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Resolving disputes without reference to national laws: analysis of the nature and practice of Documentary Instruments Dispute Resolution Expertise (DOCDEX)

Abstract

The International Chamber of Commerce (ICC) has played an important role in the development of various instruments to regulate the trade finance field as well as any adjacent areas in the sphere of international trade. Therefore, it is not surprising that the initiative to establish a specialised international trade finance dispute resolution forum – Documentary Instruments Dispute Resolution Expertise (DOCDEX) – was taken under the aegis of the ICC. In fact, until 2015, DOCDEX was limited exclusively to disputes arising out of the instruments subject to ICC banking rules. Obviously, this ensured that the interpretation and application of soft law instruments developed by the ICC is done in the way intended by the ICC when such instruments were designed. However, the scope of the system was significantly expanded in 2015 which allows it to deal with any trade finance disputes, even with those which are not covered by any ICC-developed soft law.

In this article the author will discuss the nature, scope, benefits and limitations of DOCDEX for resolving trade finance disputes. Furthermore, unique procedural features of DOCDEX will be analysed along with case law generated by this dispute resolution forum as well as the attitude of courts towards DOCDEX Decisions. Lastly, the author will analyse the current problematic aspects of the system which need to be addressed by the ICC in the next revision of DOCDEX Rules. Possible solutions that would rectify the shortcomings of DOCDEX will be provided.

Introduction: what is DOCDEX?

DOCDEX was established by the ICC in October 1997 in response to a growing number of disputes between commercial parties concerning documentary credits and the “apparent frustrations of bankers that many judges, arbitrators and lawyers failed to grasp the complexities of documentary credit practice”.¹ Indeed, there seems to be a recurrent issue of misinterpretation and incorrect application of the basic principles of documentary instruments’ functioning, which may be counterintuitive to many lawyers and courts.²

¹ Nicholas Manganaro, ‘About-Face: the New Rules of Strict Compliance Under the Uniform Customs and Practice for Documentary Credits (UCP 600)’ (2011) 14 International Trade and Business Law Review 273, 289-290.

² See, for example, Matthew Brown, ‘Value-Adding Predictability: A Way Forward for Non-Legal Arbitrators & Letter of Credit Disputes’ (2016) Transnational Dispute Management 9; Jim Barnes, ‘ISP98 Standard Forms and Achieving

Consequently, misguided court judgments have frequently been causing consternation among trade finance practitioners.³ Moreover, some trade finance actors have also failed to follow or interpret correctly the established principles and practices of documentary instruments' functioning, thus threatening the reliability of such instruments for international trade transactions.⁴

Early from the time of its establishment DOCDEX has positioned itself as the unique platform for resolving trade finance-related matters, not on the basis of national law, but via interpretation of the express terms of a documentary instrument, soft law regulations, trade usages and customs, and the application of international standard trade finance practice. DOCDEX has seemingly built the above hierarchy of sources in its dispute resolution process in order to transcend national laws and any local customs,⁵ an idea reminiscent of the 'purist' view on new *lex mercatoria* theory for resolving disputes.⁶ This is a central feature of the DOCDEX system which distinguishes it from any other comparable dispute resolution platforms.

At an initial look, the system is closer to expert determination: the decision is made by experts, who are renowned individuals in the area of trade finance. The factual and technical circumstances play an important role in resolving a dispute, and the name of the system contains the word "expertise". Additionally, DOCDEX Rules specifically provide that DOCDEX proceedings are not arbitral proceedings and a rendered decision is not an arbitral award.⁷

However, there are some important differences between DOCDEX and standard expert determination. For example, the parties to DOCDEX do not choose experts as opposed to general expert determination.⁸ Furthermore, they do not even know their identities. Consequently, DOCDEX experts escape any liability, which other experts cannot avail

Independence' (2013) 19 (1) DCInsight.; Chang-Soon Song, 'Coming age of the DOCDEX Decisions' (2013) 19 (3) DCInsight; Lawrence Newman and Michael Burrows, *The Practice of International Litigation* (2nd edn, Juris 2013) V-143.

³ Gary Collyer, 'Documentary Credit Dispute Resolution under the DOCDEX Rules: Three Years On' (2000) ICC Publication No. 627 Special Supplement: Arbitration, Finance and Insurance; Anthony Connerty, 'Documentary Credits: a Dispute Resolution System from the ICC' (1999) 14 (3) *Journal of International Banking Law* 65, 67-68.

⁴ Collyer, 'Documentary Credit Dispute Resolution under the DOCDEX Rules: Three Years On' (n 3); see also Gary Collyer and David Meynell (eds), *Collected DOCDEX Decisions 2013-2016* (ICC Publication No. 786E 2017) 2.

⁵ See the interview of Georges Affaki in 'The Insight Interview: Georges Affaki' (2008) 14 (3) DCInsight.

⁶ The followers of the view formulated by Berthold Goldman that new *lex mercatoria* is totally autonomous of any national law, see Berthold Goldman, 'Frontieres du Droit et "*Lex Mercatoria*"' (1964) 9 *Archives De Philosophie du Droit* 177. The following authors can be considered as supporters of this idea: Jan Dalhuisen, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its *Lex Mercatoria*' (2006) 24 *Berkeley Journal of International Law* 129; Ali Abdelrahman Khalil, 'The New *Lex Mercatoria* in the Sudanese Legal System' (2015) 29 (1) *Arab Law Quarterly* 1; Alfredo De Jesús, 'The Prodigious Story of the *Lex petrolea* and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' (2012) 1 (1) *Transnational Petroleum Law Institute Series on Transnational Petroleum Law* 1; Michael Medwig, 'The New *Law Merchant*: Legal Rhetoric and Commercial Reality' (1993) 24 (2) *Law and Policy in International Business* 589.

⁷ See Article 2(5) of the DOCDEX Rules.

⁸ Clive Freedman and James Farrell, *Kendall on Expert Determination* (5th edn, Sweet & Maxwell 2014) 1.

themselves of. In addition, whilst a partnership or a company can generally be appointed as an expert,⁹ this is not the case in DOCDEX. As in arbitration, the decision-makers in DOCDEX are exclusively individuals.

Another difference is that before the decision by DOCDEX experts is reported to the parties, such decision is scrutinised by the ICC Banking Commission's Technical Adviser, who examines not only the form of such decision, but also can draw the experts' attention to any points of substance in order to ensure that it is in line with the ICC-developed instruments and/or international trade finance practice standards.¹⁰ It is worth noting that the same level of scrutiny is exercised by the ICC in its arbitration proceedings towards any arbitral awards.¹¹ A further shift from expert determination can also be traced to the change in nomenclature following the latest revision of DOCDEX Rules. Thus, a party that refers to DOCDEX is called "Claimant" instead of "Initiator" and the application by such party is named "Claim" instead of "Request". However, the most significant difference from both expert determination and arbitration is that every DOCDEX Decision is published and has a precedential value, and is thus capable of setting up certain standards in the area of trade finance.

The evolution and expansion of DOCDEX scope is illustrative of its progress and adaptation to the needs of the business community. As mentioned above, initially DOCDEX was intended to resolve disputes only in relation to issues arising from the use of letters of credit governed by the ICC Uniform Customs and Practice for Documentary Credits (the UCP) and the ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (the URR). However, following the revision of DOCDEX Rules in 2002 it became possible for the parties also to file disputes in relation to a collection incorporating the ICC Uniform Rules for Collections (the URC) and a demand guarantee incorporating the ICC Uniform Rules for Demand Guarantees (the URDG).

