and documentation related to Containers and Cargo**

- 6.1 When offering a Container for carriage through ERS, the Customer (or any third party acting on behalf of the Customer) shall provide in time all data, documentation and information that is required for the proper performance of this carriage and that is related to the Container(s) and the Cargo, including but not limited to:
- a. data required to comply with the ERS booking requirements (such as type and weight of the Containers);
  - b. data and documentation required by customs or other authorities;
  - c. as to dangerous goods: any declaration, specification, documentation and/or other requirements as prescribed by law or prevailing regulations, in particular those in relation to RID.
- 6.2 ERS shall be entitled but not be obliged to verify the correctness and completeness of the data and documentation provided by the Customer or any third party. These data and documentation will be used for the transport of the Containers and for invoicing by ERS. They may not be invoked against ERS, in particular they cannot be regarded as conclusive evidence in case of loss or damage.
- 6.3 If the abovementioned data, documentation and information required for the proper performance of the contract of carriage are not provided to ERS in time or turn out to be incorrect or incomplete, ERS reserves the right to suspend or cancel the performance of the contract of carriage and to charge the Customer for the additional costs and expenses in relation thereto.

- 6.4 ERS is not liable for any damages or losses whatsoever directly or indirectly resulting from the failure of Customer to provide the abovementioned data, documentation and information in time, or because ERS has acted upon incorrect or incomplete data, documentation or information provided by the Customer or any third party.

#### **Article 7 Loading, unloading and storage**

- 7.1 Unless otherwise agreed, the Customer will load and unload the Container to be carried for its own risk and expense. The Customer will be responsible for possible costs and charges if the period for loading and/or unloading is exceeded.
- 7.2 A Container must be offered for loading on the train at the time and place indicated by ERS. At the place of destination the Container has to be taken away by the consignee immediately upon unloading from the train, unless otherwise agreed. Any storage of a Container at the arriving or departing terminal will be for account and responsibility of the Customer. Such storage will be charged separately and ERS shall not be liable for any loss of or damage to the Container and Cargo which occurs during the period of storage.
- 7.3 If it is expressly agreed between ERS and the Customer that if ERS is requested to perform certain handling activities, the responsibility and liability of ERS for the Container and the Cargo will end as soon as the discharge of that Container has been completed.

#### **Article 8 Performance**

- 8.1 ERS is entitled at its discretion to engage any third party in respect of any of its operations. ERS or this third party may proceed by any route, at any speed and stay at any place, once or more often and in any order and, if circumstance so require, load or unload the Container and Cargo and store it at any place. If the carriage is affected by any hindrance preventing that the Container will arrive at the place of destination within a reasonable time, ERS will take all such measures as it will consider appropriate in the circumstances. ERS is entitled to recover from the Customer any additional costs which ERS reasonably incurs in respect of the Container during the transit.
- 8.2 ERS has the obligation to minimise delays in transport as much as possible. However, ERS has the right to decide that (a) certain Container(s) will not be transported on the day scheduled for that transport if and in so far under the

(logistic) circumstances applicable at that moment it cannot be reasonably expected from ERS to carry out that transport on the scheduled day. In such a case the Container(s) will be transported by ERS on the next available train and ERS will not be liable for any costs and/or damages as a result thereof.

If ERS has to decide that (a) certain Container(s) will not be transported on the day scheduled for that transport, ERS will inform the Customer thereof as soon as possible and in any event prior to the scheduled departure time.

## **Article 9 Dangerous goods**

- 9.1 Dangerous goods shall be packed, labeled and documented by the Customer and all the necessary information for the safe transport of these dangerous goods will be timely communicated to ERS.
- 9.2 The carriage of dangerous goods, including loading, stowage and discharge, will be subject to the rules, regulations and conditions as set out in RID as well as possible local rules, regulations and conditions and any additional costs and charges resulting from the carriage of dangerous goods will be borne by the Customer.
- 9.3 If in the opinion of ERS any Cargo becomes an actual danger to life or property, such Cargo may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without ERS being liable for any damages whatsoever and without prejudice to ERS' right to freight and possible additional charges. Any cost incurred by ERS in connection with such unloading, destruction or rendering innocuous shall be for account of the Customer, who will indemnify ERS against all these costs and against possible claims from third parties.
- 9.4 If additional costs result from the carriage of dangerous goods and/or Cargo becoming an actual danger, these costs will be borne by the Customer.

