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The Hidden Risks of Varying a Confirmation's Terms

Exactly what is an issuing bank authorizing or requesting a nominated bank to do when it requests the bank to "add its confirmation" to a credit? Several considerations and questions should be weighed by a would-be confirmer.

by Michael Evan Avidon

Under UCP 600 Art. 7c: "An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a **complying presentation** and forwarded the documents to the issuing bank. … An issuing bank's undertaking to reimburse a nominated bank is **independent** of the issuing bank's undertaking to the beneficiary."

Because a nominated bank's right to reimbursement is independent of the beneficiary's right to honour from the issuing bank, a nominated bank potentially has greater rights against the issuing bank than the beneficiary or an assignee of credit proceeds, whose rights against the issuing bank are subject to any defenses available to the issuing bank against the beneficiary (such as forgery, material fraud, or setoff). To put it differently, a nominated bank that is authorized to add its confirmation to a credit potentially has greater rights against the issuing bank than the beneficiary or an assignee of credit proceeds, including a "silent" confirmer.

To acquire these potentially greater rights, it is critical for a nominated bank that it honour or negotiate a "complying presentation," which is a term defined in UCP 600 Art. 2: "**Complying presentation** means a presentation that is in accordance with the terms and conditions of the **credit**, the applicable provisions of these rules and international standard banking practice."

The "credit" that is referred to in the definition of the term "complying presentation" must be the credit issued by the issuing bank to the beneficiary rather than the credit (or confirmation) issued by the confirming bank to the beneficiary – otherwise, the issuing bank would be obligated to reimburse the confirming bank for honouring a presentation to the confirming bank that complied with the confirmation no matter how different or unrelated the confirming bank's undertaking appeared to be from the issuing bank's credit.

The term "credit" is defined in UCP 600 Art. 2: "**Credit** means any arrangement, however named or described, that is irrevocable … to honour a complying presentation."

Other relevant definitions in UCP 600 Art. 2 are:

Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a **complying presentation**.

Confirming bank means the bank that adds its confirmation to a **credit** upon the issuing bank's authorization or request.

Note that under UCP 600 Art. 8d, "If a bank is authorized or requested by the issuing bank to confirm a **credit** but is not prepared to do so, it must inform the issuing bank without delay and may advise the **credit** without **confirmation**."

Exactly what is an issuing bank authorizing or requesting a nominated bank to do when it requests the nominated bank to "add its confirmation" to a credit? To address this question, several considerations and questions come to mind.

1. **Governing Law**. Unless the issuing bank's credit specifies a different governing law for the confirmation than for the credit, is it standard practice for the confirmation to be governed by the law of the location of the confirming bank, whether expressly stated in the confirmation or not? If so, what if the nominated bank, without the express consent of the issuing bank, added a provision that its undertaking would be governed by the law of the location of the issuing bank or applicant or by the law of another place that is not the location of the nominated bank? In that case, would the nominated bank's undertaking not qualify as a "confirmation?" To put it differently, is it the normal expectation of beneficiaries and issuing banks that a confirmation will be governed by the law of the location of the confirming bank unless the issuing bank's credit specifies that a different law is requested to govern the confirmation?

2. **Governing Rules**. If the issuing bank's credit states that it is governed by or subject to a set of practice rules such as UCP 600, would it be a "confirmation" if the nominated bank provided that its undertaking were governed by a different rule set such as ISP98? Or would the nominated bank need the issuing bank's consent to use ISP98 in place of UCP 600 in order for the nominated bank's undertaking to qualify as a "confirmation?"

3. **Forum for Adjudicating Disputes**. Assuming the issuing bank's credit does not specify a forum for adjudicating any disputes that may arise between the beneficiary and the nominated bank involving the confirmation, is it standard practice that any disputes between the beneficiary and the nominated bank involving the confirmation could be adjudicated in courts located in the jurisdiction of the nominated bank? What if the nominated bank, without the express consent of the issuing bank, added a provision to its undertaking that any disputes between the beneficiary and nominated bank involving the confirmation may only be adjudicated in courts located in the jurisdiction of the issuing bank or applicant or another place that is not the location of the nominated bank? To put it differently, is it the normal expectation of beneficiaries and issuing banks that a dispute between the beneficiary and a confirming bank concerning a confirmation may be adjudicated by courts in the location of the confirming bank unless the issuing bank's credit specifies that a different forum is to be used for disputes concerning the confirmation?

4. **Omitting Conditions**. May the nominated bank omit from its undertaking a condition contained in the issuing bank's credit for the presentation of a document? *E.g.,* may the confirming bank omit a condition that the beneficiary present a default certificate? If the nominated bank honours a presentation that complies except for the omission of the default certificate that was required by the issuing bank's credit but not by the nominated bank's undertaking, is the nominated bank entitled to reimbursement under UCP 600 Art. 7c? To put it differently, is the nominated bank's undertaking not a "confirmation" if, without authorization from the issuing bank, the nominated bank omits from its undertaking conditions for the presentation of one or more documents that the beneficiary would have been required to present to the issuing bank for honour?

