

ICC GUIDELINES FOR THE CREATION OF BPO CUSTOMER AGREEMENTS

GUIDELINES

Prepared by the ICC Banking Commission

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Background:

Following a request made by a number of banks to the ICC, the Banking Commission and SWIFT agreed to create a working group for the drafting of guidelines to assist banks in the creation of customer contracts or agreements for use with their BPO related services or products.

The document does not provide a suggested text of a contract or agreement. The drafting of a BPO contract or agreement is like any other bank document and should remain within the domain and control of the concerned bank. However, what it does provide is a suggested list of categories, and the individual components within those categories, that should be considered when drafting a customer contract or agreement.

The appendix to the document contains a list of bank financing product and services descriptions that were drafted by SWIFT in May 2009 for the Trade Services Utility (TSU) documentation. This list is by no means fully encompassing or comprehensive, may contain concepts and terms which are not uniformly used worldwide, and is offered solely for guidance.

A previous draft text has been reviewed by the ICC Banking Commission Legal Committee and their valuable comments are incorporated into this final version.

It is the responsibility of each bank to design its financing products and services relating to the BPO and to assess their legal and operative feasibility.

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ICC Guidelines for the creation of BPO Customer Agreements

The purpose of these Guidelines is to assist banks in developing contracts or agreements with their customers for the provision of BPO-related services or products (BPO customer agreement). The provisions governing the bank's BPO-related services or products may either be set out in a BPO-specific contract/agreement, or in a contract/agreement that covers BPO-related services in addition to other services.

The URBPO only governs bank-to-bank relationships, so a separate BPO customer agreement is needed, but it should be consistent with URBPO wherever possible. It is also advisable for banks to highlight to their customers the function and concept of a BPO, the impact of the URBPO and the basic role of the Transaction Matching Application in respect of such services or products it may provide.

In order to accomplish these objectives, banks may wish to consider covering the topics indicated in sections 1-9.

Please note that the title or classification in the heading of each section is for reference as to intent and purpose and is offered only for guidance in the structure of the BPO customer agreement.

Terms used in these guidelines and defined in URBPO articles 3 and 4 shall have the meaning given to them in the URBPO.

BPO-related services or products are specific to each bank and fall within the competitive space in which the banks will operate. It is not for this paper to provide full details of the kind of services or products that a bank may wish to offer. However, in the appendix to this document you will find a list of bank product descriptions that were drafted in May 2009 for the SWIFT Trade Services Utility documentation.

Section 1 - Definitions

(a) Include definitions of relevant terms that are consistent with how such terms are defined in URBPO articles 3 and 4.

(b) Indicate that where applicable, defined terms used in the BPO customer agreement shall have the same meaning as set forth in URBPO articles 3 and 4.

Section 2 – The Concept of a Bank Payment Obligation

(a) Specify, consistent with URBPO sub-article 6 (a), that a BPO is separate and independent from the underlying trade transaction. Also see "Section 8 (Liabilities) paragraph 1."

(b) Specify, consistent with URBPO article 7 that Involved Banks only deal with data and not with the commercial contract, documents, or the goods, services or performance to which the data or documents may relate.

(c) By signing the BPO customer agreement, the customer acknowledges that the bank has no involvement in, nor is responsible for, the underlying trade transaction.

- (d) Any BPO issued pursuant to the BPO customer agreement will be subject to URBPO.
- (e) The customer should complete its own due diligence to assess the impact of the URBPO on its commercial transaction.
- (f) If a customer requests a bank to issue a BPO, it incurs a corresponding reimbursement obligation to this bank as of the time a BPO is incorporated in an Established Baseline or when a BPO is incorporated by an amendment to an Established Baseline. Upon its receipt of notification of a Data Match, or upon the customer's acceptance of a Data Mismatch, the customer becomes liable to reimburse the bank (as Obligor Bank) in accordance with the payment terms of the BPO or as otherwise agreed between the customer and the bank.
- (g) A Data Match or Data Mismatch will be handled entirely in accordance with the provisions of URBPO, and the functionality and rules that are applicable to the TMA at the time of such Data Match or Data Mismatch.
- (h) If the bank provides the customer with details of a Data Mismatch, the customer must provide prompt instructions to accept or reject the Submission. Clarification of the bank's rights and duties in case it receives, or does not receive, the customer's instruction to accept a Data Mismatch should be given.
- (i) The bank may rely on the results of a data comparison reported to it by the TMA as accurate and may act accordingly.
- (j) Any obligation of the bank to make payment in connection with a BPO is limited in amount and duration according to the BPO terms or as otherwise agreed between the customer and the bank.

