

1. Scope

These terms of trade ("Terms of Trade") apply to the supply of Endace hardware, firmware, software and/or documentation ("Products") by Endace Measurement Systems Limited (a New Zealand company) (referred to as "we", "our" or "us") to the purchaser of the Products (referred to as "you" or "your").

2. Information

You warrant that all information supplied in the customer account opening form and all information subsequently supplied to us is true and complete. You agree that you will (a) if requested by us, provide adequate information for us to verify the correctness of any information supplied to us; and (b) promptly notify us of any changes in any information supplied to us, including any change in your address.

3. Payment

Unless you have requested and received prior credit approval from us, payment must be made before we will ship the Products.

If you have received credit approval and your order is within your credit limit, payment must be made within 30 days of the date of the invoice. Invoices are issued on the date of shipment and are payable via direct bank transfer or as otherwise arranged with your Endace sales representative. If payment in full is not received by the due date for payment, we reserve the right to charge interest at the rate of two percent (2%) per month from the due date until actual date of payment.

4. Prices

Prices are exclusive of sales taxes, import duties or similar taxes or duties and any applicable bank charges (which are your sole responsibility) and are expressed in US dollars unless otherwise stated. To the extent Endace is required by law to collect such taxes, such taxes shall be added to invoices as separately stated charges and paid in full by you, unless you are exempt from such taxes and furnish Endace with a certificate of exemption in a form reasonably acceptable to Endace. In the event you claim exemption from such taxes, you agree to indemnify and hold Endace harmless from any and all subsequent assessments levied by a proper taxing authority for such taxes, including interest, penalties and late charges.

5. Default

If (i) any warranty or representation given or made to us regarding your account is false or materially incomplete; or (ii) you default in the payment of any monies due; or (iii) you are otherwise in breach of any obligation owed to us, or to any of our subsidiaries or related companies; or (iv) you become insolvent, bankrupt, commit an act of bankruptcy, are placed in liquidation or a similar event occurs; or (v) we become aware of information that causes us to believe that any of the above may occur;

then, without prejudice to any other rights we have, (a) all invoices, debit memos, and other obligations owed by you to us of any kind shall immediately become due and (where applicable) payable to us in full, to the extent permitted by law; and (b) we may, without liability on our part, cancel or suspend in whole or in part any contract for the supply of goods or services to you (and any such cancellation or suspension will not affect our claim for monies due at the time of cancellation or suspension or for damages).

6. Indemnity For Costs

You shall indemnify us against any costs or damages (including our legal costs) incurred in recovering goods or any monies due by you and such amounts shall be monies due for the purposes of this document.

7. Delivery

Time for delivery, if stated, is according to our best estimates but is not guaranteed nor will it be a representation or term of any contract. You will not be relieved of any obligation to accept or pay for the Products by reason of any delayed delivery. We will not be liable for any loss, expense, injury, damage or claim resulting from any delay however caused.

8. Risk and title

The risk in any hardware Product passes to when made available to you or your agent or any carrier at our premises or other delivery point agreed to by us. Ownership of hardware Products (other than intellectual property rights) will remain with us until we have received payment in full. Title to Endace software and all intellectual property rights in the Products remains with us (or our suppliers) at all times. If prior to making payment in full of the total price of the Products, you on-sell the Products in the ordinary course of your business, or if they become constituents of other products which are sold by you, you shall be liable to account for such proceeds to us. If you default in making any payments due to us or if any creditor of yours takes any steps to recover moneys due by you or has grounds for taking such steps then we shall be entitled to enter your premises and take possession of all Products supplied by us.

9. Use of Products and Product information

Unless we have agreed otherwise in writing, Products supplied in card only form ("Cards") are supplied to you for your own use only or for resale as part of a server or appliance. You agree that you will not sell, rent, loan or otherwise make available to any other person any Card as a card only.

Endace hardware Products are designed solely for use as or within servers and/or network infrastructure equipment for switching, signalling, transmission and network management. You indemnify us for any losses, damages, suits and other liabilities arising in whole or in part out of any use or resale for purposes outside these usage parameters.

Other than as permitted under law, you must not disassemble, reverse engineer or copy the Products (or any part of them). You acknowledge the confidential nature of all user manuals, programming guides, design, functional or performance data or documentation for the Products, and all information able to be obtained or derived therefrom or from the Products themselves. You agree not to use or disclose any such materials or information other than as reasonably necessary for your legitimate use of the Products for your internal business purposes.

10. Hardware warranties and support

Our warranty for hardware Products is valid for 12 months, and covers full replacement of defective Endace hardware and firmware. Full details are set out in our Hardware Warranty attached.

11. Software licence

Use of any Endace software will be subject to the End User Licence Agreement attached.

12. Exclusion of warranties

To the extent permitted by law, we expressly exclude all warranties, conditions or representations, express or implied, not expressly set out in these Terms of Trade, including any warranties of merchantability and fitness for a particular purpose.

13. Limitation of liability

To the extent permitted by law:

- a. we will not have any liability or responsibility for any loss, damage or injury whether arising in contract, tort, equity or otherwise which does not flow directly or naturally from a breach of these Terms of Trade including, in each case consequential loss of business or profits or other loss; and
- b. we shall only be liable for losses which flow directly or naturally from a breach by us of these Terms of Trade up to a maximum of the price paid for the Product or the cost of repair or replacement of the whole Product or the defective components (whichever is the lesser).

14. Export control

You agree to comply with all applicable export control laws and regulations and not to export or re-export Products or technical data received other than in compliance with the applicable export control laws and regulations. You are responsible for obtaining such licences to export, re-export or import Products or technical data as may be required.

15. Governing law / jurisdiction

These Terms of Trade will be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

16. Entire Agreement

These Terms of Trade read together with our quotation, the End User Licence Agreement, the Hardware Warranty and Support Agreement constitute the entire agreement between the parties for the supply of Products. Where there is any inconsistency between these documents, the following order of precedence will apply (a) the End User Licence Agreement; (b) the Hardware Warranty; (c) the Support Agreement (if any); (d) these Terms of Trade; and (e) our quotation.

You acknowledge that you accept these Terms of Trade to the exclusion of any standard terms you may have for purchases. No modification, alteration, or addition to these Terms of Trade will be binding on Endace unless accepted in writing by an authorised Endace signatory.