Following the latest revision to DOCDEX Rules in 2015, the scope of application of DOCDEX has significantly been widened. It is claimed that now, DOCDEX can address any trade finance-related dispute, including those relating to trade loans, syndications, negotiable instruments, risk purchase agreements, conflicts of priority and fraud in letters of credit, etc., *i.e.* all areas that are not otherwise covered by existing ICC banking rules.¹² Such widened

⁹ Freedman and Farrell (n 8) 3.

¹⁰ See Article 9(2) of DOCDEX Rules.

¹¹ See Article 34 of the ICC Arbitration Rules.

¹² 'ICC revises DOCDEX rules – enhancing scope, transparency, and efficiency' (ICC, 22 April 2015) <<https://iccwbo.org/media-wall/news-speeches/icc-revises-docdex-rules-enhancing-scope-transparency-and-efficiency/>> accessed 20 May 2022. However, there is some theoretical evidence that DOCDEX is not applicable to certain aspects of trade finance-related dispute, in particular to fraud in letters of credit, see Yanan Zhang, 'Approaches to Resolving the International Documentary Letters of Credit Fraud Issue' (PhD Thesis, University of Eastern Finland 2011), 209.

scope was likely aimed at effectively transforming the system into a universal platform for resolution of all trade finance and banking disputes. In particular, it means that DOCDEX, provided that it retains its industry-specialised features, could be used as a platform for a broader field of trade finance, not just in the area of documentary instruments. However, it remains to be seen how DOCDEX Panels will treat cases involving matters not currently regulated by any rules issued by the ICC, because at the time of writing there have not been any reported cases that were dealt with under these revised DOCDEX Rules.

Benefits of DOCDEX for commercial parties

DOCDEX is able to offer substantial benefits to commercial parties. Firstly, because a DOCDEX Decision is rendered by experts in the banking and trade sectors, the reasoning behind such a Decision is very different from the reasoning expressed in court judgments or arbitration awards in similar matters which tend to be overly generalized, because judges and arbitrators do not have enough expertise in the trade finance field.¹³ This itself can be considered a significant benefit for the parties.

Secondly, the cost of applying to DOCDEX is considerably less in comparison to other dispute resolution options. If the amount in dispute is equal to or below USD 1,000,000, the claimant is required to pay USD 5,000. If the amount in dispute exceeds USD 1,000,000, the fee is USD 10,000.¹⁴ Given that an average amount in dispute in DOCDEX is USD 4.2 million,¹⁵ such policy is very beneficial for trade finance actors, in particular when compared to general arbitration institutions which, as a rule, charge their fees on the basis of the specified amount in dispute.¹⁶ However, there is a particular downside: pursuant to DOCDEX Rules, the fee is payable by the claimant only.¹⁷ Therefore, no allocation of fees is available, unlike in arbitration.¹⁸

Thirdly, the DOCDEX system can be considered as an expeditious dispute resolution process. Usually, a DOCDEX Decision is made within 30 days of receipt of all information and documents which a DOCDEX Panel considers necessary for determining the issues in a dispute.¹⁹ This time limit is extended only in exceptional circumstances, which should be approved by the ICC.²⁰ Such speed is achieved, *inter alia*, through the use of electronic

¹³ Chang-Soon Song, 'Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)' (2013) 30 (3) *Arizona Journal of International & Comparative Law* 529, 545.

¹⁴ See Article 1 of the Appendix to the DOCDEX Rules.

¹⁵ Song (n 13) 534.

¹⁶ For example, according to the official data, the average cost of arbitration at the Singapore International Arbitration Centre (the SIAC) amounts to USD 80,337 and in the London Court of International Arbitration (the LCIA) – around USD 97,000.

¹⁷ Article 3(3) of the DOCDEX Rules.

¹⁸ See, for example, the LCIA Rules (Art. 28), the SIAC Rules (Art. 37), the HKIAC Rules (Article 33), etc.

¹⁹ Article 8(5) of the DOCDEX Rules.

²⁰ Article 8(6) of the DOCDEX Rules.

submissions²¹ and the absence of oral hearings.²² Often the experts do not need to physically meet and be in one premises in order to resolve a dispute and can handle it via means of video- and telecommunication.²³

The ICC estimates that the entire process from filing a claim to communication of a decision to the parties usually takes between two and three months.²⁴ Again, the comparison with arbitration is quite dramatic: the median duration of arbitral proceedings varies from 14 to 22 months.²⁵

Fourthly, DOCDEX is a very straightforward dispute resolution process and does not require commercial parties to seek additional or external legal assistance. As mentioned above, DOCDEX is a documentary-based process which does not involve any oral hearings.²⁶ Furthermore, the parties are not allowed to submit any supplementary documents in addition to those included in the original claim and/or answer, except for those which are specifically requested by a DOCDEX Panel.²⁷ Moreover, the absence of oral hearings results in a non-adversarial basis of the process. This helps to maintain business relations following the resolution of a dispute, which may not always be the case in litigation and arbitration.

In practice, for users of the system (mostly companies and banks) this means that usually there is no need to seek professional legal advice from an external advisor because the matter can effectively be handled by an in-house legal department. This is particularly beneficial for small and medium enterprises, who often find themselves at a disadvantage when their opponent with greater resources (a large corporation, a multinational company or an international bank) hires a team of renowned counsel for arbitration or attorneys for litigation.

Publication of DOCDEX Decisions and their precedential value

Apart from resolving disputes without any reference to national law, DOCDEX also has a

²¹ See Articles 3(1), 4(2), 5(2) and 6(1) of the DOCDEX Rules.

²² Articles 2(4) and 8(7) of the DOCDEX Rules.

²³ As an example, see Anthony Connerty's experience of being an expert at a DOCDEX Panel described in his article 'Trade with China: How and Where Disputes Can Be Resolved' (1998) 64 (2) Arbitration 129 at footnote 22.

²⁴ Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2009-2012* (ICC Publication No. 739E 2012) 3; see also 'DOCDEX' (ICC, [no date]) < <https://iccwbo.org/dispute-resolution-services/docdex/> > accessed 20 May 2022.

²⁵ According to data taken from the official websites of the respective arbitral institutions, the median duration of arbitration proceedings in the SIAC is 11.7 months, in the LCIA is 16 months and in the ICC is 22 months.

²⁶ Articles 2(4) and 8(7) of the DOCDEX Rules.

²⁷ Article 5(3). However, it is worth noting that a dangerous precedent was set in DOCDEX Decision No. 342. The proceedings in this Decision were initiated by the respondent in DOCDEX Decision No. 336, who failed to submit an answer in a timely manner. The Panel allowed such submission stating that it provided "for the arguments of the Initiator to be taken into account and to reconsider the conclusion of DOCDEX Decision No. 336" (see Collyer and Meynell, *Collected DOCDEX Decisions 2013-2016* (n 4) 97). Even though the Panel did not amend DOCDEX Decision No. 336 following consideration of new arguments, this practice of opening new proceedings due to the failure of one of the respondents to submit a timely answer is not provided by and clearly goes against the spirit of the DOCDEX Rules.

number of other features which signify its uniqueness as a private dispute resolution system. These include comprehensive publication of dispute outcomes as well as attributing precedential value to past rendered decisions.

