



# Foreign exchange **terms and conditions**

General conditions of contract  
relating to foreign currency transactions

(For use with counterparties that transaction spot, same day and TOM FX only)



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## 1. Introduction

- 1.1** The terms and conditions set out in this document are those applicable to all foreign currency transactions between the Bank and its clients in respect of which these terms and conditions have been incorporated by reference. These terms and conditions do not cover derivatives, documentary credits or guarantees. The Bank reserves the right to amend these terms and conditions at any time and such amended terms and conditions will only apply to the transactions into which they have been incorporated by reference. Any amendments will be agreed by the Bank and the Counterparty in writing.

## 2. Interpretation

- 2.1** The headnotes to the clauses are inserted for reference purposes only and shall in no way govern or affect the interpretation hereof.
- 2.2** Unless inconsistent with the context, the expressions set forth below shall bear the following meanings:
- **“Bank”** – RMB Botswana, a division of First National Bank of Botswana Limited
  - **“Business Day”** – any day on which a transaction may be settled through normal banking channels in the countries in which the principal market for dealing in the currencies which are the subject matter of a transaction are located
  - **“Counterparty”** – a legal and natural person who has entered into a transaction with the Bank in respect of which these terms and conditions have been incorporated by reference
  - **“Foreign Currency”** – the lawful currency of any country other than Botswana
  - **“Pula”** – the legal currency of Botswana
  - **“Trade Date”** – a date upon which a transaction is concluded
  - **“Settlement Date”** – the agreed date of settlement of a transaction (provided that if any such Settlement Date occurs on a day other than a Business Day then the Settlement Date for such transaction shall be the next Business Day) or, in the case of a spot transaction for which no date of settlement is provided, the second Business Day after the Trade Date
  - **“Transaction”** – a foreign currency transaction concluded between the parties.
- 2.3** Unless inconsistent with the context, an expression which denotes any gender includes the other genders, a natural person includes an artificial person and vice versa and the singular includes the plural & vice versa.
- 2.4** References to **“writing”, “written notice”, “written instructions”** and the like shall include communication by electronic dealing system and electronic communications which may be printed, such as telexes, telefaxes and emails.

## 3. Exchange Rate

Where Foreign Currency is sold by the Counterparty to the Bank, the agreed exchange rate will be settled on the basis of delivery by S.W.I.F.T. or by telegraphic transfer, for the Settlement Date. If delivery is in any other form, such as the negotiation of sight or usance bills, the rate will be adjusted on the Settlement Date by the Bank by the difference between the Bank's telegraphic transfer rate and the appropriate sight or usance rate.

## 4. Confirmation

- 4.1** Transactions may be concluded between the Bank and the Counterparty telephonically, which are recorded.
- 4.2** Confirmations of spot Transactions will only be sent to the Counterparty on request.
- 4.3** The failure by the Bank to make a confirmation as provided for shall not invalidate the Transaction concerned.
- 4.4** A confirmation which has been provided by the Bank shall constitute prima facie proof of the subject matter of the Transaction concerned unless the Counterparty notifies the Bank in writing or by telephone, that it disputes the confirmation, within 24 hours of receipt of such confirmation. Where notification is by telephone, the Counterparty must confirm the telephonic notice, in writing within 24 hours of giving the telephonic notice. Non-Business Days will be excluded in determining the 24 hour period.

## 5. Settlement of Transactions

**5.1** Payments to the Counterparty in terms of a Transaction will be made as follows:

**5.1.1** if the Counterparty has previously provided standard settlement instructions for the currency concerned to the Bank, settlements will be made to that account unless a specific instruction to the contrary is advised by the Counterparty in writing to the Bank not less than 2 Business Days prior to the Settlement Date; or

**5.1.2** if no standard settlement instructions have previously been provided for the currency concerned, settlements will be made to the account advised by the Counterparty in writing to the Bank not less than 2 Business Days prior to the Settlement Date; or

**5.1.3** if no account has been so specified, or advised and if no other arrangement has been agreed, the Bank may, at its election:

**5.1.3.1** cancel the Transaction concerned, and any loss arising on such cancellation (as determined by the Bank in accordance with its standard procedures) will be for the account of the Counterparty. Should there be any profit arising on such cancellation, it will be paid to the Counterparty at the Bank's discretion; or

**5.1.3.2** take whatever action is required to ensure that settlement of the Transaction takes place (but without obligation on the Bank to do so) which will include, but not be limited to, payment of Pula to the Counterparty's principal demand deposit account maintained with the Bank (if any).

**5.1.4** Standard settlement instructions, or other accounts to which payments must be made, may be recorded in the confirmation. Failure to do so will not affect the provisions of this clause 5.1.

**5.2** Payment of Foreign Currency to the Bank in terms of a Transaction must be made to the Bank's relevant Nostro account, depending on the currency concerned.

