

SECTORAL DISPUTE RESOLUTION IN INTERNATIONAL BANKING (DOCUMENTARY CREDIT DISPUTE EXPERTISE: DOCDEX)¹

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I. INTRODUCTION

Today, the world is smaller than at any time in history, and international trade is a commonplace for most countries. Companies deal with their counterparts across borders and at long distances, while banks provide many different services to support those companies.

For the most part, the contracts that are undertaken by parties in different countries are carried out to the satisfaction of all. However, from time to time, there are differences of opinion and disputes regarding the performance of the contract that arise from changing economic circumstances. Most companies faced with such disputes usually submit their differences to an arbitral tribunal, rather than to a court. Courts are cumbersome in their procedures, results are often unpredictable, and legal costs sometimes grossly exceed the value of the contract at hand.

Unlike the business community, which uses arbitration extensively to resolve disputes arising from their international contracts, the international banking community does not use arbitration; instead, it mainly resorts to litigation, despite the high cost and time involved.

This article posits that an expert-panel based dispute resolution system, such as the Documentary Credit Dispute Expertise, as called DOCDEX by bankers, would be a good alternative to such litigation. The DOCDEX has its experts base their decisions on reasonableness and international standard practice, while deciding disputes that arise from letters of credit and bank guarantees. While a judge decides the issues after hearing evidence presented during trial by experts, the DOCDEX panel of experts can decide the issues based on their own extensive experience of standard practice in international banking.

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¹ DOCDEX stands for Documentary Credit Dispute Resolution Expertise, which is an expert-panel based dispute resolution system provided by the International Chamber of Commerce (ICC) Banking Commission. It was created in 1997, and it has resolved many letter of credit disputes, including ones between banks and between bank and beneficiary, instead of going through the courts.

A. Business Dispute Resolution

Most contracts have arbitration clauses in their text stipulating that if any disputes arise, the disputes will be submitted to arbitration for a speedy and inexpensive resolution. The arbitrators are often experts in the industry, as well as lawyers familiar with the respective field. Although the procedures are much simpler than court proceedings, the review of the matters in dispute is handled much as it would if handled in court, except that the procedures for the presentation of evidence and the civil litigation procedures are streamlined for the specific case.

There are usually experts who are well versed in the industry practice at issue. The experts reviewing the disputes and determining the merits of the case are also lawyers who practice law in the same area. Although arbitration takes place outside a courtroom, the procedures are similar to those employed by a court, but are simpler.²

The advantage of arbitration is that among the arbitrators, there are industry experts and lawyers familiar with the particular industry.³ This enables the arbitrators to have a full understanding of a case's context when reaching a decision. Although judges who adjudicate similar cases in court try to do the same, professional arbitrators are in a better position to understand the context of the case, leading to a more reasonable and standard practice-based decision.

B. Banking Dispute Resolution

Unlike the business community, international banks have not often used arbitral proceedings for disputes amongst themselves.⁴ Although letter of credit litigation is not commonplace, some countries have a well-developed jurisprudence on letter of credit law, which may be referred to by other countries where such litigation is less frequent.⁵ However, litigation in letters of credit, just like any other litigation, takes a lot of time, entails high legal expenses, and requires a lot of effort in presenting the case in its best light. All these issues exist despite the fact that litigation is highly uncertain.

Most international companies do not have time to waste on long and expensive litigation, and they are weary of creating a bad relationship with their

² See THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 10 (2007) (“Arbitration is a private and informal trial procedure for the adjudication of disputes.”).

³ See *id.* at 19 (“The commercial experience of the arbitral tribunal lessens the significance of legal precedent, eliminates the need for complex rules of evidence, and minimizes discovery, the use of experts, and other informational trial procedures.”).

⁴ See Stefano E. Cirelli, *Arbitration, Financial Markets and Banking Disputes*, 14 *AM. REV. INT’L ARB.* 4 (2003).

⁵ The court decisions of the United States and the United Kingdom on letters of credit are well respected by other countries, and they provide a persuasive authority to courts in other countries.

business counterparts in other countries. They will often have to deal with them again when the need arises. Also, business opportunities are fast moving, and companies do not have time to dwell on litigations to resolve differences with their counterparts. Thus, arbitration is more private, faster, and less expensive than litigation and is often companies' preferred method of dispute resolution.⁶

For banks, although the relationship with their correspondent banks in other countries is also important, the clear and certain resolution of disputes is necessary. Despite the high cost and time involved in litigation, banks typically choose litigation over arbitration.⁷ The conservative mindset of the bankers also plays a part in going with traditional litigation, rather than an unfamiliar arbitration, when resolving banking disputes.

C. Creation of DOCDEX⁸

Thus, the Commission on Banking Practice of the International Chamber of Commerce came up with an arbitration procedure outside the courts to resolve such letter of credit disputes both efficiently and inexpensively by creating the

⁶ CARBONNEAU, *supra* note 2, at 18.

⁷ Most international contracts have an arbitration clause. Litigation is both costly and time consuming, and thus, arbitration is the usual dispute resolution method chosen by businesses. Lawyers drafting such contracts therefore regularly insert the arbitration clause in the contracts that they draft. However, lawyers do not draft letters of credit. It has a given format that has been formulated by Society for Worldwide Interbank Financial Telecommunications (SWIFT), which is a computer communications network used by international banks. Thus, an arbitration clause is not in the format. When disputes arise in letters of credit transactions, the dispute is settled not through arbitration, but by litigation.

⁸ ICC, *Rules for Documentary Credit Dispute Resolution Expertise (DOCDEX)*, Publ'n No. 577 (1997). The ICC DOCDEX rules are administered by the ICC Center for Expertise in collaboration with the ICC Banking Commission. The DOCDEX rules were first published in October 1997 to facilitate the settlement of disputes in connection with the Uniform Customs and Practice for Documentary Credit (UCP 500) under the name of the ICC Rules for Documentary Credit Dispute Resolution Expertise. They were then revised in March 2002 also in order to encompass other sets of ICC rules, specifically, the Uniform Rules on Collections (URC 522) and the Uniform Rules for Demand Guarantees (URDG 458), becoming known as the ICC Rules for Documentary Instruments Dispute Expertise. See ICC, *Rules for Documentary Instruments Dispute Resolution Expertise (DOCDEX)*, Publ'n No. 811 (Mar. 15, 2002) [hereinafter ICC DOCDEX Rules], available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/docdex/docdex-rules/>.

As a consequence of this first revision, new users can now benefit from the DOCDEX system. For general comments on the DOCDEX rules, see Anthony Connerty, *Documentary Credits: A Dispute Resolution System from the ICC*, 14 J. INT'L BANKING L. 65 (1999); Gary Collyer, *Documentary Credit Dispute Resolution Under the DOCDEX Rules Three Years on*, ICC INT'L CT. ARBITRATION BULL.67, Publ'n No. 627 (2000).

DOCDEX.⁹ DOCDEX stands for Documentary Credit Dispute Expertise, which is administered by the International Chamber of Commerce in Paris, France.

In a letter of credit arbitration, the parties can also use a special letter of credit arbitration procedure administered by the International Center for Letter of Credit Arbitration (the Center).¹⁰ Once a dispute is referred to the Center, it will be dealt with by expert arbitrators. The Center was founded as a result of an initiative within the letter of credit community.¹¹ It was created after extensive consultation with corporate, legal, and banking representatives throughout the United States and the world.¹² The Center was formally established in September of 1996 and is located in metropolitan Washington, D.C.¹³

Beginning in 1997, a pool of banking and legal experts on letters of credit and bank guarantees has been maintained.¹⁴ When a party makes a request for a DOCDEX decision to a letter of credit transaction, the decision is made within two months by a panel of three experts. The banking expert usually has extensive experience in trade finance and is a member of the Banking Commission. They often write in trade journals, such as *Documentary Credit Insight* published by the International Chamber of Commerce, *Documentary Credit World*, and *Annual Survey Book on Letter of Credit Law and Practice* published by the Institute of International Banking Law and Practice in the United States. The legal experts are in-house counsel of banks, handling trade finance, as well as lawyers who are experts in letters of credit law and practice.