Confidentiality is valued within DOCDEX, so no names and/or origin of the participants in the process (parties and experts) are publicly disclosed.²⁸ At the same time, every DOCDEX Decision is numbered and published.²⁹ Publication is made in the Trade Finance Channel of the ICC Digital Library and the ICC also periodically publishes them in a special dedicated DOCDEX Decisions publication.³⁰

Unfortunately, both of these sources are not freely accessible. Subscription to the Trade Finance Channel of the ICC Digital Library is an expensive option for accessing the DOCDEX database, because it gives access not only to DOCDEX Decisions, but also to many other sources of trade finance regulation, such as ICC Opinions, letters of credit legal cases summaries, specialised ICC banking and trade finance magazine, etc. At the time of writing the standard one-year subscription package costs EUR 3125.00.³¹

A cheaper solution is to purchase a special dedicated DOCDEX Decisions publication, which is currently available in four volumes selling separately.³² The price differs for each volume, but if one wishes to buy all four it is EUR 273.5 at the time of writing. Thus, even though they are not freely distributed, DOCDEX Decisions are affordable to most, if not all, businesses and trade finance practitioners.

The problem is, however, that such collected DOCDEX Decisions publications are published with a significant lag of approximately four to five years. Thus, a party might not be aware about the most recent DOCDEX decisions, which could potentially be of great significance to its dispute. It would be logical and welcomed for a Decision arising from any new DOCDEX cases to appear immediately in the Trade Finance Channel of the ICC's Digital Library. However, upon accessing the ICC's Digital Library in 2018 and 2019 this author did not find any new DOCDEX Decisions issued after 2016, the year when the latest publication of the collected DOCDEX Decisions was released.³³

Hence, it is not sufficient for the dispute resolution outcomes to be merely published, they need to be promptly published after rendering. Failure to do so may result in a lack of coherence in the decision-making process and attract criticism of the transparency of the

²⁸ Article 12(1)-(3) of the DOCDEX Rules.

²⁹ Article 12(1) of the DOCDEX Rules.

³⁰ 'DOCDEX' (n 1086).

³¹ 'ICC Digital Library Subscription' (ICC, [no date]) < <https://library.iccwbo.org/subscription.htm> > accessed 20 May 2022.

³² 'ICC Store' (ICC, [no date]) <http://store.iccwbo.org/search?Q=collected+docdex> > accessed 20 May 2022.

³³ Feedback about it was left to the ICC.

dispute resolution system and its activities.

DOCDEX Rules do not explicitly provide for the use of precedents. However, due to the publication of DOCDEX Decisions the parties and panels have started to cite previous DOCDEX Decisions. After such trend was spotted by the ICC, it seems that, whilst not specifically addressing the matter, the organisation actually encourages this practice.³⁴

Notably, first references to previously rendered DOCDEX Decisions were made not by the parties, but by the Panels of experts (see DOCDEX Decisions No. 250 and No. 255). This is illustrative of the wish of the experts to make use of the already published decisions for support of their own deliberations in the case. It could also serve as evidence that the decision-makers realise the potential of DOCDEX to develop coherent and consistent trade finance regulation via dispute resolution alongside any national regulation.

Shortly after, the parties to DOCDEX have also started to refer to previously made DOCDEX Decisions in their submissions, see, for example, DOCDEX Decisions No. 257, 263, 345 and 347. Upon substantive analysis of the above DOCDEX Decisions it becomes clear that DOCDEX Panels take considerable time and carefully examine whether a previously rendered decision may be used in support of any claims by the parties. Often the Panels elaborate on factual differences in the cases cited by the parties.³⁵ Hence, the active use of and reliance on the positions set in previous DOCDEX Decisions³⁶ combined with such careful scrutiny has resulted in DOCDEX Panels being very mindful not only of their conclusions with regards to the presented disputed issue, but also about any relevant consequences for future interpretation and practice in cases dealing with similar matters. Furthermore, in DOCDEX Decision No. 348 the panel specifically emphasised the importance of consistency of DOCDEX Decisions, stating that the rendered decision in this case was consistent with previous DOCDEX Decisions on a similar matter.³⁷

Analysis of DOCDEX practice: interpretation, application and development of trade finance rules, practices and usages

The main task of a DOCDEX Panel is appropriately to interpret and apply the provisions of the uniform rules in the area of trade finance developed and issued by the ICC. This includes such instruments as the UCP, the URDG, the URR and the URC. In addition, article 2(2) of the DOCDEX Rules provides that panels in a DOCDEX dispute may also refer to

³⁴ “The revised rules will also enhance transparency – requiring ICC to publish redacted decisions in every DOCDEX case. *Doing so will not only set a precedent for future cases*, it will also allow ICC to analyze the panel of experts charged with forming a decision [...]”, see ‘ICC revises DOCDEX rules’ (n 12).

³⁵ See, for example, DOCDEX Decision No. 330.

³⁶ In addition to the cases cited above, see also other cases wherein a party or a panel referred to previous DOCDEX Decisions, e.g. DOCDEX Decisions No. 345 and 347.

³⁷ See DOCDEX Decision No. 348 as reported in Collyer and Meynell (n 4) 128.

international standard practice in trade finance. This is best represented by, but not limited to, the International Standard Banking Practice (ISBP 745) and various ICC Opinions on certain aspects of trade finance. In fact, a DOCDEX Decision itself can be considered as international standard trade finance practice or at least being capable of creating such practice.³⁸

Since the instruments described above are themselves considered as representative examples of industry-specific customs and practices, DOCDEX panels have mostly been focusing on ensuring their correct understanding and coherent and consistent practical application. Thus, upon analysis of DOCDEX Decisions rendered to date, the author has identified three dominant functions which DOCDEX Panels exercise when dealing with an issue before them:

- a) interpreting relevant ICC rules;
- b) applying trade finance principles; and
- c) developing new practices and standards.

A) Interpretation of relevant ICC rules

The largest portion of DOCDEX Panels' activities is to correctly interpret the ICC-issued rules in the area of trade finance and provide important guidance for all concerned parties.³⁹ For example, in DOCDEX Decision No. 299 the beneficiary company (the initiator) claimed that the confirming bank (the respondent) failed to negotiate and pay the required amount under the letter of credit. The confirming bank argued that following the receipt of the instruction from the initiator to send the documents to the advising bank "as presented" it was obliged to honour or negotiate only against the compliant presentation, which was not the case here because the advising bank had identified a number of discrepancies.

In order to determine the amount of a confirming bank's obligations the DOCDEX Panel proceeded to analyse the meanings of the terms "Complying presentation" and "Confirmation" as specified in article 2 of the UCP. It stated that it was clear from the wording used in these definitions that the confirming bank was not obliged to negotiate or pay against the presentation of discrepant documents. Furthermore, the DOCDEX Panel, relying on international standard banking practice, stated that by giving specific instruction in writing to accept the documents and forward them to the issuing bank as presented the initiator effectively discharged the respondent from its duties as a confirming bank pursuant to article 14(a) of the UCP. Therefore, the DOCDEX Decision was rendered in favour of the

³⁸ Gary Collyer, 'Exclusions, Interpretations and the Future of the UCP' (2008) 14(2) DCInsight; Pavel Andrlé also expressed this opinion in his interview, see 'Two Observers with Questions About the New UCP' (2007) 13 (3) DCInsight.