**5.3** In the event of the Counterparty not giving timeous valid instructions to the Bank to debit a particular Pula account with amounts due by the Counterparty to the Bank in respect of any Transaction, the Bank will be entitled, but not obliged, to debit any such amounts to the Counterparty's principal demand deposit account maintained with the Bank (if any). The foregoing shall not prejudice any rights which the Bank may have as a result of the Counterparty's failure to pay amounts due to the Bank.

**5.4** The Bank may apply any credit balance to which the Counterparty is at any time beneficially entitled on any account with the Bank, or any other financial institution, in (or towards) satisfaction of any sum then due and payable (but unpaid) by the Counterparty to the Bank under these terms and conditions. If such balance is in a different currency, the Bank may convert the said balance at a market rate of exchange for the purpose of the set-off.

## 6. Cancellations, Partial Payments, Early Draw-Downs and Extension of Transaction

**6.1** In the event of the Counterparty wanting to:

**6.1.1** cancel a Transaction in whole or in part;

**6.1.2** effect partial settlement of a Transaction;

**6.1.3** make an early drawdown of a Transaction; or

**6.1.4** extend the Settlement Date of a Transaction; it shall instruct the Bank, at least two Business Days prior to the then existing Settlement Date or the proposed new earlier Settlement Date of the Transaction, as the case may be, to effect such variation. Such instructions shall be in writing or by telephone. Where the instruction is by telephone, the Counterparty must confirm the telephonic instruction in writing within 24 hours of giving the telephonic instruction.

**6.2** Any loss arising on a variation contemplated in 6.1 (as determined by the Bank in accordance with its standard procedures) will be for the account of the Counterparty and will be payable at the time of such variation, or on the originally agreed Settlement Date for the Transaction, as determined by the Bank.

## **7. Dispute Resolutions**

**7.1** If the Counterparty disputes the contents of a confirmation in terms of 4.4 the parties shall forthwith meet to resolve such dispute and endeavour jointly to agree upon their respective indebtedness to each other thereunder. If they fail to reach agreement thereon by the close of business on the Business Day after receipt by the Bank of the dispute notice under 4.4, the Bank will, unless the parties agree otherwise in writing, terminate the disputed Transaction by no later than close of business on the next Business Day (by entering into an equal and opposite Transaction at then prevailing current rates of exchange). Either party shall be entitled thereafter to refer the dispute for resolution by an arbitrator selected by agreement between the parties. Such arbitration shall be held in accordance with the provisions of the Arbitration Act of Botswana (Cap 06:01) and in terms of Botswana Institute of Arbitrators ("BIA") rules, save that it shall be informal and the arbitrator shall have full and free discretion to determine the procedure to be adopted. The decision of the arbitrator in any such arbitration proceedings shall be final and binding on each of the parties, will be carried into effect and may, at the instance of either party, be made an order of court.

**7.2** In the event of a dispute which has not been resolved by the Settlement Date of the Transaction, and the Transaction in respect of which the dispute exists has not been terminated, as contemplated in 7.1, each of the parties shall be obliged to settle the Transaction concerned pending resolution of the dispute pursuant to 7.1 by effecting the payment of the undisputed amount, if any.

## **8. Recording**

**8.1** It is the Bank's practice to record all telephone conversations with regard to Transactions. The Bank may use the recording of and/or a transcript thereof in any disputes.

**8.2** Notwithstanding 8.1, the Bank has no obligation to the Counterparty to:

**8.2.1** retain its practice of recording telephone conversations;

**8.2.2** retain such recordings for any period of time longer than which is required by law if any; or

**8.2.3** to ensure that its recording equipment is in a working condition and any failure to have a recording for any of the aforementioned reasons (or any other reason) will not give rise to an adverse inference against the Bank.

## **9. Interest on Arrears**

**9.1** Interest shall accrue on the outstanding balance from time to time of each foreign currency amount or each Pula amount due and payable but unpaid, by any party to the other. The interest rate will be the relevant overnight LIBOR rate, plus 2 percentage points for any foreign currency amount and the prime rate, plus 2 percentage points for any Pula amount.

**9.2** Should:

**9.2.1** the Counterparty fail, for any reason whatsoever, to make payment due by it under any Transaction, within two Business Days after notice of that non-payment has been given to it by the Bank; or

**9.2.2** The Counterparty breach any other provision of a Transaction and fail to remedy such breach within seven days after receipt of a notice from the Bank requiring it to do so; or

- 9.2.3** The Counterparty be placed under business rescue, provisional or final sequestration or liquidation, or be unable to pay its debts as they fall due, or attempt to compromise with its creditors, or enter into an arrangement, compromise or a composition with or for the benefit of its creditors, or commit an act of insolvency, as defined in the Insolvency Act, Cap 42:02
- 9.3** the Counterparty will be in breach of these Terms and Conditions
- 9.4** If the Counterparty is in breach, the Bank may do the following:
- 9.4.1** any amounts outstanding will become due and payable immediately in terms of any Transactions concluded;
- 9.4.2** the Counterparty will be responsible for the loss incurred by the Bank as a result of the Counterparty's breach of the provision of the Terms and Conditions;
- 9.4.3** the Bank has the right to immediately cancel the Transaction and to claim damages from the Counterparty; and/or
- 9.4.4** the Bank has the right to immediately demand specific performance and/or entitled to stipulate an early termination date with regard to all Transactions then in existence, by written notice to the Counterparty.