Based on such extensive practical experience in banking and a wide view of letter of credit law and practice in international banking, the experts are very familiar with the international standard practice, which develops among international banks over time. Thereafter, these standard practices are codified in rules such as the Uniform Customs and Practice for Documentary Credits and the International Standard Banking Practice, promulgated by the International Chamber of Commerce Banking Commission.

⁹ *Banking*, ICC, <http://www.iccwbo.org/about-icc/policy-commissions/banking/> (last visited Sept. 15, 2013).

¹⁰ See also Lawrence W. Newman & Michael Burrows, *Alternatives for Resolving Letter of Credit Disputes*, N.Y. L.J., Dec. 31, 1996, at 24 (comparing the two international regimes for resolution of letter of credit disputes: those of the International Chamber of Commerce and those of the International Center for Letter of Credit Arbitration; discussing the nature and classification of letters of credit; comparing the procedural rules governing letter of credit dispute resolution under these two different organizations).

¹¹ INST. OF INT'L BANKING LAW & PRACTICE, 1997 ANNUAL LC SURVEY BOOK 417 (James E. Byrne & Brian J. Downey eds., 1997).

¹² *Id.*

¹³ *Id.*

¹⁴ See Charles Spragge, *DOCDEX or Arbitration to Settle L/C Disputes? Charles Spragge Compares the Two Systems*, 6 DOCUMENTARY CREDIT INSIGHT (Spring 2000).

D. Decisions by DOCDEX

Unlike usual arbitrations where there is agreement by two parties to abide by the arbitral result, the request for a DOCDEX decision is made by one of the parties to the dispute without requiring the other party's acquiescence. Initially, the ICC Banking Commission considered inserting the DOCDEX rules in the letters of credit, just as the Uniform Customs and Practice for Documentary Credits (UCP) are inserted into the letters of credit. However, it was decided that such a choice should be made by the interested parties, rather than applying the DOCDEX rules across the board.

As a result, unlike an arbitration clause in an international contract, which makes the arbitral award binding on the parties, a DOCDEX decision only has persuasive authority and is not binding authority on the parties involved. This is why the author suggests that insertion of the DOCDEX clause in the letters of credit by the parties should be required, so as to make the DOCDEX decision binding.

Although only one party is needed to initiate the DOCDEX procedures, the other party is given the chance to present his own arguments and evidence to the expert-panel if the party wishes. Even if the respondent in the DOCDEX procedure presents his arguments and supporting evidence, the DOCDEX decision by the expert-panel is not binding on the respondent to the dispute.¹⁵ However, the decision represents a reasoned analysis and conclusion by experts in the field, and therefore is regarded by the courts as persuasive authority on the issues based on reasonableness and international standard practice.¹⁶

¹⁵ See S. Isabella Chung, *Developing a Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 *FORDHAM INT'L L.J.* 1349, 1364 (1995); see also Janet Koven Levit, *Bottom-Up Lawmaking through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 *EMORY L.J.* 1147 (2008) (documenting DOCDEX development from 1997 to 2008).

¹⁶ See *Fortis Bank Sa/NV & Anor v. Indian Overseas Bank*, [2010] *EWHC* (Comm) 84, [46] (Eng.), which states:

Both parties also referred to Opinions of the ICC Banking Commission in support of their arguments. These Opinions are of persuasive weight, as explained in *Brindle and Cox* at paragraph 8-005:

“The Commission has stated that its Opinions “reflect international practice in their interpretations of the stated circumstances and/or documents presented . . . aim to encourage uniformity of practice . . . [and] . . . serve as guideposts to courts interpreting ICC rules . . .” These materials are not of course legally binding as a matter of English law, but as time goes on it seems increasingly likely that the English Courts will regard them as having considerable weight.”

Moreover, DOCDEX decisions are screened by the ICC Banking Commission for its consistency with the ICC Banking Commission Opinions.

E. Status of DOCDEX Procedures

A 2010 report on DOCDEX procedures stated:

In 2010, 6 new cases were filed under ICC's DOCDEX rules. DOCDEX is a rapid procedure, conducted entirely in writing, in which a panel of three independent experts decides on a dispute relating to a letter of credit, bank-to-bank reimbursement, collection or guarantee. The amounts in dispute in cases commenced in 2010 ranged from [U.S.] \$350,000 to [U.S.] \$13 million, and averaged [U.S.] \$4.2 million.

The parties in the 2010 cases came from 12 different countries: Algeria, Belgium, China (Hong Kong), Denmark, Finland, France, Germany, India, Switzerland, Turkey, Ukraine and the United Kingdom. The experts appointed to decide on their cases came from: Australia, Bahrain, Belgium, the Czech Republic, Denmark, France, Germany, Greece, Italy, Lebanon, Malaysia, Pakistan, Singapore and the [United States].¹⁷

F. Decisions of DOCDEX and Judicial Decisions

When comparing judicial decisions on letters of credit and the results of the DOCDEX decisions, it is apparent that they follow a similar line of reasoning. Bankers make the DOCDEX decisions, and banking lawyers who are familiar with international banking practices apply them to the case at hand. The courts do not review the letter of credit case from a purely legal standpoint, but instead base their decision on a review of banks' international standard practice regarding letters of credit.¹⁸ The parties often submit the expert opinions on the issues, and although they may differ, the court is able to understand the issues clearly based on the bank practice from which the dispute arose. Thus, the judicial decision and the DOCDEX decision are not contrary to each other, but often supplement each other in terms of banking procedures and the legal doctrines underlying such bank procedures.

¹⁷ E-mail from Ana Sylvia Prado, Deputy Manager, ICC Dispute Resolution Services International Centre for ADR, to Chang-Soon Thomas Song, First Expert, Trade & Services Division, Korea Exchange Bank (Feb. 14, 2012) (on file with author). Although the author requested the information based on the 2012 ICC Bulletin, he was not able to obtain the information.

¹⁸ U.C.C. § 5-108(e) (2012) ("An issuer shall observe standard practice of financial institutions that regularly issue letters of credit.").

II. GENERAL DESCRIPTION OF THE DOCDEX

A. Typical Parties, Experts, Issues, Amount, Duration, Costs, and Decision Drafting

In a letter of credit transaction, there are four main parties.¹⁹ The parties are the applicant, the issuing bank, the negotiating bank, and the beneficiary. The bulk of the disputes are centered on documentary compliance issues.²⁰ Thus, most disputes arise when the issuing bank does not make payment to the beneficiary, which is usually framed as a wrongful dishonor claim in the courts.

1. Parties to DOCDEX

The typical parties in such disputes are the issuing bank and the negotiating bank, or the issuing bank and the beneficiary who are claiming wrongful dishonor. The applicant can also claim that the issuing bank wrongly made payment, but this type of case arises infrequently. The contractual dispute between the applicant and the beneficiary is not a letter of credit dispute; instead, it is outside the competence of the DOCDEX. Thus, typical parties to the DOCDEX procedures are issuing bank versus negotiating bank, or issuing bank versus beneficiary, and the issue is documentary compliance. Sometimes, the confirming bank also claims against the issuing bank.

2. Panel of Experts

There are about 90 experts registered with the ICC Centre for Expertise for the DOCDEX procedures, and they are generally bankers and banking lawyers.²¹ The experts have been recommended to the ICC by the ICC National Committees and possess the requisite qualifications as arbiters under the procedures.²² A chairperson and two experts are chosen to examine the case and to deliver a decision within a month after all the documentary evidence has been submitted to the panel of three experts.²³

¹⁹ JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT: COMMERCIAL AND STANDBY CREDITS* ¶ 2.01 (3d ed. 1996).