³⁹ King-Tak Fung, 'Another Look at Five Banking Days and Negotiation' (2010) 16 (1) DCInsight.

respondent.

The initiator decided to take this matter to court, but suffered another defeat in the Superior Court of Québec. Not least, this was attributed to DOCDEX Decision No. 299 which was presented by the respondent. Following an analysis of the DOCDEX Decision and the overall nature of DOCDEX proceedings, the Honourable Chantal Masse stated that whilst the court was not bound by the DOCDEX Decision in any way and treated it as a judicial fact, the tribunal was “in complete agreement with its [the DOCDEX Panel’s] interpretation of the UCP 600 rules”.⁴⁰

In DOCDEX Decision No. 301 the Experts decided whether the refusal of a claim under the guarantee was made in accordance with the URDG. The Panel analysed Article 10 of the URDG 458 (applicable to the guarantee), which provided that a guarantor should have a reasonable time within which to examine a demand under a guarantee and to decide whether to pay or to refuse the demand. Thus, the Panel discussed two issues: a) what was reasonable time for the examination and sending of the notice; and b) was the content of the sent notice of refusal in accordance with the requirements of the URDG 458. With regards to the former issue, the Panel referred to the ICC Banking Commission Opinion R624 (2004), which concluded that the reasonable time for processing a demand guarantee should be three banking days. Since the URDG 458 did not specify any particular requirements towards the content of the notice of refusal, the mere fact of stating that presentation was not complete (without specification of the missing documents) was sufficient for the notice to satisfy the requirement of the URDG.

In DOCDEX Decision No. 257 the Panel dismissed one of the claims completely on the basis that Article 14(c) of the UCP 500 was not applicable to nominated or advising banks, but only to issuing banks.

It is worth mentioning that DOCDEX Panels can also provide for interpretation of DOCDEX Rules. Such interpretation was mostly required by parties in the early years following the inception of the system in order to clarify certain aspects. For example, in the very first decision rendered (DOCDEX Decision No. 201) the respondent claimed that standby letters of credit were out of the scope of the system. However, through the interpretation of Articles 1 and 2 of the UCP 500 as well as some ICC Opinions, the Panel decided otherwise.

B) Application of trade finance principles

DOCDEX Panels often decide disputes on the basis of trade finance principles. For example, DOCDEX Decision No. 277 dealt with the refusal of the issuing bank to honour

⁴⁰ *Teston Precision Products Inc. v. Bank of Nova Scotia* [2012] QCCS 4185, 19-20.

presentation. In this case, the terms of the letter of credit provided that “payment will be effected against documents with no discrepancies and the arrival advising report from shipping company which expiry date is as same as that of this L/C”. The beneficiary presented the documents including a document named “arrival advising report” from a shipping company. However, the issuing bank refused to honour the presentation claiming that the supplied “arrival advising report” was not the document required by the credit as it could only be issued after arrival of the vessel.

The DOCDEX Panel resolved the matter by applying the principle of specificity and unambiguity of the terms of credit, which, as it stated, is enshrined in international standard banking practice, the ISBP and is also supported by several ICC Opinions.⁴¹ According to this principle, any ambiguity in the terms of the credit must be held against the issuer of the credit. Therefore, the responsibility is on the issuing bank to ensure that the credit is issued with correct and unambiguous terms, and the beneficiary is entitled to follow international standard banking practice in interpretation of the terms of the credit.

The same principle was used to resolve the dispute in DOCDEX Decision No. 288. Here the issuing bank rejected the documents on the basis of a discrepancy in the bill of lading, because it was not blank endorsed as required by the terms of the letter of credit. However, given the contents of the bill of lading (to order of the issuing bank), only the issuing bank could endorse it in blank, making the requirement to present such document under the letter of credit automatically unachievable by the beneficiary. Therefore, the DOCDEX Panel decided that the principle of specificity and unambiguity had been violated by the issuing bank, which rendered the credit to be unworkable. Thus, the Panel continued, the responsibility of the issuing bank prevailed whether such an inaccuracy was made deliberately or inadvertently.⁴²

In addition, the Panel in DOCDEX Decision No. 337 further extended the validity of the principle to any amendments to the terms of the credit. Whilst the Panel confirmed the right of the issuing bank to amend the terms of the letter of credit, it pointed out that the manner and wording of the amendment in question was opaque and unusual in the context of international standard banking practice and “represented a very detrimental deviation from the principles of the UCP 600”.⁴³

In DOCDEX Decision No. 312 the dispute in question was between the issuing bank and the applicant company, which claimed that the bank had been wrong in examination of the bill of

⁴¹ Here reference was made to the ICC Opinions TA629 (2008), R340 (1999), R554 (2004).

⁴² See also DOCDEX Decision No. 298.

⁴³ See DOCDEX Decision No. 337 as reported in Collyer and Meynell (n 4) 78.

lading and declaring it as compliant with the terms of the letter of credit. The applicant based its arguments on the fact that the signature on the bill of lading belonged to the forwarder and not to the carrier as specifically required by the letter of credit. It also stated that the bank should have made proper investigation as to whether the forwarder was performing the functions of the agent on behalf of the carrier.

On both of these issues the DOCDEX Panel ruled in favour of the issuing bank relying on the principle that, in documentary credit transactions, banks deal with the presented documents only and are not expected to investigate any other additional facts or underlying issues of a sale transaction. Thus, as the presented bill of lading provided that it was signed by a person “as agent on behalf of the carrier”, on its face it constituted a complying presentation and the issuing bank was correct in honouring it under the UCP.

The applicant company brought the dispute to a Singaporean court⁴⁴ adding some additional evidence in support of its arguments. In particular, it claimed that the bank: a) could not have been unaware that the signature belonged to a well-known international freight forwarding (not carriage) company; b) having been involved in the previous transactions between the applicant company and the seller, should have been aware which freight carrier company is usually used by the seller; and c) that there had been another bill of lading issued four days later by a proper carrier.

George Wei JC referred to the DOCDEX Decision and, whilst stating that his reasoning was not solely based on the findings of the DOCDEX Panel because such findings were not in any way binding, described it as having a “persuasive value” and completely mirrored the position expressed in DOCDEX Decision No. 312 that an issuing bank was only concerned with the presented documents and other facts were irrelevant.⁴⁵

The principle of independence (autonomy) of letters of credit from the underlying transaction has been commonly used by Panels in two situations. Firstly, the independence principle is applied to the presentation of documents under the letter of credit, resulting in each presentation of documents being independent from previous or subsequent presentations. This was highlighted in DOCDEX Decisions No. 213 and No. 227. In both of these cases the issuing banks rejected the initial presentation of the documents due to some discrepancies, but subsequently accepted the same documents under the second presentation. The advising banks claimed that due to subsequent approval of the same documents presented, the issuing banks invalidated previously identified discrepancies. However, the Panels stated that the principle of independence of letters of credit results in issuing banks having the right

⁴⁴ *Abani Trading Pte Ltd v BNP Paribas and another* [2014] SGHC 111, 13-14

⁴⁵ n 44, 47-50.

to treat each presentation of documents independently from either preceding or subsequent presentations. Thus, the issuing banks were not obliged to accept similar discrepancies in future, unless local law required otherwise.⁴⁶

Secondly, and most commonly, the independence principle is relied upon in relation to the only exception to this principle, namely the fraud exception. DOCDEX Panels have been consistent in reminding parties that the fundamental obligation of banks in letter of credit transactions is to examine the documents on their face, and therefore, the banks cannot refuse the presentation on the basis of any fraud suspicions, written or oral allegations/information from parties, etc.⁴⁷ Furthermore, the banks are not obliged to make any investigation of such matters.⁴⁸

The only situation wherein banks can rely on fraud exception and can suspend their irrevocable undertaking under a letter of credit without being subject to liability from wrongful dishonour is when such fraud is established by a court or arbitral tribunal.⁴⁹ This is because the UCP (as well as other uniform rules issued by the ICC) does not contain any provisions with regards to fraud and its treatment.⁵⁰ Thus, any fraud allegations should be examined by a competent court or tribunal pursuant to applicable law on a case-by-case basis.⁵¹ Accordingly, DOCDEX is not the forum for examination and/or establishment of fraud.