Section 3 – Type of Bank Services

- (a) A bank should specify the type of BPO-related services it will provide and the terms under which it will provide such services. The type and range of services may or may not expose the bank to credit risk of the customer or one of the other Involved Banks, or may be limited to processing or collection services. The bank should consider including or referencing in the BPO customer agreement provisions that address the risks applicable to a particular product.
- (b) Depending on the type of BPO service to be provided to the customer, the bank should specify the party responsible for making payments and when, and under what conditions, payments are due.
- (c) It is recommended that the BPO customer agreement include conditions that clarify the responsibilities of the bank (e.g., with respect to the timing of messages sent by the customer to the bank and vice-versa). Ensure the understanding of the customer of the concept of Universal Time Coordinated (UTC) and indicate the specific timeframe in which the bank expects the customer to act or react depending on a given event.

Section 4 – Customer request for a BPO Transaction

- (a) A bank should develop a form of customer request that contains data fields suitable for the type of service it offers to the customer. A bank may wish to include a customer acknowledgement that its request is irrevocable and that the bank may act in reliance on such request, including in relation to establishing or amending a Baseline.

Data fields should include:

- Transaction reference
- PO Reference
- Buyer name and country
- Buyer Bank BIC
- Seller name and country
- Seller Bank BIC
- Obligor Bank
- Recipient Bank
- Amount / currency
- Goods and quantity
- Payment terms
- Data required (commercial, transport, insurance, certificate, other certificate)
- Expiry date
- Contact person
- Law applicable to the BPO
- Charges

(b) The BPO customer agreement should outline the requirements for the transmission of data between the bank and the customer. (For example, this may be performed via a proprietary electronic banking platform (in which case the conditions for usage of such platform may require amendment), or even in paper mode (in which circumstance, a clear and concise guideline is to be separately produced, or added as an addendum)).

(c) In case the bank is not prepared to make a firm commitment to the customer to participate in a particular transaction or BPO, emphasise that the bank has no obligation to do so and is at liberty to refrain.

Section 5 – Validity and Handling of Data

(a) Address the extent to which the bank and customer are required (i) to restrict disclosure of and/or are allowed to disclose confidential data received from the other party and (ii) to comply with applicable data protection regulations (if any).

(b) Address whether the bank may use customer data provided in relation to the underlying trade transaction other than in connection with providing BPO-related services to the customer.

(c) Be consistent with URBPO article 12, Disclaimer on Effectiveness of Data (also see Section 8 (Liabilities) paragraph 3 (i) (a)).

(d) Be consistent with URBPO sub-article 9 (c) in respect of the data that an Involved Bank receives and transmits i.e., that the data it submits to the TMA is to accurately reflect the data it has received from the customer in respect of an underlying trade transaction.

(e) The transaction should not breach any applicable sanctions or other legal or regulatory requirements to which the bank is subject. The bank may wish to reserve the right to request further information from the customer for due diligence purposes, including a copy of the underlying contract or trade documentation. The bank may also wish to incorporate its standard wording regarding compliance with applicable sanctions regulations e.g., UN, US, EU, etc. and other legal or regulatory requirements.

(f) The customer must ensure that the data it submits to the bank accurately reflects the underlying trade transaction and, in respect of the submission of Data Sets, that the data accurately reflects that indicated on the shipping documents;

(g) Require the customer to provide, without delay, any data to be submitted by the bank to the TMA in order for a comparison of data to take place and outline to the customer the bank's expectation of 'without delay', and that a failure to provide such data may prevent a data comparison occurring.

Section 6 – Fees and Charges

Indicate the bank's applicable fees for the services that they will be providing and how such fees will be calculated.

Section 7 – Use of Transaction Matching Application (TMA) and TMA Availability

(a) The chosen TMA is not a bank proprietary system and that, in accordance with URBPO sub-article 1 (a), all Involved Banks must use the same TMA in respect of an Established Baseline.

(b) The bank has entered into a separate contract with the provider of the TMA and that the performance of the bank's services will be subject to the availability of that TMA at the appropriate time. The bank may wish to specify that this separate contract may be amended from time to time and that the bank is bound to act according to the terms and conditions that are in place at the time of the transaction.

(c) The bank's position in the event of the unavailability of the TMA. This should be addressed according to the comments in section 8 paragraph 3 (i) (b).

(d) The bank reserves the right to use another bank, known as a 'Submitting Bank', as the entity that will interact directly with the TMA in the delivery and receipt of data. Failure of a Submitting Bank to act in a manner requested is covered in section 8 paragraph 3 (e).