²⁰ *See generally* Spragge, *supra* note 14.

²¹ *See generally* E-mail from Gary Collyer, Technical Advisor, ICC Banking Commission, to Chang-Soon Thomas Song, First Expert, Trade & Services Division, Korea Exchange Bank (July 24, 2013) (on file with author) (reviewing the decisions given by the DOCDEX experts before given to the applicant for the decision).

²² The author's personal experience when the ICC National Committee nominated him as the DOCDEX expert to the ICC.

²³ ICC DOCDEX Rules art. 7.4.

The issues are decided by a majority vote among the experts, and the chairperson of the expert panel usually writes the decision.²⁴ To be nominated by the National Committee of a country, an expert has to have extensive experience in trade finance. For a lawyer, he must have handled many letter of credit litigations to be qualified for such a nomination. The in-house counsel of a bank that handles trade finance is also eligible for the position.

The individuals are recommended by their banks to the local bankers' association with proof of their expertise in trade finance, as well as competence in both spoken and written English.²⁵ After reviewing the applicants' credentials, the local bankers' association finally sends a list to the National Committee. The National Committee reviews the applications and sends their own recommendations to the ICC Banking Commission. The ICC then makes its final nominations to the expert-panel list, and from that list, the experts are called upon to resolve disputes submitted to the DOCDEX.

3. Issues Reviewed and Decided

One of the issues examined by the expert panel is the documentary compliance issue, i.e., whether the presented documents comply with the terms and conditions of the letter of credit. This is the same issue presented in legal proceedings to the courts. But unlike a judge who has little experience in the international standard practice in letters of credit, the expert panel is well aware of the current international bank practice in letters of credit. In court proceedings, the judge is often assisted by the opinions of experts regarding the international standard practice.²⁶ Although such opinions are not dispositive, the judge is able to understand the context in which such documentary compliance issue arise, and thereby is in a better position to determine the answer to the issues posed to the expert.

Judges are generalists, not specialists.²⁷ They review the merits of cases arising from a wide variety of human activity. Judges are not letter of credit experts. Thus, when a letter of credit dispute is placed before a judge in court, the issue often concerns what international standard practice has to be applied to the case at hand. This is why expert opinions are usually presented to the court to explain and prove the contents of such international standard practices. Although

²⁴ The author's personal experience reviewing a DOCDEX case as Chair of the Expert Panel.

²⁵ The author's personal experience when the ICC National Committee was nominating him as the DOCDEX expert to the ICC.

²⁶ *Fortis Bank Sa/NV & Anor*, [2010] EWHC (Comm) 84, [19] ("The experts addressed banking practice and market understanding when dealing with documents following service of a notice under Article 16(c)(iii) of UCP 600.").

²⁷ The author's personal experience litigating letters of credit over the years.

such evidence is not dispositive, it has a very persuasive effect on the judge when deciding the merits of the letter of credit case.²⁸

The UCPs are often presented to the judge for his or her interpretation. Rather than relying on the national laws for such a construction, the judge chooses to listen to the expert's opinion on the international standard practice from which the UCP rules have been formulated. The judge's decision, based on such expert opinion, usually underpins the best practice in international letter of credit practice.

4. Cost of the DOCDEX Procedures

The standard application fee to the DOCDEX procedures is U.S. \$5,000, paid by the claimant, which may be raised to U.S. \$10,000 depending on the complexity of the case.²⁹ Although this amount may not seem cheap, the usual expert opinion in letter of credit litigation costs from U.S. \$10,000 to U.S. \$20,000, aside from the usual attorney's fees.³⁰ Thus, U.S. \$5,000 spent to resolve the case would be, in most cases, quite a reasonable cost to the amount actually in dispute, which may range from U.S. \$100,000 to U.S. \$1,000,000 and more.

5. Amount in Dispute Handled by the DOCDEX Procedures

As to the typical amounts under dispute, Gary Collyer reported as follows in his presentation given at the ICC Banking Commission meeting in Portugal in April of 2013:

In 2012, 10 new cases were filed under ICC's DOCDEX rules. DOCDEX is a rapid procedure, conducted entirely in writing, in which a panel of three independent experts decides on a dispute relating to a letter of credit, bank-to-bank reimbursement, collection or guarantee. The amounts in dispute in cases based on information provided in 94 cases³¹ showed the average amount of [U.S. \$2,279,746], with the

²⁸ *Fortis Bank Sa/NV & Anor*, [2010] EWHC (Comm) 84, [46] ("Both parties also referred to Opinions of the ICC Banking Commission in support of their arguments. These Opinions are of persuasive weight, as explained in *Brindle and Cox* at paragraph 8-005").

²⁹ ICC DOCDEX Rules art. 10.1.

³⁰ The author's personal experience litigating letters of credit over the years.

³¹ Although 126 cases have been handled by the DOCDEX procedures up to date, in the other cases, the amounts in dispute were not given in the application for a decision.

highest amount of [U.S. \$27,000,000] and the lowest amount of [U.S. \$40,124].³²

6. Duration of Proceedings

Under the DOCDEX procedures, after the claimant contacts the ICC Centre for Expertise, four sets of relevant documents are submitted with the payment of the required fee.³³ The Center designates the panel of three experts, and the defendant is contacted for any possible submissions on his part to the procedures. By allowing both sides of the dispute to present their case, the DOCDEX procedures ensure an impartial view of the case to the expert panel. The administrative procedures are usually completed within a month, after which the documents are sent to the expert panel for its review and findings. The expert panel usually takes about a month to make its decision. Thus, the whole process takes about two months, which cannot be compared to judicial litigation.³⁴

When banks litigate letter of credit cases, often the applicant or the beneficiary is out of the picture due to bankruptcy or other reasons, and the banks (either the negotiating bank, the confirming bank, or the issuing bank) are litigating on their own behalf. In such situations, time and money are not too much of a problem for the bank.³⁵ However, where there is a letter of credit dispute, and the applicant or the beneficiary is an ongoing business, unlike the banks, the applicant or the beneficiary simply does not have time to litigate the dispute. Usually one of the parties takes a big loss on the transaction and wishes to simply conclude the transaction.

When the DOCDEX procedures are used in such an instance, it is because the process is a cost effective and speedy way to resolve disputes, and it provides a reasonable resolution of the matter. The companies involved can go their separate ways and continue doing what they do best, which is making deals in international trade.

³² *Revising the ICC DOCDEX, A Status Report*, Presentation of George Affaki, Technical Advisor, ICC Banking Commission, at the Banking Commission Meeting in Portugal (Apr. 2013) (on file with author).

³³ ICC DOCDEX Rules art. 2.3.

³⁴ Generally, the DOCDEX decision process is as follows: the application for a DOCDEX decision from the ICC Dispute Resolution Services, with the attached documents, is submitted; the three experts for the case are designated; the relevant documents are dispatched to the experts; the experts make the decision; the decision is reviewed by Gary Collyer, the Technical Advisor of the Banking Commission; and the decision is given to the ICC Dispute Resolution Services. Finally, the DOCDEX decision is sent to the requestor of the decision. All of these administrative processes usually take about a month in total, and thus, the whole process from application for a decision to the receipt of the decision takes about two months.

³⁵ The author's personal experience litigating letters of credit over the years.