At the same time, the above approach of fraud exception being valid and applicable only if supported by a respective order from a court or arbitral tribunal can sometimes be damaging to the actors in a letter of credit transaction. Such damage occurs when courts or arbitral tribunals disregard the fundamental independence (autonomy) principle of the functioning of letters of credit, thus providing a significant threat to the reliability of this instrument of payment in international trade. DOCDEX Panels, having consistently accentuated the superiority of local law, including any court orders and arbitral decisions, over any ICC issued soft law, cannot overrule any such aberrant judgments or awards in which the independence principle has been gravely violated. The most evident examples of that are DOCDEX Decisions No. 314 and 317.

In DOCDEX Decision No. 314 the presentation of documents by the beneficiary was confirmed as compliant by the issuing bank, but the applicant initiated arbitration against the beneficiary on the basis of the sale of goods contract and obtained a court order prohibiting the issuing bank from making payment to the beneficiary. The issuing bank did not dispute

⁴⁶ Reference was also made to ICC Opinion R332 (1999).

⁴⁷ See DOCDEX Decisions No. 218, 238, 261, 268, 277, etc.

⁴⁸ See DOCDEX Decisions No. 229, 230, 232, etc.

⁴⁹ See DOCDEX Decisions No. 218, 229, 230, 232, etc.

⁵⁰ See DOCDEX Decisions No. 229, 268, 277, 291, 308, 316, 317, 349, etc.

⁵¹ See DOCDEX Decisions No. 229, 268, 277, 291, 308, 316, 317, 349, etc.

its obligation to pay and in fact requested the court to remove the freezing order in order to enable it to perform its duties to the beneficiary pursuant to UCP (at the time of this DOCDEX Decision such request had not been considered by the court, thus its outcome is not known). The DOCDEX Panel stated that the independence principle of the letters of credit should be upheld to the fullest extent possible and any court interference that prevents the bank from fulfilling its obligation under a letter of credit transaction should be based on very strong arguments, such as fraud. The mere existence of a dispute between the applicant and the beneficiary does not by itself constitute a reason for not honouring the credit, especially given the fact that the issuing bank is liable for honouring the credit, pursuant to timely and complying presentation, from the time of issuance of such letter of credit. However, the issuing bank cannot ignore a court order prohibiting payment.

In DOCDEX Decision No. 317 the beneficiary made a complying presentation and the issuing bank agreed to pay the amount under the letter of credit on the maturity date. However, before the maturity date the issuing bank had notified the beneficiary that it could not make the payment due to an injunction order. According to the facts of the case, this court order was not only made without any notification to the beneficiary, but was also brought by a third party under a different letter of credit transaction. The Panel again accentuated the importance of the independence principle of letters of credit, specifying that under all circumstances the court in this case had prohibited payment with reference to a different transaction and a different letter of credit without making any reference to irregularity or unlawfulness of the transaction in question. This was highly unusual, the Panel continued, and it would be at least expected that any freezing order of the funds payable under the letter of credit would be related to the transaction covered by that documentary credit. However, as in DOCDEX Decision No. 314, the issuing bank could not ignore the court order.

Thus, in both these cases DOCDEX Panels dismissed the claims of the beneficiaries and acquiesced to the terms of the courts' freezing orders. At the same time, the reasoning given in these two Decisions was seemingly addressed more to the courts that issued such injunction orders rather than the parties. In fact, pernicious interpretation and egregious application of trade finance principles and accompanying industry regulations by national courts seem to be a common issue. In an earlier DOCDEX Decision No. 229 the Panel pejoratively interpolated, as *obiter dictum*, that "an effort by banks to educate the judicial systems within their countries in the principles of the UCP will be useful to help courts judge cases properly".⁵²

⁵² Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No. 665 2003) 115.

C) Development of new practices and standards

This last category of DOCDEX activities is setting up new practices and standards. Thus far this has been a minor portion of all activities, but following the changes to DOCDEX Rules in 2015⁵³ it may become the most important. This category deals with situations wherein neither the ICC-developed rules nor international trade finance practice have any clear guidance with regards to a certain aspect and its practical application.

The example of such matter can be found in DOCDEX Decision No. 242. In this decision a number of issues with regards to the treatment of certain terms and conditions of the letter of credit were raised which were not covered by the UCP. One of the issues was to determine whether the issuing bank returned the dishonoured documents to the presenter in a timely manner. Whilst there is some specific timeframe established for examination of documents and provision of the notice of refusal, there is no qualification period for returning dishonoured documents to the presenter specified in the UCP (the issue concerned the UCP 500). This was noted by the panel as well as the fact that ICC Opinions also did not clarify the issue. Therefore, the Panel, resorting to international standard banking practice and market expectations of the businesses, highlighted the importance associated with possession of the title documents and, consequently, the need for priority processing in order to return the dishonoured commercial documents timeously because any delay in this process may prejudice the beneficiary's rights and security. Thus, whilst stating that it did not have relevant authority to set the precise time limit for returning the documents, the panel came to the conclusion that the minimal accepted standard for the return of any dishonoured documents should be without delay and by expeditious means once the notice of refusal was sent. As for the case presented to the panel, the delay in returning the documents lasting between 12 and 26 days following the notice of refusal was deemed to be unreasonable and the one that "fails to comply with the spirit, if not the letter of the UCP".⁵⁴

In fact, this DOCDEX Decision was crucial to the outcome of litigation in English courts.⁵⁵ In *Fortis Bank SA/NV and another v Indian Overseas Bank*⁵⁶ both the High Court and the Court of Appeal were persuaded by the experts' findings on the applicable minimal standard for return of the documents treating their position as evidence of indisputable, normal and expected international banking and trading practice.⁵⁷

⁵³ See section 5.2.1 of this chapter.

⁵⁴ See DOCDEX Decision No. 242 as reported in Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2004-2008* (ICC Publication No. 696 2008) 53.

⁵⁵ Ebenezer Adodo, 'Article 16 of UCP 600: the Time Frame for Returning Rejected Documents and Consequences of Its Breach' (2011) 26 (11) *Journal of International Banking Law and Regulation* 548, 553.

⁵⁶ [2010] EWHC 84 (Comm) and [2011] EWCA Civ 58.

