



COMMERZBANK



## Conditions of a letter of credit, to be fulfilled by the nominated bank – what effects can these have for the parties involved?

A letter of credit is an undertaking of a bank in favour of the beneficiary to honour a complying presentation.

It is not unusual for letters of credit to contain conditions to be fulfilled by the bank with which the letter of credit is available (“nominated bank”). Typically, these are, for example, instructions regarding the dispatch of the documents or the request of the issuing bank to be informed in advance via SWIFT about documents presented.

But what if a letter of credit contains conditions beyond such instructions to be fulfilled by the nominated bank?

Is this in line with the security function of a letter of credit for the beneficiary and what effects can such conditions have for the parties involved?

### Examples:

With this top@doc we want to look at these questions on the basis of two examples. A letter of credit, being available by sight payment and stipulating Free and Easy Bank as advising and nominated bank, contains the following conditions among others:

- **CERTIFICATE (DOCUMENT NO. 5 OF DOCUMENTS REQUIRED) MUST BE SIGNED BY THE BENEFICIARY AND THE NOMINATED BANK MUST CONFIRM ON THEIR COVERING LETTER THE AUTHENTICITY OF THESE SIGNATURE(S)**
- **HONOURING BANK MUST DECLARE GENUINENESS, CORRECTNESS, SUFFICIENCY AND ACCURATENESS OF THE DOCUMENTS ON THEIR COVERING SCHEDULE.**

It raises the question whether Free and Easy Bank can provide the required declarations at all.

In our opinion, it is not clear what is meant by the required confirmation in the first example (“... BANK MUST CONFIRM ... THE AUTHENTICITY OF THESE SIGNATURES”). Should the bank confirm the genuineness or the legal validity of beneficiary’s signatures? And is a bank even in the position to do this at all? Usually, for a company that maintains a customer relationship with a bank, authorised signatories and specimen signatures are maintained by the bank. The purpose for the collection of the authorised signatories and specimen signatures is to identify the person(s) authorised to act on behalf of the company in its dealings with the bank. However, the list of authorised signatories does not usually include any information on the capacity of signatories to sign certain commercial documents. Such a list is therefore not necessarily helpful. Does a comparison with such an internal list meet the letter of credit condition of authenticating signatures? The “Uniform Customs and Practice for Documentary Credits” (UCP 600) also fail to provide guidance on this type of confirmation. Furthermore, we assume that there are different practices in different countries in dealing with this condition. Of course, we do not know how Free and Easy Bank acts. However, from our point of view, it cannot give such confirmation without precise clarification of what verification it is expected to provide.

The second example requires that Free and Easy Bank to make a declaration on genuineness, correctness, sufficiency and accurateness of the documents on their covering schedule. Nominated banks are regularly requested to confirm conformity of documents in their covering schedule. However, the declaration requested in the second example is broader. Irrespective of a bank’s obligation to exercise due care in examining documents, article 14a of the UCP 600 states that banks examine presented documents for whether or not the documents **appear on their face** to constitute a complying presentation. From our point of view, it is not possible for a bank to provide a declaration such as that required in the example presented here. In this context, article 34 of the UCP 600 states amongst others, that banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document. On this point, it can therefore be assumed that Free and Easy Bank will not provide the declaration.

What does the failure of the nominated bank to comply with such letter of credit conditions now mean for the further processing of the letter of credit?

In line with common standards, conditions addressed to the nominated bank as in the above examples are to be stated in field 78 of a letter of credit issued via SWIFT message. Field 78 is defined as INSTRUCTIONS TO THE PAYING/ACCEPTING/NEGOTIATING BANK and specifies instructions given by the issuing bank to the nominated bank. Consequently, instructions inserted in this field are not intended for the beneficiary.

The absence of the required declarations has no influence on the conformity of letter of credit documents presented. If the nominated bank honoured the documents without making the required statements, this would, however, lead to the situation that the nominated bank does not meet the conditions of the issuing bank. This can cause problems in the further processing of the letter of credit between the banks. It can therefore be assumed that the nominated bank will not honour the documents, but will send them to the issuing bank for payment. This means for the beneficiary that he will receive the payment of the countervalue of documents only after documents have been taken up and paid by the issuing bank irrespective of the letter of credit being available with Free and Easy Bank and documents being creditconform.

Last but not least, the non-fulfilment of such letter of credit conditions has an effect on a confirmation instruction under a letter of credit. If it is already foreseeable at the time of advising the letter of credit that the nominated bank will not be able to fulfil the conditions, it makes no sense for the nominated bank to add its confirmation to the letter of credit. Therefore, the only option is to delete the conditions entirely or to rephrase them in a way that they can be fulfilled by the nominated bank and that they take into account the interests of all parties involved.

#### **Do you have any questions or suggestions regarding [top@doc?](mailto:top@doc?)**

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