## **Article 10 Liability**

- 10.1 For determining the possible liabilities of ERS, a distinction will be made between ERS solely acting as a rail carrier on the one hand and possible ancillary services performed by ERS like loading, unloading, storage, trucking, further handling activities, etc. on the other hand.
- 10.2 Unless agreed otherwise, ERS will solely act as a rail carrier, meaning that ERS will only be responsible for the actual carriage by rail, which is the period after

loading the Containers at the loading terminal until the arrival of the Containers (before discharge) at the terminal of destination.

- 10.3 When acting as a rail carrier as described in the previous paragraph, the possible liability of ERS will be determined in accordance with the provisions and stipulations as laid down in the CIM Uniform Rules and Title 8.18 CC in as far as these rules and stipulations form mandatory law. In addition to these provisions and stipulations, the possible liability of ERS will be determined in accordance with these general terms and conditions.
- 10.4 Advised or published arrival and departure times, whether scheduled or not, are indicative only and may never be construed as a guarantee making ERS liable for damages due to delay.
- 10.5 For all the ancillary services performed by ERS, the possible liability of ERS will be determined in accordance with these general terms and conditions, more specifically the conditions set forth below.
- 10.6 ERS is not responsible and can never be held liable for possible damages directly or indirectly related to (the Cargo in or on) the Container if these damages result from the responsibilities of the Customer in relation to the Cargo and/or the Container as described in Article 5 of these general conditions.
- 10.7 ERS is never liable for any losses and/or damages caused by the non-acceptance for carriage or caused by not, incorrectly or incompletely performing the contract of carriage if this is a result of circumstances beyond the control of ERS, as further described in the Article with the heading "Force Majeure".  
Furthermore, ERS is never liable for any losses and/or damages if these losses and/or damages are caused by the fault or negligence of the Customer or any other third party or are caused by an event that comes for the risk of the Customer or any third party.  
ERS is also excluded from any liability for losses and/or damages if these are the result of the use of open wagons or are caused by inherent vice of the Cargo.
- 10.8 ERS shall exercise all due care in the performance of its operations. It will be liable for physical loss or damage (under the conditions as set forth below) if the Customer (or any other claiming party) proves that such loss or damage results from any proven failure in performing its contractual obligations. However, ERS shall never be liable for non-physical (immaterial) damage or any indirect or consequential damage in any form, including but not limited to loss of profits, and

arising from any cause whatsoever.

- 10.9 In no event ERS liability shall exceed
- a) as to loss or damage to Cargo: EUR 2.80 per kilogram with a maximum of EUR 2800 per Container;
  - b) as to loss or damage to a Container: EUR 2,800.00 per Container;
  - c) as to personal injury: EUR 10,000.00 per person;
  - d) as to loss or damage to property other than loss or damage to a Container or to Cargo: EUR 10,000.00 per case.

In all cases in which ERS is obliged to pay damages, these shall, in general, never exceed at ERS' discretion, either the invoice amount (excluding VAT), at least a part thereof whereby or in connection with which the damage was caused, or, if the damage is covered by an insurance policy of ERS, the amount that is actually paid by the insurers with respect thereto. Damages shall always be subject to a maximum of EUR 25,000 per occurrence or series of occurrences with one and the same cause of damage.

- 10.10 Any liability of ERS is extinguished by the unqualified acceptance of the Container by the Customer, his representative or any other third party, save for hidden damage. In case of hidden damage, the liability of ERS will be extinguished unless a written notice of loss or damage is submitted to ERS with documentation identifying the possible liability of ERS within five days after acceptance of the Container (or the day that the Container should have been accepted). In any case ERS shall be discharged of all liability unless legal proceedings have been initiated against ERS within six months after the date of acceptance of the Container by the Customer or his representative or the date that such acceptance should have taken place.

## **Article 11 Prices**

- 11.1 All prices as mentioned in the agreements between the Customer and ERS are exclusive of VAT. Whenever applicable, these prices will be increased with VAT.
- 11.2 Unless otherwise agreed, all prices, rates and charges will be stated in Euros.
- 11.3 All prices as mentioned in the agreements between the Customer and ERS are valid for a specific calendar year only, and ERS reserves the right to amend these prices after such a calendar year if the rates, wages, costs, prices, indexes, governmental levies, freights, energy costs, exchange rates, etc. on which these

prices are based, changed during that calendar year.

- 11.4 Any additional charges, rates, prices, etc. including but not limited to payment of energy surcharges, surcharges for hazardous cargo, veterinary-medical and phyto-sanitary taxes will be charged separately.