⁵⁷ See *Fortis Bank SA/NV and another v Indian Overseas Bank* [2010] EWHC 84 (Comm), 74 and *Fortis Bank SA/NV and another v Indian Overseas Bank* [2011] EWCA Civ 58, 35. See also Roger Fayers, 'Rejection of Documents and Preclusion' (2010) 16 (4) *DCInsight*; Mohd Hwaidi and Brian Harris, 'The Mechanics of Refusal in Documentary Letter of Credits: an

Another example of developing new trade-finance practice is found in DOCDEX Decision No. 215. Here, the advising banks found presentation under the letter of credit discrepant due to several issues, one of which was the fact that there had been some alterations and corrections to the cargo receipts which, in the opinion of the issuing banks, were improperly authorised by the carrier who issued these documents. The beneficiary argued otherwise and claimed that the documents were in compliance with the terms of the letter of credit. When considering this issue the DOCDEX Panel focused its attention on the appropriate mode for making any alterations or corrections. However, it found that not only is the UCP silent on this issue, but not a single ICC Opinion issued at the time of the case dealt with this question (the available Opinions dealt with corrections on a transport document, but a cargo receipt is not a transport document). Therefore, the Panel came to the conclusion that as long as the correction was made by the issuer of the document rather than a beneficiary, this was not a discrepancy. To authorise such a correction or alteration a signature of the general manager of the issuer was required. Thus, the discrepancies pointed out by the issuing banks were declared invalid.

However, following the DOCDEX Decision the issuing banks refused to pay under the letter of credit, so the beneficiary had to resort to litigation in which one of its supporting arguments was the DOCDEX Decision No. 215. Having analysed the DOCDEX Decision, Hon Stone J of the High Court of the Hong Kong Special Administrative Region stated that the arguments of the respondents (the issuing banks) presented in the court hearing must have been placed before the DOCDEX Panel, but nevertheless were rejected.⁵⁸ Thus, he fully agreed with the DOCDEX Panel's conclusions and ruled in favour of the beneficiary.

Furthermore, the position expressed in this DOCDEX Decision No. 215 was later reflected in the section 'Corrections and alterations' in the first issue of the ISBP in 2002 and its further revisions in 2007 and 2013. Thus, it has now become a codified trade finance practice.

Support by national courts

In the context of discussion about DOCDEX, it is important to assess the treatment of and reliance placed by national systems, and courts in particular, on DOCDEX Decisions, since such decisions are generally not binding and are not based on any national law.

To date there has not been any research with regards to the treatment of DOCDEX Decisions by local courts. Indeed, this is quite a difficult task for several reasons. Firstly,

Analysis of the Procedures Introduced by Article 16 UCP 600' (2013) 28 (4) Journal of International Banking Law and Regulation 146, 150.

⁵⁸ *NEC Hong Kong Limited v the Industrial and Commercial Bank of China and Gaoming Light Industrial Products Import & Export Company of Guangdong* [2006] HCCL 60/2000, 123.

each DOCDEX Decision is anonymised, thus making it impossible to trace the origin of the parties involved. Secondly, DOCDEX has been used by parties from a variety of jurisdictions, both civil and common law.⁵⁹ Consequently, any comprehensive search in legal court judgment databases in many countries may be either restricted or impossible to perform due, *inter alia*, to language barriers. Thirdly, according to the ICC, it is frequent practice for parties to settle their disputes amicably following the receipt of a DOCDEX Decision without any further reference to a court.⁶⁰

During my research I attempted to perform this seemingly difficult task and searched for court cases wherein reference was made to a DOCDEX Decision. The results of such activity should only be indicative and ideally appropriate full-scale research is required by researchers in different jurisdictions. However, even this somewhat modest attempt produced some intriguing results and observations. Notably, DOCDEX Decisions have been largely viewed by courts worldwide as having persuasive value and evidencing international commercial practice.⁶¹ Furthermore, as shown in the above sections, whenever a party has presented a previously rendered DOCDEX Decision in its favour as supporting evidence, the courts have invariably resolved the matter to the benefit of such party without any deviation from DOCDEX Panels' findings.⁶² This is clearly a sign of the unchallenged support for DOCDEX outcomes by state courts in various jurisdictions, both civil (Quebec, South Korea)⁶³ and common (England, Singapore, Hong Kong) law.

Moreover, since the DOCDEX process has gradually developed as a favourable option for documentary credit dispute resolution for international trade actors resulting in a steady growth of the number of rendered DOCDEX Decisions on various aspects of trade finance, state courts have started to place significant reliance on such decisions even in cases wherein neither of the parties had presented such a Decision as additional evidence.

In *Standard Chartered Bank v Dorchester LNG (2) Ltd*.⁶⁴ Teare J made reference to DOCDEX Decision No. 303, even though the parties to this case did not cite such source. However, whilst reaching the same conclusion as the DOCDEX Panel, the reasoning of the judge differed from the one adopted by the Panel. In essence, Teare J took into

⁵⁹ See annual ICC Dispute Resolution statistics. See also Song (n 13) 534.

⁶⁰ Collyer and Katz, *Collected DOCDEX Decisions 2009-2012* (n 24) 3.

⁶¹ *Bulgrains & Co Ltd v Shinhan* [2013] EWHC 2498 at 37; *Mizuho Corporate Bank Limited v Woori Bank* [2004] SGHC 219 at 42; *Fortis Bank SA/NV & Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA Civ 58 at 34-35; *Abani Trading Pte Ltd v BNP Paribas and another* [2014] SGHC 111 at 45-46.

⁶² In addition to the cases mentioned in section 5.3.4 of this chapter, see also *Mizuho Corporate Bank Limited v Woori Bank* [2004] SGHC 219.

⁶³ Whilst I could not identify and study the court judgment, I found two reports about the District Court of Seoul supporting the position expressed in the previously rendered DOCDEX Decision No. 272 which was presented by one of the parties, see King-Tak Fung, 'A Transfer L/C Fraud Case' (2012) 18 (3) DCInsight; N.D. George, 'The Case of a Transferred L/C' (2013) 19 (1) DCInsight.

⁶⁴ [2013] EWHC 808 (Comm).

consideration the contents of the SWIFT MT734 message in order to decide that Standard Chartered Bank had rejected the documents,⁶⁵ whilst the DOCDEX Panel stated that since the SWIFT MT734 message is named as “Advice of Refusal” it is clear that by using such message banks cannot have any intention other than to notify about the refusal of the presented documents.⁶⁶ Such differentiation in the interpretation of the UCP and banking practices did not lead to any adverse consequences in this case, but is clearly indicative of the fact that state courts sometimes misinterpret or have a different interpretation of existing practices and usages by trade finance and banking actors.

At the same time, it is worth mentioning that DOCDEX Decision No. 303 was subsequently supported and applied in *Bulgrains & Co Limited v Shinhan Bank* by Gore QC.⁶⁷ However, *Bulgrains & Co Limited v Shinhan Bank* is also interesting for other reasons. Firstly, both of the parties relied on DOCDEX Decisions No. 303 and No. 296 to which neither of them was a party. This case, in fact, is the only one identified wherein the court considered more than one DOCDEX Decision in the same proceedings. Secondly, when analysing DOCDEX Decision No. 296, Gore QC compared the factual circumstances of the case before him and the DOCDEX Panel and stated that due to different factual circumstances the Decision could only qualify to be of assistance in resolving the issue as to whether the notice of refusal had been sent in the manner compliant with the UCP.⁶⁸ In DOCDEX Decision No. 296 the Panel had set out a test which, if sufficed, resulted in the issuing bank fulfilling its obligations when refusing the presented documents received under the documentary credit.⁶⁹ This test is of significant importance because if failed the issuing bank would be precluded from claiming that the presentation was discrepant and would be obliged to honour even if the documents actually contained some discrepancies.