7. Review by the Banking Commission of DOCDEX Decision

After reviewing the submitted documents, the expert panel votes on the final decision, which is either a unanimous or a majority decision.³⁶ The chairperson usually drafts the final decision. The final decision lays out the facts, discusses each issue under the applicable standard bank practice, and comes to a conclusion. The final decision is reviewed by the Technical Advisor of the ICC Banking Commission to ensure that it is in line with the Official Opinions of the ICC Banking Commission. However, the Technical Advisor cannot change the final decision.³⁷

B. An Analysis of a Typical DOCDEX Decision

In court litigation, there are two questions that are addressed by either the judge or the jury in the proceedings. One is the question of fact, which is proven by both sides with evidence, such as witness statements, documentary evidence, or opinions of experts. The other is the question of law, which is decided by either the judge or the jury based on the facts of the case.

1. Documentary Evidence Based Decision-Making

In a typical DOCDEX case, the claimant submits documents evidencing the facts of the case. There are no witness statements, as there is in court proceedings. As the dispute revolves around the question of documentary compliance, all of the evidence presented is in the form of documentation.³⁸

When a letter of credit case is litigated in court, most cases are decided on a summary judgment basis without a jury, as all evidence is in documentary form, and there is rarely a factual dispute. The only question presented to the court is the question of law and how the law is applied to the facts of the case. Thus, even in letter of credit court litigation, witness statements are not necessary.

The focus of the question posed by the claimant to the expert panel is not a question of fact, but is a question of law applied to the facts of the case. For the most part, all of the facts presented by the claimant or the respondent can be verified by the documentary record. If there are any misunderstandings of the facts by either party, the expert panel can easily correct them based on the documentary evidence that was submitted. If the expert panel requires further

³⁶ ICC DOCDEX Rules art. 8.1.

³⁷ See Janet Koven Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1176 (2008).

³⁸ ICC DOCDEX Rules art. 2.1.

information on the case, it can ask the claimant or the respondent through the ICC Center for Expertise for further details.³⁹

2. Application of the Uniform Customs and Practice for Documentary Credits⁴⁰ to the Facts of the Case

Just as courts apply the relevant law to the facts of a case, the expert panel applies the UCP to the facts of the case while considering the International Standard Banking Practice for Examination of Documents under Letter of Credit (ISBP), which is a compilation of the best practices involved in the examination of letter of credit documents under the UCP.

The UCP is a compilation of the best practices or the standard practice of banks.⁴¹ The UCP seeks to codify accepted international banking practice and to achieve a common and certain standard to be applied universally. The UCP is applied to most letters of credit in the world, and it binds both the banks and the parties involved in the letter of credit transaction.⁴²

Although not a law, the court interprets and applies the UCP, as customary law, to the facts of a case. The expert panel also interprets the UCP when applying it to the facts of a case.⁴³ Unlike the judge who is unfamiliar with bank practices, which have to be explained to him through an expert opinion, the expert panel is familiar with the bank practice involved and can determine the case in the context of banking practices.

3. Interpretation of the UCP and the Use of the ISBP

The UCP and the ISBP are both practices based on, and cannot be understood apart from, the context of bank practice from which they have been compiled. Because the DOCDEX is an expert panel based dispute resolution system with experts familiar with the international banking standard practice, in comparison to the judge who is not familiar with such international practice, the DOCDEX procedures can be a better alternative to court litigation.

While the judge has to listen to expert evidence on the standard practice represented by the UCP and the ISBP, under the DOCDEX procedures, the expert panel, being familiar with the standard practice, is in a better position to determine

³⁹ ICC DOCDEX Rules art. 7.3.

⁴⁰ ICC, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, UCP No. 600 (2007) [hereinafter UCP 600].

⁴¹ *Fortis Bank Sa/NV & Anor*, [2010] EWHC (Comm) 84, [24] (“Both experts agree that the UCP seeks to codify accepted international banking practice and to achieve a common and certain standard to be applied worldwide.”).

⁴² UCP 600 art. 1.

⁴³ The author’s personal experience as an expert in DOCDEX cases.

the merits of the case before the expert panel than a judge reviewing the same case is in court.

Under the United States Uniform Commercial Code Article 5, the judge is instructed to consider the banks' standard practice dealing with letters of credit when interpreting the UCP.⁴⁴ The law recognizes that while interpreting the UCP, it is essential to understand the context of the bank practice underlying the provisions of the UCP.

Since the UCP is a compilation of provisions of rules in letter of credit transactions, it is sometimes difficult for bankers to apply them to actual letter of credit operations. Thus, the ISBP was compiled by the ICC Banking Commission, which covers the verification of each shipping document presented under a letter of credit and how the relevant UCP provisions are applied to the document.⁴⁵ The ISBP is not a set of rules like the UCP, but rather, a compilation of the examples of document examination under the letter of credit, which can be easily used by bank document checkers in their work at the bank.

The ISBP is the standard practice as applied to the examination of documents by banks in letters of credit transactions.⁴⁶ Just like the UCP, the ISBP has to be cost-effective, reasonable, and fair in order to be accepted by international bankers as the set of best practices or the standard practice of banks. The observance of reasonable standards of fair dealing is what bankers consider the best practice or international standard practice.

The following statement contained in the text of the court decision *Fortis Bank SA/NV & Anor* explains the approach to the UCP by the courts best:

The generally accepted approach a court should take to the construction of the UCP is set out in the judgment of Sir Thomas Bingham MR in *Glencore v Bank of China* [1996] CLC 111 at 112. Practice is generally governed by . . . the UCP, a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present, they seek to give effect to the international consequences underlying the UCP.⁴⁷

⁴⁴ U.C.C. § 5-108(e) (2012) ("An issuer shall observe standard practice of financial institutions that regularly issue letters of credit.").

⁴⁵ ICC, *International Standard Banking Practice for the Examination of Documents Under UCP 600*, Publ'n No. 745 (2013) ("The practices described in this publication highlight how the articles of the UCP 600 are to be interpreted and applied, to the extent that the terms and conditions of the credit, or any amendment thereto, do not expressly modify or exclude an applicable article in UCP 600.").

⁴⁶ *Id.*

⁴⁷ *Fortis Bank Sa/NV & Anor*, [2010] EWHC (Comm) 84, [1] ("Such an interpretation reflected both best practice and the reasonable expectations of experienced market practitioners.").

4. Interpretation of the UCP by the English Court in *Glencore International AG v. Bank of China*⁴⁸

In the *Glencore* case, the English Court of Appeal ruled that when the beneficiary certificate had a manual signature, but did not have a stamp noting “Original” on its face, the document could not be considered an original document under the UCP. For bankers or traders, such a ruling is counter-intuitive. The signature would make the document an original document, whereas the stamp “Original” cannot make a copy document an original document.

This result came from the court’s interpretation of the relevant UCP provision without considering the context of bank practice that it arose from. When one looks at the text of the provision in question, from a statutory interpretation viewpoint and regardless of whether the provision is right or not, the judge’s ruling can be said to be faithful to the text of the provision. That is simply how it reads.

In this instance, the court interpreted the provision of the UCP regarding original and copy documents in a statutory interpretation manner, rather than in the context of international standard practice. Thus, the ruling ran counter to international practice of banks and caused much confusion until the ICC Banking Commission clarified the relevant provision in the UCP.⁴⁹

Drafting of the UCP is not perfect and neither are the provisions in the statutes. Although the judge cannot arbitrarily correct poorly drafted provisions, under certain circumstances, the English Golden Rule has been applied and the courts have made such corrections.⁵⁰

5. Policy Statement on Original Documents by the Banking Commission⁵¹

Likewise, the Banking Commission announced the Policy Statement on Original Documents, which gave a practice-based interpretation of the relevant provision in the UCP on original and copy documents. The Banking Commission stated that when the issuer of a document intends the document to be an original, the document becomes an original. When a document is issued with a manual signature, it can easily be inferred that the issuer of the document intends it to be an original document. In such a case, the stamp “Original” is not required to

⁴⁸ *Glencore Int’l AG v. Bank of China*, [1996] Lloyd’s Rep. 135 (Eng.).