## **10. Certification of Indebtedness**

A certificate signed by any manager of the Bank (whose appointment and designation need not be proved) as to any indebtedness of the Counterparty in terms of any Transaction/s, or as to any other fact, shall be prima facie evidence of the Counterparty's indebtedness to the Bank, or of such other fact, for the purpose of any application or action, judgement or order, or for any other purpose whatsoever.

## **11. Authorised Persons**

- 11.1** If the Counterparty provides to the Bank a list of persons who are authorised to provide instructions, notices or requests or to acknowledge confirmations, the Bank may rely on such instructions, requests, notices or acknowledgements which the Bank believes are given or made by any person who is or who is believed by the Bank to be a person who is authorised or entitled under the said list to give or make such instructions, notices, requests or confirmations on the Counterparty's behalf, provided that in doing so the Bank acts reasonably and in good faith. The Bank shall not be required to enquire as to the authority or entitlement of any such person to give such instructions, notices, requests or confirmations.
- 11.2** If the Counterparty does not provide a list of the type contemplated in 10.1 to the Bank, the Bank is entitled to assume that any instruction, notice, request or confirmation (whether in writing or not and however communicated to the Bank) has been properly authorised by the

Counterparty if they are given or purported to be given by an individual or person who is or purports to be and is reasonably and in good faith believed by the Bank to be a director or employee of the Counterparty, or the Counterparty's authorised agent.

## **12. Warranties**

- 12.1** Each Transaction shall be subject to and conditional upon compliance with any relevant financial services law, including, without derogating from the generality of the foregoing, the Bank of Botswana Act (1996), the Banking Act (1995), and the Counter-Terrorism Act (2014), and This shall include any rulings, laws, rules, regulations and directives of any competent regulatory authority in force at the time of entering into any Transaction or which may come into force thereafter but be applicable to any Transaction already entered into.
- 12.2** The Counterparty warrants to the Bank that each Transaction shall accord with approvals or permissions granted to the Counterparty by any competent regulatory authority with requisite powers and that the Counterparty shall not be in contravention of any of the rules, laws, regulations or directives referred to in clause 12.1 in respect of any Transaction.

- 12.3** The Bank warrants that it is an authorised dealer in Foreign Currency as envisaged in the Bank of Botswana Act.
- 12.4** In the event of the warranties made by the Counterparty not being and remaining true and correct while any Transaction remains outstanding, the Bank will be entitled to take such action as it considers necessary to ensure that it is in or becomes in compliance with any of its obligations as an authorised dealer. The foregoing is without prejudice to any other rights which the Bank may have as a result of such incorrect warranty being given.
- 13. Indemnity**
- The Counterparty will indemnify the Bank against any losses or damages arising from claims by any third party, and waives any claims which it may have against the Bank from whatsoever cause arising, including but not limited to errors or delays in transmission of communications or payments, misinterpretation of communication on receipt, or failure to identify properly the person or persons mentioned in any communication, unless such loss or damage was caused by the Bank's wilful default or negligence.
- 14. Notices**
- 14.1.** All notices, demands or communications intended for the Bank shall be made or given to the Bank as follows:
- 14.2.** RMB Botswana – a division of First National Bank of Botswana Limited Limited, 2nd f Floor, 1st First Place, CBD, Gaborone
- 14.3.** The Counterparty will be deemed to have elected either its registered address or its most recent physical address (as well as its most recent telefax number) advised to the Bank, at
- the option of the Bank, as its address for notices etc. and as its domicilium.
- 14.4.** Any party shall be entitled to change its domicilium from time to time, provided that any new domicilium selected by it shall be an address other than a post box number, and any such change shall only be effective upon receipt of notice in writing by the other party of such change.
- 14.5.** A notice sent by one party to the other shall be deemed to have been received on the same day, if delivered by hand or sent by telefax and on the fifth day after posting, if sent by prepaid registered post.
- 14.6.** Notwithstanding anything to the contrary contained herein a written notice or communication actually received by a party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.
- 15. General**
- 15.1** These terms and conditions and the confirmations of transactions into which these terms and conditions are incorporated by reference set out the entire agreement and understanding between the parties in connection with the subject matter. No party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded herein or in any other document recording the transaction.
- 15.2** No indulgence which either of the parties ("the grantor") may grant to the other of them ("the grantee") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which might have arisen in the past or which might arise in the future.
- 15.3** Save as otherwise agreed to and provided for in writing between the parties, no party shall be entitled to cede or assign its rights or obligations in terms of any transaction to any third party without the consent of the other party.

**16. Law to Apply**

All transactions shall be governed and construed in all respects in accordance with the laws of Botswana as constituted from time to time.

**17. Jurisdiction**

Subject to the provisions of clause 7, the parties consent to the jurisdiction of the High Court of Botswana in respect of any dispute arising from a transaction.