5. **Substituting Confirming Bank Action for Issuing Bank Action**. If the issuing bank's credit contains an annual auto-extension clause that permits the issuing bank to stop any future extensions upon at least 60 days' notice to the beneficiary and, in that case, provides that the beneficiary may draw by submitting a statement that it has received notice of non-extension **from the issuing bank**, may the nominated bank add a provision to its undertaking that (a) it can stop any future extensions of its confirmation upon at least 30 days' (or some other time period) notice and (b) the beneficiary may draw on the nominated bank by submitting a statement that it has received notice of non-extension **from the nominated bank**? If this is permitted, isn't that effectively the same as allowing the nominated bank to omit the credit's requirement for a statement that the beneficiary has received a notice of non-extension **from the issuing bank** and substituting a requirement for a statement that the beneficiary has received a notice of non-extension **from the nominated bank**? If this is not permitted, the nominated bank ought to obtain clear authorization from the issuing bank for how the nominated bank would like to modify the auto-extension clause in its confirmation.

6. **Curtailment**. Does standard practice permit a nominated bank to confirm an issuing bank's credit for an amount less than the full amount of the issuing bank's credit or for a term less than the full term of the issuing bank's credit? If so, what other terms of the issuing bank's credit may be curtailed, varied from, or omitted such that the nominated bank's undertaking to the beneficiary would still meet the UCP 600 requirements to be a "confirmation" and Art. 7c could apply?

7. **Adding Conditions Not in the Issuing Bank's Credit**. May a nominated bank add a condition for an additional document to be presented to it that was not specified as a condition in the issuing bank's credit, such as a condition requiring presentation to the nominated bank of the original confirmation, an additional default certificate, or a duplicate set of the drawing documents? May the nominated bank add a requirement that some or all presented documents must be in a certain language where the issuing bank's credit did not specify such requirement?

8. **Requested Form of Confirmation.** How often does an issuing bank specify the exact form for a requested confirmation, and how often does a nominated bank request express consent from the issuing bank to vary the terms and conditions of its undertaking from those of the issuing bank's credit? Would standard practice be improved if banks coordinated more closely to ensure that the undertaking issued by the nominated bank aligned with what the issuing bank expected the confirmation to provide? To accomplish this, wouldn't better alignment between applicants and beneficiaries be desirable so that applicants and beneficiaries reached agreement on what the terms and conditions of the issuing bank's credit and the confirming bank's confirmation would provide?

9. **UCP Revision or Guidance.** In the next UCP revision, would it be helpful for the rules to address which terms and conditions of an issuing bank's credit may be curtailed, varied from, omitted, or added to such that the nominated bank's undertaking to the beneficiary would still meet the UCP requirements to be a "confirmation" and for Art. 7c to apply? UCP 600 Article 38 may provide a model for such revision in that it specifies which terms and conditions of an issuing bank's credit may or may not be varied or deviated from in a partial transfer of a letter of credit. Pending the next revision of the UCP, would additional guidance from the ICC's Banking Commission or another authority be useful?

The ICC's Banking Commission addressed a few of these issues in Technical Advisory Briefing No. 13, "Confirmation of a documentary credit under UCP 600" (18 August 2025) (**TAB 13**). TAB 13 warns that:

> *Conditional (or "soft" or "qualified") confirmations, although not formally recognised by UCP 600, are used in practice. Such usage can lead to ambiguity and potential disputes.*

TAB 13 provided examples of what it termed "conditional confirmation:"

> • *limiting the acceptable language of the documents to be presented.*
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> • *restricting the types of documents that the confirming bank will examine.*
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> • *specifying a shorter latest date for document presentation.*
>
> • *imposing additional requirements for document compliance.*
>
> • *limiting confirmation to a proportion of the credit amount, and stating no obligation to honour any claim in excess of that amount.*

Notably, TAB 13 did not address (i) the law that governs the confirmation (as opposed to the law governing the credit), (ii) the rules that govern the confirmation (as opposed to the rules governing the credit), (iii) the forum for adjudicating disputes concerning the confirmation (as opposed to the forum for adjudicating disputes concerning the credit), (iv) whether confirming banks may omit from a confirmation one or more conditions specified in the credit, or (v) whether confirming banks may substitute confirming bank action for issuing bank action.

TAB 13 hints at potential danger for confirming banks by warning that, "The issuing bank remains bound by the original terms and conditions of the credit."

The key for a confirming bank to protect itself (apart from more widely understood risks like credit risk and country risk) is understanding all the terms and conditions of the credit it is asked to confirm (including the applicable rules and law), understanding the precise scope of the issuing bank's request or authorization to the nominated bank to add its confirmation, and staying within that scope or obtaining the issuing bank's consent to any deviations.

Unfortunately, however, as pointed out by TAB 13, "Conditional confirmations are typically agreed upon between the confirming bank and the beneficiary, often without the knowledge or explicit approval of the issuing bank." Some confirming banks may be unaware that they are potentially putting themselves at risk when they deviate from the terms and conditions of the issuing bank's request or authorization to confirm a credit.

TAB 13 does not give banks permission to act contrary to applicable law, rules, contractual terms, requests, or authorizations. TAB 13 acknowledges its limitations: "This briefing is educational only."

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