⁴⁹ ICC, *The Determination of an “Original” Document in the Context of UCP 500 Sub-Article 20(b)*, Doc. No. 470/871 (July 12, 1999).

⁵⁰ The Golden Rule gives the words of a statute their plain, ordinary meaning but when it may lead to an irrational result the judge can depart from that meaning. The rule was applied in *In re Sigsworth*. See *Bedford v. Bedford*, [1935] Ch. 89 (Eng.), where the court applied the rule to section 46 of the Administration of Estates Act 1925).

⁵¹ ICC, *The Determination of an “Original” Document*, *supra* note 49.

make the document an original, even if a computer had reproduced the document.⁵²

Unlike the interpretation on the original and copy document provision of the UCP by the court, the policy statement is based on the best practices or the standard practice of banks dealing with original and copy documents. Thus, such a practice-based interpretation is more faithful to the purpose of the UCP provision than a strict statutory interpretation of the UCP provision.

6. Interpretation of the UCP by the English Court in *Banco Santander v. Banque Paribas*⁵³

In the *Banco Santander* case, the English Court of Appeal ruled that the UCP did not authorize the nominated (confirming) bank under a deferred payment credit to negotiate or prepay on shipping documents before the maturity date. The court also noted that the deferred payment credit did not authorize such negotiation or pre-payment in the terms and conditions of the letter of credit. Thus, the confirming bank, which had prepaid on the shipping documents before the maturity date under a deferred payment credit, could not claim payment from the issuing bank when fraud occurred before the maturity date.

Nomination under a letter of credit implies that the issuing bank has authorized the nominated bank to negotiate or prepay under the credit. This had been the understanding of international bankers at the time of the English Court of Appeal decision.

The UCP is a compilation of the “best practices”⁵⁴ of international banks dealing with letters of credit. It is not a complete recital of all the practices in place, but only the important ones. However, when there is a dispute over what the best practices under the UCP are, such as in the *Banco Santander* case, the Banking Commission adds a new provision in the UCP to clarify the best practice. Under a sight or a usance (deferred payment) credit, it had been understood among international bankers that when there is a nominated bank and that nominated bank is requested to confirm the credit and had done so, the nominated confirming bank is authorized to prepay or purchase the draft or undertaking incurred under the deferred payment credit. This is the best practice in this particular instance.

⁵² This has been exhaustively included in the International Standard Banking Practice (ISBP), which was approved in April of 2013 at ICC Banking Commission Meeting in Portugal. Because the ISBP is not a rule like the UCP, there is no effective date *per se*. But with the ICC publication, making the ISBP available in the beginning of July 2013, it is now widely used by banks. See ICC, *International Standard Banking Practice*, Publ’n No. 745 (Apr. 2003).

⁵³ *Banco Santander v. Banque Paribas*, [2000] C.L.C. (Civ) 906 (Eng.).

⁵⁴ See Boris Kozolchuk, *The “Best Practices” Approach to the Uniformity of International Commercial Law: The UCP 500 and the NAFTA Implementation Experience*, 13 ARIZ. J. INT’L & COMP. L. 443 (1996).

However, the English Court of Appeal decided that because the UCP did not expressly authorize such prepayment or purchase, and the letter of credit text also did not expressly authorize such prepayment or purchase, the nominated confirming bank was not authorized to prepay or purchase the draft or the undertaking incurred in a deferred payment credit. This best practice was clarified by the ICC Banking Commission through the insertion of Article 12 Nomination in UCP 600. Thus, in UCP 600, the Banking Commission added a new article on nomination and stated very clearly that when a bank is nominated, it is at the same time authorized to negotiate or prepay under deferred payment credits.⁵⁵

7. Interpretation of the UCP by the Korean Supreme Court
in *Industrial Bank of Korea*⁵⁶

Unlike the English Court of Appeal, the Korean Supreme Court, after listening to various bank experts and banking lawyers, held that when a bank is nominated under a deferred payment credit, it is deemed that the nominated bank has been authorized to negotiate or prepay under the deferred payment credit.⁵⁷ Although the holding of the English Court of Appeal was rejected, the holding of the Korean Supreme Court has been incorporated into UCP 600 by the Banking Commission as the correct reflection of the best practice on the issue.⁵⁸

After much debate within the ICC Banking Commission as to how one should understand the nomination under a deferred payment credit, a vote was held among the National Committees. The National Committees resolved the issue in favor of treating nomination under the deferred payment credit as authorizing the nominated bank to negotiate or prepay on the presentation of shipping documents before maturity date.⁵⁹

⁵⁵ UCP 600 art. 12(b) (“By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.”).

⁵⁶ Supreme Court [S. Ct.], 2001DA68266, Jan. 24, 2003 (S. Kor.), *quoted in* DONG-HEON CHAE, *THE REVISED STRICT COMPLIANCE RULE IN THE EXAMINATION OF SHIPPING DOCUMENTS UNDER UCP 500: COMMENTS ON KOREAN COURT CASES 101-11 (2004)*; *see also id.*, *reprinted in* ANNUAL SURVEY ON LETTER OF CREDIT LAW & PRACTICE 372-77 (James E. Byrne & Christopher Bynes eds., 2004).

⁵⁷ *Id.*

⁵⁸ *See* Chang-Soon Thomas Song, *Review of the Recent Swiss Supreme Court Decision on Deferred Payment Credit from a Comparative Commercial Law Perspective*, 11 J. INT’L LEGAL AFFAIRS 103, 127 (Feb. 2007) (Kyunghee University, South Korea).

⁵⁹ During the Drafting Group for UCP 600 discussions on how to formulate new articles in the text, there were differences of opinion among the members as to how the new articles should be formulated. At the end, the issue was put to a vote among the National Committees, and the issue was decided by a majority of votes either in favor or against the new article.

The current version of UCP 600, sub-article 12(b) reads as follows: “By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.”⁶⁰ The ruling of the Korean Supreme Court was codified in UCP 600, sub-article 12(b) and is now standard practice. UCP 600 came into force on July 1, 2007.⁶¹

8. How Would DOCDEX have Handled *Glencore* and *Banco Santander*?

If either the *Glencore* case or the *Banco Santander* case had been handled through the DOCDEX procedures, the decisions would not have been the same as what the English Court of Appeal had held. The DOCDEX decisions would have confirmed that the manual signature on the documents without the stamp “Original” on its face is an original document, and that the confirming bank under the deferred payment credit is authorized to negotiate or prepay under the deferred payment credit. As we can see from the two English court cases, the DOCDEX procedures would have been faster, less costly, and yielded a correct interpretation of the UCP under the context of the bank practices from which they came.

The only reason the Korean Supreme Court differed from the English Court of Appeal was that the Korean Supreme Court was more open to the expert opinions of bank experts and banking lawyers on the issue at hand. Although the confirming bank in *Banco Santander* offered proof of the bank practice involving negotiation or prepayment by the confirming bank in the market, the English court was not convinced that such a bank practice really existed. And thus, the English court simply looked to the provisions of the UCP and the text of the deferred payment credit. By not finding the express authorization to negotiate or prepay on the part of the confirming bank, the English court held that the confirming bank did not have the authority to either negotiate or prepay on the shipping documents because such authority had never been expressly given by the issuing bank, no such authority is mentioned in the provisions of the UCP, and the market practice proving the existence of the bank practice was insufficient.⁶²

9. Aftermath of the *Banco Santander* Decision

After the *Banco Santander* decision, even nominated banks under deferred payment credits could no longer negotiate or prepay on shipping

⁶⁰ UCP 600 art. 12(b).

⁶¹ *Id.* art. 1.