(e) The bank is entitled to rely on the data received from the TMA as being complete and precise and a true reflection of the data that has been submitted by the customer, and that a Baseline Match Report or Data Set Match Report indicating a Data Match or Data Mismatch is to be considered as conclusive evidence of a successful establishment of a Baseline or a Data Match in respect of a Data Set Submission, or an accurate listing of the only identified mismatches in the two Baselines, or in a Data Set Submission.

(f) Under the URBPO, the bank is not required to notify the customer of a Data Mismatch. However, such a notification may be advisable depending on the service being provided and the customer's role in the transaction.

(g) The manner in which data may be transmitted between the bank and the customer and any authentication requirements.

Section 8 – Liabilities

(a) The bank has no responsibility for the underlying trade transaction that exists between the buyer and seller, notwithstanding the bank's provision of the related service (**see URBPO sub-article 6 (a): Bank Payment Obligations v. Contracts**).

(b) In connection with the provision of BPO-related services to a customer, any limitation of the bank's liability to its customer must be permissible under the law applicable to the BPO customer agreement.

- (c) The following topics relate to potential liability or responsibility of the bank in connection with the provision of such services. Where applicable, the relevant URBPO provisions determining the roles and responsibilities of Involved Banks are cited:
- (i) Whether the bank should be liable or responsible to the customer, or to any third party, for loss or damage that is suffered or incurred as a result of:
- a. the source, accuracy, authenticity, falsification or legal effect of any data received from the buyer or seller, the documents, or the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance to which such data relates, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, carrier, forwarder, consignee, insurer of the goods, or any other person referred to in any data (**see URBPO article 12: Disclaimer on Effectiveness of Data**). In this regard, the bank should take into consideration the obligations of an Involved Bank to ensure that any data submitted by it to a TMA accurately reflects the data it has received from a customer (**see URBPO sub-article 9 (c): Role of an Involved Bank**);
 - b. the unavailability to the bank or any other Involved Bank of a TMA or of the services provided by a TMA service provider (**see URBPO article 14: Unavailability of a Transaction Matching Application**);
 - c. the consequences arising out of delay, loss in transit, data corruption or other errors arising in the transmission of any messages or delivery of documents that are relevant to any underlying trade transaction, a Baseline or a BPO;
 - d. the consequences arising out of the interruption of the bank's business, including its inability to access a TMA, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control. The bank may also consider requesting the customer to acknowledge that as Obligor Bank it may, upon the resumption of its business, remain liable to a Recipient Bank to make payment or to incur a deferred payment obligation and pay at maturity a specified amount in respect of a BPO that expired during such interruption of business (**see URBPO article 13: Force Majeure**);
 - e. failure of any other Involved Bank to make a Submission for any reason whatsoever or any error, omission, default, non-performance or failure of a TMA service provider, a TMA or the services provided by the TMA to the bank involving the matching, processing, handling, sending and/or comparison of data or messages through a TMA in connection with a trade transaction, a Baseline or a BPO. In considering this risk, the bank should keep in mind any corresponding limitations on the liability of the TMA to the bank;
 - f. the bank being prevented from paying any BPO or sending or receiving any message or data or taking any other action in connection therewith because of an applicable law, regulation or ruling of any governmental agency now or hereafter in effect. (**see URBPO sub-article 15 (c): Applicable Law**);
 - g. the bank's use of an agent bank (or other person) in providing the customer with any service, including where such bank (or other person) fails to carry out the bank's instructions. The bank may also want to consider whether to allocate responsibility for (A) use of an agent bank; (B) costs and charges of an agent bank; and (C) costs and charges that are payable by the customer's counterparty to their bank or to any other third party in relation to any trade transaction;

- h. the bank acting in accordance with the BPO Rules, the terms and conditions applicable to users of the TMA, or applicable laws, regulations or rules, in each case as in effect from time to time;
 - i. the bank acting in accordance with the customer's instructions; or
 - j. the processing of data, including on the bank's platform or by way of manual handling of data by the bank.
- (ii) Whether the bank should specify the standard of care and skill with which it will perform the services it renders to the customer, and if so, what standard should apply.
- (d) To the extent that it is appropriate to allocate the risk of loss to the customer in respect of these topics, the bank may wish to outline the extent of the customer's responsibility. In addition, the bank may wish to consider the degree to which the customer should be responsible for the losses incurred by the bank or its officers, directors, employees or agents in connection with provision of BPO-related services at the customer's request.