The crucial point of the test in this case was whether the issuing bank correctly notified the beneficiary about the disposal of the documents. In holding that the beneficiary was appropriately notified in accordance with the test as specified in DOCDEX Decision No. 296 Gore QC stated that whilst the MT734 message did not specifically indicate what the issuing bank was proposing to do with the documents, it stated “Notify as per UCP 600 article 16(c)(iii)(b)”.⁷⁰ Thus, reliance on the specific article of the UCP along with the industry term “notify” (on this point HHJ Gore QC again referred to DOCDEX Decision No. 303 as well as

⁶⁵ *Standard Chartered Bank v Dorchester LNG (2) Ltd.* [2013] EWHC 808 (Comm), 60-62.

⁶⁶ The DOCDEX Panel also set up two exceptions to this rule, namely when a SWIFT message other than an MT734 is sent to notify refusal or in the event when a message other than SWIFT is sent directly to a beneficiary which is not a bank.

⁶⁷ [2013] EWHC 2498 (QB), 34-42.

⁶⁸ *Bulgrains & Co Limited v Shinhan Bank* [2013] EWHC 2498 (QB), 45-50.

⁶⁹ As specified by the DOCDEX Panel, the refusal notice should: a) state clearly that the bank is refusing to honour or negotiate; b) state each discrepancy with them being complete and specific; and c) state the disposal of the documents pursuant to the four options available in UCP 600 sub-article 16(c)(iii).

⁷⁰ *Bulgrains & Co Limited v Shinhan Bank* [2013] EWHC 2498 (QB), 51.

Fortis Bank SA/NV and another v Indian Overseas Bank) satisfied the requirement for informing the beneficiary about the disposal of documents.

Future improvement of DOCDEX

DOCDEX occupies a unique place in trade finance dispute resolution and is arguably the most successful forum in this area. For example, the International Center for Letter of Credit Arbitration (ICLOCA) was established by the Institute of International Banking Law & Practice in 1996, *i.e.* even before the inception of DOCDEX. Its arbitration service is available in relation to a letter of credit, independent guarantee, collection instruction, reimbursement undertaking, or other agreement or undertaking, whether independent or not.⁷¹ The key difference between DOCDEX and ICLOCA is that the latter functions as a pure arbitration service and its rules are adopted on the basis of the UNCITRAL Arbitration Rules. Thus, parties submitting disputes to ICLOCA will receive a final and binding arbitration award enforceable under the New York Convention. However, after 25 years since its establishment there has not been a single award rendered by ICLOCA.⁷² Moreover, as of 2022 it seems that the Institute of International Banking Law & Practice has stopped advertising the services of ICLOCA on its website.

A somewhat more ambitious attempt to revive the idea of a specific arbitration service for trade finance was made in 2012 through the establishment of the Panel of Recognized International Market Experts In Finance foundation (P.R.I.M.E.).⁷³ P.R.I.M.E. was established with the aim of facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets, and consists of internationally renowned experts in the field of both finance as well as dispute resolution, including retired and sitting judges, central bankers, regulators, representatives from private practice and derivatives market participants.⁷⁴ Thus, P.R.I.M.E. is concerned not only with documentary instruments, but a larger area of financial markets regulation.

P.R.I.M.E. released its arbitration rules, as well as mediation rules, in 2012, which were revised in 2016 and 2022. P.R.I.M.E. arbitration rules, like ICLOCA arbitration rules, are based on the UNCITRAL Arbitration Rules. However, despite some positive general developments such as recognition by the International Swaps and Derivatives Association (ISDA) as one of the potential dispute resolution forums in derivatives disputes, extensive

⁷¹ See Article 1 of the ICLOCA Rules.

⁷² Zhang (n 12) 175; Brown (n 2). Also confirmed by Professor Georges Affaki during his lecture 'Arbitration in Banking and Finance Deconstructed: The New Deal' at the Chartered Institute of Arbitrators on 5 April 2018.

⁷³ 'History' (*P.R.I.M.E. Finance*, [no date]) <<https://primefinancedisputes.org/page/history>> accessed 20 May 2022.

⁷⁴ Daniella Strik, 'Launch of P.R.I.M.E. Finance Arbitration Rules: dispute resolution in global financial markets' (*Kluwer Arbitration Blog*, 17 January 2012) <<http://arbitrationblog.kluwerarbitration.com/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/>> accessed 20 May 2022.

cooperation with the PCA and plans to co-operate with LexisNexis on the creation of a specific financial case law database,⁷⁵ to the author's best knowledge, to date there have not been any reports about opened or concluded arbitration proceedings.⁷⁶ The fact that P.R.I.M.E. arbitration rules have been revised three times within a decade may be indicative of the lack of interest from commercial parties to resolve their financial disputes via arbitration. The latest revision of P.R.I.M.E. arbitration rules provide for a greater level of transparency with the publication of anonymised arbitration awards which will shed some light on the real popularity of this dispute resolution forum.⁷⁷

Thus, as opposed to DOCDEX, neither ICLOCA nor P.R.I.M.E. have proven to be a successfully functioning system in the area of trade finance.

Nonetheless, despite its many benefits, DOCDEX is not an ideal system and there are some limitations inherent in the process. Some of those relate to the initial design of DOCDEX, such as limited scope in the area of trade finance and banking or inappropriateness to cases where the hearing of witnesses, oral examination or oral submissions are required to resolve any factual or legal issues.⁷⁸ These are difficult to cure without overhauling the entire system. However, there are a number of other current limitations that may need to be addressed by the ICC in any upcoming revision of DOCDEX Rules and procedure.

Impractical scope limitations

For example, Article 2(3) of the DOCDEX Rules poses significant threats to the existing scope of the system. Pursuant to this provision, if the dispute arises out of or is in connection with an instrument, undertaking or agreement that does not provide for the application of any ICC Banking Rules, it shall be administered under the DOCDEX Rules *only* if each claimant and each respondent so agree. Consequently, because a respondent is not obliged to submit an answer to a claim, in practice it is likely that DOCDEX will be used almost exclusively for resolving disputes which involve some of the ICC banking rules. Whilst there are strong claims that the UCP is incorporated in most or nearly all commercial letters of credit and is used by the banks and banking associations of virtually every country and territory in the world,⁷⁹ this does not mean that other types of documentary instruments incorporate the ICC-developed soft law banking rules on the same scale.⁸⁰

⁷⁵ 'Press releases' (*P.R.I.M.E. Finance*, [no date]) < <https://primefinancedisputes.org/page/press-releases> > accessed 20 May 2022.

⁷⁶ In addition, relevant email inquiries were sent to P.R.I.M.E. in 2018, 2019 and 2020. However, no response has been received to any of them.

⁷⁷ Article 39(10) of the P.R.I.M.E. Finance Arbitration Rules 2022.

⁷⁸ Article 2(4) of the DOCDEX Rules.

⁷⁹ Walter Baker and John Dolan, *Users' Handbook for Documentary Credits under UCP 600* (ICC Publication No. 694 2008) 10; Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 48.

⁸⁰ See examples in Mugasha (n 79) 48-55.