⁶² *Banco Santander*, [2000] C.L.C. (Civ) 906.

documents. Thus, both the nominated bank and the beneficiary had to wait until the maturity date to be paid by the issuing bank.⁶³

Whether the letter of credit is a sight credit or a deferred-payment credit, the purpose of the credit is to allow the beneficiary to be paid immediately after shipment is made and the required documents under the credit are presented to the nominated bank.⁶⁴ Therefore, the English Court of Appeal's construction of the authority of the nominated (confirming) bank under a deferred-payment credit was not in accord with banking practices in the market, and the decision placed a halt on such negotiations and pre-payments.

In the Uniform Commercial Code in the United States, Article 5 Letters of Credit provides that the interpretation of the UCP should be based on the standard practice of banks regularly dealing with letters of credit.⁶⁵ Being experts in the standard practice on letters of credit, the expert panel under the DOCDEX procedures is the best group of people to confirm the best practices in the market, which undergirds the UCP, and to interpret the UCP accordingly.

Documentary compliance, which is at issue in most letter of credit litigations, is best determined by the expert panel under the DOCDEX procedures instead of by judges who are not familiar with the handling of such documents on a day-to-day basis. When both sides present expert opinions, the conclusions may not be the same, but the experts often explain the points at issue in the same manner. As to differences in conclusions, the judge will weigh the two expert opinions and take them into consideration when analyzing the case. When the expert panel under the DOCDEX procedures reviews the documents presented under the letter of credit, it is well aware of the best practices and is in a position to make the best decision possible under the circumstances.

C. Independent Fact-Finding in DOCDEX Procedures

In court litigations, findings of fact are sometimes more important than the question of law in the case. But in letter of credit litigations, the facts of the transactions are mostly documentary, so there is little dispute over the facts. In court, there is usually a special master who verifies questions of facts and the authenticity of the documents presented to the court. In court, the master usually goes over the verification of certain allegations by the parties, and he makes a

⁶³ Unlike the English Court of Appeal, the Korean Supreme Court ruled that the nominated bank is deemed to have been given the authority to negotiate under the deferred payment credit. Supreme Court [S. Ct.], 2001DA68266, Jan. 24, 2003 (S. Kor.). The ICC Banking Commission reflected the decision of the Korean Supreme Court in its UCP 600 revision effective July 2007. See UCP 600, § 12(b).

⁶⁴ See Song, *supra* note 58, at 119.

⁶⁵ U.C.C. § 5-108(e) ("An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is the matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.").

report of his findings to the judge after his investigation. When there are allegations of forged documents or the elements of forgery, the special master checks the allegations and the evidence presented. The master is appointed by the court for his expertise and objectivity in such verification of fact situations.⁶⁶ The DOCDEX procedures are documentary in nature, and there is rarely such a master involved in the verification of facts in the case.

The DOCDEX deals with the question of law applied to the facts of the case, and thus fact-finding is not one of its missions. The question of law in this context is the interpretation of the provisions of the UCP and the consideration of the bank practice, which underlie the rules.

Should any kind of fact-finding be required, a trusted third party is designated to go over the evidence related to the fact-finding. After all, in trials the jury is composed of parties' peers and decides the questions of fact. Currently, the DOCEX expert panel is not empowered to review the factual evidence in the case.

D. Role of Standard Banking Practice in DOCDEX Decisions

Under the United States' Uniform Commercial Code,⁶⁷ Article 5 Letters of Credit, a court is directed to base its decision on the standard practice of banks dealing with letters of credit on a daily basis. Rather than a legal interpretation by a judge, the standard practice is the rule applied by the court. Therefore, expert opinions on this point are often used to prove the relevant standard practice.

In the UCP, there is a mention of *international standard banking practice*, which applies to all letter of credit transactions.⁶⁸ The original term used was the *reasonable banker standard*, but due to the reluctance of many bankers to the use of the words *reasonable person*, the words *international standard banking practice* was chosen instead. Nonetheless, the meaning is not much different.⁶⁹

Some best practices remain, but they often evolve through time and are adjusted to satisfy the commercial needs of the times. For example, in UCP 400, the preclusion rule involved reasonable time to examine documents failing, which

⁶⁶ Judicial adjuncts can take on several types of roles. Often—but not exclusively—these roles arise in multi-district litigation cases, class actions, or other complex or multi-party litigations. As an analogy, judicial adjuncts appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure would be referred to as “masters.”

⁶⁷ See generally U.C.C. § 5 (2012).

⁶⁸ UCP 600 art. 2 (“**Complying presentation** means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.” (alteration in original)).

⁶⁹ The words “international standard banking practice” continues to be used in the UCP and in the title of the booklet *ISBP, International Standard Banking Practice for Examination of Documents Under the UCP 600*, which can be found at *ICC Launches 2013 Edition of International Standard Banking Practice*, ICC (June 20, 2013), <http://www.iccwbo.org/News/Articles/2013/ICC-launches-2013-edition-of-International-Standard-Banking-Practice/>.

the issuing bank would be precluded from claiming that the presented documents do not comply with the terms and conditions of the credit. In UCP 500, the reasonable time was changed to seven banking days to make the reasonable time more specific. In UCP 600, however, the reasonable time is now five banking days to ensure that the documents may be cured quickly by the beneficiary after advice of refusal by the issuing bank. Although the preclusion rule remains the same, the specific time frame is changed from reasonable time to seven banking days to now five banking days to make the process more efficient. Thus, it is a *living law*,⁷⁰ which is applied by the banks in international letters of credit transactions.

For some time, the UCP deemed a letter of credit that was silent as to irrevocability as a revocable letter of credit. With time, it seems that a revocable letter of credit was not the guarantee of payment that international traders expect in a letter of credit. Therefore, it was changed. Now, when the letter of credit is silent as to the irrevocability; the letter of credit is deemed to be irrevocable.⁷¹ The UCP is a compilation of such best practices in the market and can be considered as a good reflection of the international standard banking practice as understood by the participants, such as banks, traders, insurance companies, and carriers.

When the practices applied in international trade are not cost effective, unreasonable, or not fair, it leads to the international traders departing from the use of such instruments. Thus, when standard practices are cost effective, reasonable, and fair, banks and traders alike embrace it.

Not only do courts look to the UCP as the international standard banking practice to apply to the issues in dispute, but the expert panel in the DOCDEX also does the same. Although past Official Banking Commission opinions do not function as precedents as they would in the common law system, they are referred to for factual situations in similar opinions.

The international standard banking practice, which is embodied in the UCP and elaborated in the ISBP,⁷² is the basis on which the documentary compliance issues are decided by the DOCDEX. In fact, the courts adjudicating on letter of credit cases also do the same. In law, the *reasonable person standard* is used to denote an objective standard, which is not specifically spelled out for each circumstance, but is applied to different fact situations by the court.⁷³ In the DOCDEX procedures, the *international standard banking practice* is likewise an objective standard, which is not specifically spelled out for each circumstance, but

⁷⁰ Boris Kozolchyk, *U.C.C. Article 5 Symposium: Strict Compliance and the Reasonable Document Checker Standard*, 56 BROOK. L. REV. 45, 72 (1990) [hereinafter Kozolchyk, *Reasonable Document Checker*] (emphasis added).

⁷¹ UCP 600 art. 3 (“A credit is irrevocable even if there is no indication to that effect.”).

⁷² International Standard Banking Practice for Examination of Documents Under Letter of Credit, or ISBP, is a compilation of best practices under UCP, first published in 2002, amended in 2007 with the revision of the UCP 600, and revised in April of 2013.

⁷³ *Triestram v. Way*, 281 N.W. 420, 286 Mich. 13 (1938).

is applied to different fact patterns by the expert panel. The application of the UCP to the facts of each case is an interpretive process. Good faith and reasonableness are the bases upon which both the *reasonable person standard*⁷⁴ and the *international standard banking practice* are elaborated under different fact situations. The definition of good faith in commercial transactions includes both honesty in fact and observance of reasonable standards of fair dealing.⁷⁵

When one thinks about the relationship of good faith and reasonableness, the statement of Sir Thomas Bingham MR in *Glencore* comes to mind:

Practice is generally governed by . . . the UCP, a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present, they seek to give effect to the international consequences underlying the UCP.⁷⁶

E. Higher Duty Standard for Documents Checkers

People make mistakes. But when bankers make mistakes, it is often unacceptable to the customers who rely on them. Hence, in a letter of credit, as well as in any other banking operation, the bankers are held to a higher standard than an ordinary person.