Section 9 – Governing Law and Jurisdiction

- (a) URBPO sub-article 15 (a) provides that the governing law of a BPO will be that of the location of the branch or office of the Obligor Bank specified in an Established Baseline. According to URBPO sub-article 2 (a), URBPO sub-article 15 (a) may be expressly modified or excluded by the Established Baseline or by separate agreement.
- (b) Each bank should specify the law governing the relationship under the BPO customer agreement with its client. Usually, it will choose the law already governing their other business relationships with that particular client.
- (c) The BPO customer agreement should provide for the method of dispute resolution and stipulate either a specific court and its location, or an alternative dispute resolution, such as arbitration. In the case of the latter, the BPO customer agreement should make provision for the rules and law governing the resolution mechanism, and the location and language of the resolution body.

Appendix

The following is a list of bank financing product and services descriptions that were drafted by SWIFT in May 2009 for the Trade Services Utility (TSU) documentation. This list is by no means fully encompassing or comprehensive, may contain concepts and terms which are not uniformly used worldwide, and is offered solely for guidance.

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For Exporters

a) BPO Pre-Shipment Finance

1. Pre-shipment finance is provided to the Seller to support the manufacturing process and packing of goods.
2. Financing to the Seller may be based on:
 - i. Sellers limits/credit lines supported by the baseline match.
 - ii. On without recourse basis relying on a Bank Payment Obligation (BPO) supported by the baseline match (in this event, the risk will be on the BPO Obligor Bank).

b) BPO Post-Shipment Finance

1. Post-shipment finance is provided to the Seller to optimise working capital/ reduce Days Sales Outstanding.
2. Financing may be based on:
 - i. Seller's limits/ credit lines supported by the commercial data set match (discounted on with recourse basis to the Seller).
 - ii. On without recourse basis relying on the Bank Payment Obligation (BPO) supported by the commercial data sets match (in this event, the risk will be on the BPO Obligor Bank).

c) Collection Services

1. The Seller's Bank in-sources business process from the Seller.
2. This may cover a range of services including accounts receivable and collection of payment (similar to a documentary collection using MT 202/400 but without need of a front end application).
3. The payment may also be automatically triggered on sight / maturity upon satisfaction of pre-set conditions via data matching in the TSU. This may apply either:
 - i. where a BPO exists or
 - ii. where the TMA Payment Service has been used by the Buyer
4. This arrangement may be on a with or without recourse basis to the Seller.

d) Trade Management Services

1. The Seller's Bank in-sources business process from the Seller.

2. This may cover a range of advanced services including purchase order management and data preparation (dependent upon delivery via a front end application, such as a proprietary trade portal). A by-product would be export document preparation.

e) BPO Confirmation

The Seller wishes to mitigate the Obligor bank risk and/or country risk, the Recipient bank will arrange a confirmation of the credit. Providing that all data presented matched, the exporter receives a guarantee of payment from the Recipient bank should there be problems with the Obligor bank of the overseas country preventing payment.

f) TMA Reverse Factoring

1. Finance is provided to the Seller by the Buyer's Bank.
2. The Seller is offered discount facilities based on the credit rating of the Buyer or the Buyer's Bank.
3. Credit is infused into the supply chain as needed.
4. The amount of finance available is based on commercial invoices that have been matched/ approved.

For Importers

a) BPO Issuance

1. The BPO is issued by the Buyer's Bank (and/or BPO Obligor Bank) to support the Buyer's need to provide a guarantee of payment to the Seller.
2. The Buyer's Bank (and/or BPO Obligor bank) books the contingent liability on the Buyer in its books.
3. Payment to the Seller's Bank is automatically triggered upon data set match (payment may be at Sight or Usance, as specified in the baseline).

b) Buyer Finance

1. Finance is provided to the Buyer to support working capital needs and extend Days Payables Outstanding.
2. Based on the commercial data set match, the Seller is paid at sight and the Buyer is granted a deferred payment period up to the pre-agreed tenor.

c) TMA Payment Services

1. The Buyer's Bank in-sources business process from the Buyer.
2. This may cover a range of services including accounts payable, matching, discrepancy reporting and auto/authorized payments to suppliers (similar to a documentary collection using MT202/400 but without need of a front end application).
3. The payment may be automatically triggered by data matching in the TMA.

4. Alternatively, the Buyer's Bank may receive a separate payment instruction issued by the Buyer.

d) Trade Management Services

1. The Buyer's Bank in-sources business process from the Buyer.
2. This may cover a range of advanced services including order management (dependent upon delivery via a front end application, such as a proprietary trade portal).

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