Clearly, in its current form Article 2(3) significantly restricts the ability of DOCDEX to administer its alleged goal to resolve any and all trade finance related disputes. Thus, it is suggested that in their new restatement DOCDEX Rules should abolish the above requirement. This will allow DOCDEX Panels to look at all kinds of trade finance disputes irrespective of whether the parties have incorporated any ICC-developed rules in their agreement. As a possible alternative the ICC may consider a provision under which a failure of the respondent to submit answer to a claim should not prevent a DOCDEX Panel to render a decision on a disputed agreement, undertaking or instrument that does not provide for the application of any ICC Banking Rules.

Binding outcomes

Another contentious issue is that, unless the parties agree otherwise prior to the commencement of the proceedings, a DOCDEX Decision is not binding on them.⁸¹ Such an approach, taken by the drafters of DOCDEX Rules, has received some criticism and has resulted in debate as to whether the DOCDEX Decision should be binding on the parties irrespective of their choice or agreement,⁸² akin to any expert determination and/or arbitration process.

It is likely that the approach of the ICC towards DOCDEX Decisions being non-binding, which was taken in 1997, represents an initial compromise in order to attract more users to the system at the very early stage of its development.⁸³ However, since DOCDEX has been positively received by commercial actors and banks, this approach might need to be changed in the next revision of DOCDEX Rules. In particular, this would result in the mandatory nature and the duty of a respondent to participate in the proceedings and, consequently, would mitigate the problem that arises from Article 2(3) of the DOCDEX Rules described above.⁸⁴ Another possible and currently discussed development would be inclusion of a specific provision for a mandatory dispute resolution through DOCDEX⁸⁵ in the various ICC banking rules akin to the one in the Olympic Charter⁸⁶ and World Anti-Doping Agency Code⁸⁷ for the Court of Arbitration for Sport, or Internet Corporation for Assigned Names and Numbers Registration agreement for the Uniform Domain-Name Dispute-Resolution Policy,⁸⁸ and similar industry-specialised dispute resolution platforms. A less likely and practically more demanding option would be the development by the ICC of standard

⁸¹ Article 2(6) of the DOCDEX Rules.

⁸² Song (n 13) 545; Manganaro (n 1) 290.

⁸³ Song (n 13) 533.

⁸⁴ Song (n 13) 550.

⁸⁵ Song, 'Coming age of the DOCDEX Decisions' (n 2).

⁸⁶ See Article 61 of the Olympic Charter.

⁸⁷ See numerous references to the CAS in the WADA Code, in particular Articles 8.5 and 13.

⁸⁸ See note 2 to and Article 1 of the UDRP.

forms for various types of documentary instruments with a specification of DOCDEX as the dispute resolution forum (the analogous approach to the Baltic and International Maritime Council's standard form contracts and specification of the London Maritime Arbitrators Association therein). In fact, a 'DOCDEX clause' is now becoming more common in international trade practice, under which all disputes arising out of or in connection with a documentary instrument shall be finally settled under the DOCDEX Decision in accordance with the ICC DOCDEX Rules, giving DOCDEX the exclusive jurisdiction to hear such disputes.⁸⁹

Relationship between national law and ICC rules

DOCDEX Panels have consistently noted that the system cannot deal with issues under regulation by any national law,⁹⁰ decide which national law should apply,⁹¹ change or uplift court orders, etc.⁹² Understandably, it is unlikely that the ICC would change this current approach. However, it may be necessary to review the functionality of DOCDEX in situations when a disputed issue deals with an ICC-issued soft law and also concerns the applicability of certain national law regulations, e.g. the law of the advising bank, the law of the issuing bank, etc. So far this has been a grey area and DOCDEX Panels have refused to consider such matters. For example, in DOCDEX Decision No. 316 the Panel stated that it had no authority to decide in the matter whether the absence of a document not listed under the terms of the letter of credit, but mandatorily required by the law of the importing country in order to perform custom clearance of goods, comprises a valid ground to not effect the payment.

Consistent approach for damages

DOCDEX Panels can decide whether the obligation to pay under a particular documentary instrument was breached or wrongfully refused, thus declaring a losing party liable to pay the amounts under the respective documentary instrument.⁹³ However, as a general rule, DOCDEX is not suitable for determination of the quantum of damages, compensation, interest or any other additional expenses (such as legal fees, DOCDEX fee, etc.) payable to a winning party.⁹⁴ At the same time, it is worth noting that in cases dealing with documentary collections the position seems to be different and there have been several instances of Panels determining the losing party liable to pay the collection value as well as any interest

⁸⁹ See Song, 'Coming age of the DOCDEX Decisions' (n 2); Kim Sindberg, 'LC Disputes – Is DOCDEX the Answer?' (*LCViews*, [no date]) <http://www.lcviews.com/index.php?page_id=43> accessed 20 May 2022. However, see doubts over the binding effect of such clause expressed by Brown (n 2) 19.

⁹⁰ See DOCDEX Decisions No. 229, 314, 327, 333, 338, etc.

⁹¹ See DOCDEX Decision No. 315.

⁹² See DOCDEX Decisions No. 236, 317 and 343.

⁹³ See DOCDEX Decisions No. 239, 243, 302, 309, 321, 327 and 350.

⁹⁴ See DOCDEX Decisions No. 257, 317 and 345.

and other costs.⁹⁵ A consistent approach is required in relation to the issue of damages, hence the ICC may need to introduce specific provision regarding damages in DOCDEX Rules.

Identity of experts

A DOCDEX panel consists of three impartial experts with extensive experience in and knowledge of trade finance transactions, who are selected from a special list maintained by the ICC Banking Commission.⁹⁶ Notably, unlike in arbitration or expert determination, the parties do not choose the experts and the identities of the experts are not disclosed to them. Thus, even though before acceptance of any appointment a prospective expert must sign a statement of acceptance, availability, impartiality and independence and must disclose in writing any such facts or circumstances,⁹⁷ the parties are precluded from challenging the appointment of such experts. Whilst this approach serves as a certain safeguard for the ICC and DOCDEX experts against any liability, some commentators noted that it can constitute a violation of the procedural due process principle.⁹⁸ Indeed, the unknown identity of experts may undermine trust in the system (especially by courts in certain jurisdictions when a DOCDEX decision is presented as evidence) and its further global recognition. It is suggested that a more transparent approach is required for the appointment of experts along with an option for the parties to challenge such appointment. Another possibility would be to allow the parties to choose an individual from the pool of experts maintained by the ICC Banking Commission.

Conclusions

It is difficult to find another example of such a unique dispute resolution system as DOCDEX which resolves disputes not on a basis of national law, but via interpretation and application of soft law regulations and principles. The nature of DOCDEX can hardly be classified under any existing conventional classification of alternative dispute resolution methods.

DOCDEX has enjoyed some considerable success due to its benefits offered to commercial parties and clearly stands out among other dispute resolution platforms in trade finance. Moreover, national courts have been viewing DOCDEX decisions in a highly positive light.

The system further expanded its scope in 2015. However, the ICC needs to be mindful of addressing and/or rectifying the current limitations of DOCDEX in order to ensure its functionality and popularity among trade finance actors. Hopefully, the ICC Banking

⁹⁵ See DOCDEX Decisions No. 283, 333, 339 and 345.

⁹⁶ Article 7(1) of the DOCDEX Rules.

⁹⁷ Article 7(7) of the DOCDEX Rules.

⁹⁸ Brown (n 2) 20.

Commission will use some suggestions on the areas for improvement and potential solutions for next revision of DOCDEX Rules which are offered in this article.