Checking documents with the terms and conditions of the letter of credit begins with the contents on the face of the documents, but it does not stop there. It is difficult for bankers to recognize fraud based simply on the contents of the documents. However, when such fraud is apparent, then the banker should take precautions in handling the transactions.

The ISBP was recently revised in April of 2013 and was effective as of July of 2013.⁷⁷ Rather than changing the standard practice of the past, the new revision amplifies the provisions in each document covered under the ISBP to provide more detail for the bank documents checker. Also, new documents were added to the list to provide further guidance to the bank document checkers.⁷⁸ The best practices, as understood by the participants in the market, change over time,

⁷⁴ Kozolchyk, *Reasonable Document Checker*, *supra* note 28, at 70.

⁷⁵ *Id.*

⁷⁶ *Glencore Int'l AG*, [1996] Lloyd's Rep. 135.

⁷⁷ ISBP is a compilation of best practices of international bankers in interpreting and applying the UCP to the examination of shipping documents presented under a letter of credit. This booklet was prepared by the ICC and approved by the same body in its April 2013 Meeting in Lisbon, Portugal.

⁷⁸ The documents added to the International Standard Banking Practice are non-negotiable sea waybill, packing list, weight list, beneficiary certificate, and inspection certificate.

and thus necessary changes have to be reflected in the compilation of examples where documents are checked against the letters of credit.

The Banking Commission plays the role of the *respected banker*⁷⁹ in international letters of credit transactions. The deference given to the UCP, which is promulgated and revised by the same body, derives from the respect that is accorded by bankers to the Banking Commission as representing the best practices in the market through the UCP, ISBP, and its Official Opinions.

F. Defendant's Response to DOCDEX Procedures

When a query is addressed to the Banking Commission, the question may be one-sided and sometimes the answer may not fully take into account the arguments of the other side. Ergo, the DOCDEX provides for the presentation of arguments by both the respondent and the claimant. The DOCDEX procedures provide for notice to be sent to the defendant by the claimant, and he is given a chance to respond with his arguments and present any supporting documents that may be necessary to prove his points. In this way, the expert panel has the arguments from both sides, making the review of the issues a more complete one.

The definition of good faith in commercial transactions usually includes the observance of reasonable standards of fair dealing. Fair dealing in disputes involves both sides making out a case as fully as possible with an impartial arbiter deciding the merits thereafter. By providing the respondent in a DOCDEX procedure the chance to present his side of the story, it enhances the credibility of the process and bolsters the integrity of the procedures.

However, the defendants often do not present their arguments to the DOCDEX and several reasons may be surmised for such a reaction on their part. One is simply the preconception that it is better not to participate, so as not to make any unnecessary mistakes in the process. Second, the respondent may feel that they do not have such a strong argument, and thus, they would rather not participate in such an impartial arbitral tribunal, even though the decision is not binding on them.

Although it would be better to have arguments from both sides, the arguments and the supporting documents, which are presented by the claimant, are usually sufficient to get a picture of the facts and only the remaining issues to be decided by the expert panel. Thus, even though arguments by the defendant would be desirable, a lack of such arguments is not fatal to the DOCDEX procedures.

⁷⁹ See Kozolchyk, *Reasonable Document Checker*, *supra* note 28, at 70 (emphasis added).

G. Finality of Decision-Making

Unlike business arbitrations, which are based on an arbitration clause in the contract at the time of signing, the DOCDEX procedures are started simply by one of the parties to the dispute initiating a claim. Thus, there are only a few instances where the claimant and the respondent decide to abide by the decision of the DOCDEX after the fact.⁸⁰ In order for the DOCDEX to be binding, a DOCDEX clause, like an arbitration clause in contracts, would need to be inserted into the text of the letter of credit at the time of issuance. In fact, that just might not be a bad idea.

Banks are rather conservative and slow to adopt new ideas in their operations. Thus, banks may not readily insert the DOCDEX clause in the letters of credit they issue. However, when the applicant and the beneficiary decide that any disputes arising under their letter of credit should be resolved through the DOCDEX procedures, the banks will not be able to object to the insertion of the DOCDEX clause into the letter of credit. After all, the DOCDEX decisions are published, and they are fair and objective, for the most part, and are decided by experts from banks, and lawyers well versed in letter of credit law. Although the insertion of the DOCDEX clause may take time, like all changes, it is the author's view that the parties in the letter of credit transaction will positively construe it.

The use of DOCDEX procedures to resolve letter of credit disputes without going to court is a wonderful way to deal with disputes. It would contribute to the application of standard practice in letters of credit more extensively than heretofore. Also, experts in the DOCDEX procedures base their decisions on such international standard practice of banks.

Court litigation is difficult for parties who are in different countries, and therefore is not an effective means of settling disputes when differences of opinion arise regarding documentary compliance. A documentary compliance determination is not a science, and it can differ even among experts. However, if the DOCDEX procedures are put into the text of most letters of credit with its decision as binding like an arbitration clause, then even without resorting to such a procedure, there would be fewer disputes. Further, even if there were such disputes, the persuasive effect of going to the DOCDEX procedures would resolve many of the spurious disputes between the issuing bank and the negotiating bank.

⁸⁰ At the time of this writing, the inclusion of DOCDEX clause subjecting resolution of disputes through the DOCDEX procedures is not readily seen in letters of credit. Use of DOCDEX clause in letters of credit, however, has been explained, and the advantages of such clause have been written in an article appearing in ICC *Documentary Credit Insight* Summer 2013 issue. See Chang-Soon Thomas Song, *Coming of Age of the DOCDEX Decisions*, 19 DOCUMENTARY CREDIT INSIGHT 3 (2013).

H. Disputes Regarding Electronic Letters of Credit and Documents

At this time, some banks have provided a procedure where all the documents under the letter of credit may be sent electronically to the bank for negotiation.⁸¹ However, once the documents arrive they have to be printed out before being dispatched to the issuing bank. So far, the issuance of the electronic letter of credit and the presentation of electronic documents under the credit have not been fully implemented. Once it is done, the electronic version of the UCP will apply to those transactions.⁸²

As the letter of credit operations have not all been converted to an electronic letter of credit, presentation of electronic documents and examination of the electronic documents, disputes arising from the electronic letter of credit process have not yet arose. Also, once the process is fully automated and the compliance checked electronically, there will be few instances of discrepancies and rejection of documents.⁸³

A letter of credit is an assurance of payment to the beneficiary of the letter of credit.⁸⁴ Due to unnecessary refusal notices based on often-specious discrepancies by some banks, the beneficiary sometimes encounters cases where he is not able to receive his payment, even though he had faithfully complied with his contractual obligations, as well as the terms and conditions of the letter of credit.

When the presented documents are all converted into electronic documents, a computer program will carry out documentary compliance with the terms and conditions of the letter of credit automatically. Due to this fact, there will be few instances of discrepancies in documents raised by the issuing bank. The letter of credit will again become a reliable means to assure payment to the beneficiary.

⁸¹ At the author's bank, such electronic dispatch of documents from the issuers of the documents to the bank has been made possible.

⁸² This is the current state of electronic document presentation at the author's bank.

⁸³ At present examination of shipping documents is done by bank staff but once shipping documents are presented electronically, the examination of such documents be done electronically with a compliance program and in such a process, rejection of documents would be much less frequent than under manual document examination.