## **Article 12 Payment**

- 12.1 Carriage charges shall be deemed earned upon loading of the Container on the train. Freight, charges and any other amounts due for services provided by ERS are payable on receipt of an invoice from ERS. ERS reserves the right to send additional invoices in respect of the same consignment.
- 12.2 Invoices are payable without discount or deductions. The amounts due shall be received by ERS within fifteen (15) days of the date of the invoice. Late payments will bear an interest of 12 % (twelve percent) per year. Payment through setting off (compensation) is not permitted, nor is the Customer allowed to suspend any of its payment obligations.
- 12.3 All persons falling within the definition of Customer shall be jointly and severally liable for the payment of ERS invoices as provided above. Any such person shall on demand of ERS provide security for any amount due in the form and manner and up to the amount as ERS may require.
- 12.4 ERS has at all times the right to claim full or partial payment in advance. The payments by Customer are always for the fulfilment of in the first place the oldest interest costs and in the second place the longest outstanding invoices.
- 12.5 If the Customer is in default with respect to the fulfilment of one or more of its obligations, all reasonable extrajudicial collection costs to obtain payment are for the account of Customer. In such a case Customer is due an extra amount of 15% of the invoice amount, with a minimum of 500 Euro per invoice, unless the extrajudicial costs would be higher than 15% of the invoice amount, in which case the Customer will have to pay the actual costs.  
If payment in part or in full can only be obtained by ERS in law, Customer shall be due to ERS all the costs that were made by ERS related thereto in as far as possible under the applicable law.
- 12.6 If Customer in good faith disputes any invoiced amount it shall notify ERS by registered letter with documentation identifying the disputed amount within thirty (30) days following receipt of such disputed invoice, failing which the invoice shall

be deemed as accepted by the Customer, provided however that Customer in such a case shall still be responsible to pay the full amount due under such invoice within fifteen (15) days of the date of the invoice. ERS shall subsequently issue a credit note if any invoice has to be amended.

- 12.7 With respect to all claims ERS has or may at any time have against the Customer, ERS shall have a pledge (in Dutch: "pandrecht") and a possessory lien (right of retention, in Dutch: "retentierecht") on all goods, documents and money which it holds or will hold in its possession whatever the reason and the purpose thereof may be, as against any party requiring their delivery. If the goods are forwarded on, ERS shall be entitled to collect the sum due on subsequent delivery or draw a bill therefore with the shipping documents annexed. ERS is also authorized to exercise its rights as set forth above for any outstanding amounts due by the Customer with respect to previous orders, as well as for any amount(s) payable "cash on delivery". Failing payment of the amount due the security shall be sold as provided by statute or, if so agreed, by private sale.

### **Article 13 Non compliance**

- 13.1 In the event of non compliance by the Customer with these general terms and conditions, ERS is entitled to cancel all offers, quotations and agreements and to recover payment of all invoices, charges, duties, fees, costs, damages and indemnities due.

### **Article 14 Force Majeure**

- 14.1 ERS is entitled to invoke Force Majeure if its services are in whole or in part, temporarily or not, prevented or impeded by circumstances reasonably out of the control of ERS, including but not limited to acts of God, unfavourable weather conditions, business blockades, strikes, work interruptions or work to rule actions and lock out, delay or improper supply to ERS of spareparts, goods or services ordered from third parties, the use of the rail infrastructure by any other rail carrier, or any other circumstances that are not for risk of ERS.
- 14.2 In the case of Force Majeure on the part of ERS, its obligations shall be suspended. If the situation of Force Majeure lasts longer than thirty (30) consecutive days, both ERS and the Customer are authorized to terminate in writing the non feasible part of the Agreement with immediate effect. In case of such a termination resulting from Force Majeure, ERS and the Customer will not be liable for any costs, expenses and/or damages towards each other.

## **Article 15 Amendments**

- 15.1 ERS has the right to amend its general terms and conditions from time to time. Amendments apply also with regards to agreements already concluded. Amendments shall be notified in advance to the Customer and shall enter into effect thirty (30) days after this notification or on such date as specified in the notification. If Customer continues to use the services without a written request for termination of the agreements after that date the amended general terms and conditions enter into effect as referred to above, Customer accepts the amended general terms and conditions.

## **Article 16 Severability**

- 16.1 If and in so far as any provision in these general terms and conditions shall be deemed or judged invalid for any reason whatsoever, such invalidity shall not in any way affect the validity of any other provision in these general terms and conditions.

## **Article 17 Applicable law and jurisdiction**

- 17.1 The legal relationship between ERS and the Customer (and between ERS and any party making use of its services), as well as any further activity of ERS is governed by Dutch law, unless mandatory CIM Uniform Rules stipulate that any other law would apply.
- 17.2 All disputes shall be submitted to the competent Court in Rotterdam, The Netherlands, unless mandatory CIM Uniform Rules stipulate that the competent Court in Rotterdam does not have jurisdiction.