⁸⁴ DOLAN, *supra* note 19, ¶ 2.03 ("The 1995 version of Article 5 defines letter of credit as an undertaking to honor a documentary presentation by payment or delivery of an item of value.").

I. Number of Litigations Under UCP 600

The author has worked as the person in charge of letter of credit dispute resolution for the past twenty years. When I first started, there were a lot of disputes, but few of them went to litigation. After a few years, the disputes decreased, and at present, I encounter fewer of them. As of 2013, there are only a few litigations a year, and disputes are also infrequently seen.⁸⁵

During visits to our customers where I gave presentations on UCP 600, I noted that the letters of credit used by our customers had the presentation period of the twenty-one days. When the presentation period is not mentioned, the default period is twenty-one days.

In my work as a dispute resolution person for letters of credit, I would argue with the issuing bank on the discrepancies that they had noted, and when necessary, take the matter to court to get a ruling to finally resolve the case. Litigation would take time, money, and a lot of effort. I started to think about how to resolve such disputes better.

Most of the letters of credit that were the subject of discrepancy disputes had a presentation period of about seven days from the shipment date. The applicant wanted the beneficiary to present the documents right after shipment has been made, so that he would not have any delay in getting the goods through customs. One unintended result of this short presentation period was that when the issuing bank examined the documents within five banking days and the discrepancy notice was sent to the negotiating bank, the presentation period would have lapsed. Although most discrepancies in documents can be cured, the second discrepancy notice would always be “late presentation.” If, however, the presentation period were the full twenty-one days, which is the default period stipulated in the UCP, most discrepancies can be cured and payment received from the issuing bank.

When the presentation period in the letter of credit is seven days from shipment date and when the documents are negotiated and sent to the issuing bank after the beneficiary has shipped them, the issuing bank may send a refusal notice based on a number of discrepancies. The period of document examination under UCP 600 is five banking days after receipt of documents by the issuing bank.⁸⁶ Thus, when the issuing bank sends the refusal notice to the negotiating bank and the beneficiary cures the documents and represents them to the negotiating bank, the seven-day presentation period may be over by that time, and a new discrepancy or late presentation would apply to the transaction.

However, when the presentation period is twenty-one days after the shipment date, then under the same scenario, the documents would be cured by the beneficiary and represented to the negotiating bank. In addition, the re-presentation of the cured documents will be within the presentation period of

⁸⁵ This is from the personal experience of the author at his bank in South Korea.

⁸⁶ UCP 600 art. 14(b) (“A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying.”).

twenty-one days, and there will not be the discrepancy of late presentation. Even if the issuing bank finds numerous discrepancies in the documents, the beneficiary can usually cure those discrepancies and re-present the cured documents to the negotiating bank within the twenty-one day presentation period.

Thus, in all of the presentations I made to customers either at a bank or not, I stressed the importance of having the presentation period of twenty-one days as in the UCP. When applicants wished to receive the bills of lading quickly, I told the customers to assure the applicant that presentation would be made to the negotiating bank immediately after shipment, and in fact, this is the regular course of events. I do not know whether my supposition on the above is correct, but one thing is certain, I do not have many discrepancy notice disputes these days.

Some letters of credit are rather simple, and it is difficult to find discrepancies in shipping documents presented under the letters of credit. On the other hand, other letters of credit can be very detailed and complicated, and the issuing banks often find discrepancies in documents. However, even if the discrepancy notice is sent, once the discrepancies are cured, and the documents re-presented, the matter is usually solved. There typically is not another round of discrepancies.

J. Increase in DOCDEX Decisions

Although the requests for DOCDEX decisions have started to come in small numbers since 1997, the requests increased slowly over the years and by 2013, about 126 requests had been received and decisions given.⁸⁷ In the English Court of Appeal decision, *Fortis Bank SA/NV & Anor*, we find the citation to a DOCDEX decision:

A clear illustration of this practice is DOCDEX Decision 242; DOCDEX decisions are decisions by experts selected by an ICC Committee from a list maintained by the ICC Banking Commission on disputes referred for non-binding resolution according to the ICC DOCDEX Rules. Decision 242 related to UCP 500 article 14(d) and (e) (corresponding to article 16(c)-(f) of UCP 600) Decision 242 pointed out that neither the UCP nor any ICC Paper provided a specific time or a time such as “without delay” or a means by which the documents should be returned:

⁸⁷ See ICC, COLLECTED DOCDEX DECISIONS 1997-2003 (2004); ICC, COLLECTED DOCDEX DECISIONS 2004-2008 (2008); ICC, COLLECTED DOCDEX DECISIONS 2009-2012 (2012). The number of decisions from 2012 to 2013 was kindly provided by the Presentation of Gary Collyer, Technical Advisor, ICC Banking Commission, at the Banking Commission Meeting in Lisbon, Portugal (Apr. 2013) (on file with author).

“Notwithstanding the absence of a specific requirement or specific guidance in this regard, there is a market expectation that, consistent with the reading of Articles 13 and 14, international standard banking practice, and the importance associated with possession of the documents, especially title documents, the timely return of dishonored commercial documents requires priority processing, as delay in returning the documents may prejudice the beneficiary’s rights and security.

While the panel of experts does not have the authority to establish such a standard concerning an exact time period to return the documents once notice is sent, experts agree that once the notice is sent stating that the documents are being returned, the documents should be returned without delay and by expeditious means.”⁸⁸

It is only natural that the court would find the DOCDEX decision as persuasive on the issue being reviewed by the court.

Although it is only anecdotal evidence from an international banker, it is said that the mention of requesting the DOCDEX decision sometimes prod an issuing bank that has refused payment on an alleged discrepancy to make payment. When the DOCDEX decision is actually requested and received, the issuing bank is said to have abided by the decision. The reason for the increase in requests for DOCDEX decisions is not difficult to explain. The US \$5,000 cost of the decision is not a large sum when compared to legal costs in litigation, and the two months in which the decision is given cannot be compared to the usual period of litigation, because it takes more than a year. Thus, DOCDEX promotes efficiency and profitability.

K. How to Make the DOCDEX Decision Binding

Agreeing beforehand that the DOCDEX decision will be binding on the L/C dispute arising from the letter of credit in question and inserting the DOCDEX clause, providing that disputes will be handled by a DOCDEX decision in the L/C, would suffice to make the decision binding on the parties, just as an arbitration clause in contracts does. Not only will the DOCDEX clause in the L/C provide the beneficiary with a quick and inexpensive means of settling any discrepancy dispute arising from a letter of credit transaction, the clause will also enhance the reliability of the letter of credit. A DOCDEX clause will enhance reliability by providing the beneficiary with a means of settling the dispute without going to court in the country of the issuing bank, which may not have an efficient court system when dealing with letter of credit disputes.

⁸⁸ Fortis Bank SA/NV v. Indian Overseas Bank, [2011] EWCA (Civ) 58, [34] (Eng.).

Thus, the beneficiary may be able to accept a letter of credit with high country risk on the presumption that the DOCDEX clause will allow him to resolve any letter of credit dispute with the issuing bank through the DOCDEX decision, without requiring the applicant to obtain the confirmation of the letter of credit in the beneficiary's domicile. It is hoped that an expert-panel based dispute resolution system, such as the DOCDEX, will revitalize the use of the common letter of credit in world trade once again.

III. CONCLUSION

In this article, the dispute resolution system called the Documentary Credit Dispute Expertise administered by the International Chamber of Commerce's Banking Commission was introduced and explained in detail. The reason for the creation of the DOCDEX by the ICC Banking Commission was to find a viable alternative to court litigation to resolve letter of credit disputes. Letter of credit transactions are not governed by any national laws, but instead are governed by rules promulgated by bankers themselves called the Uniform Customs and Practice for Documentary Credits. These rules have been revised from time to time to reflect any necessary changes or clarifications that may be needed to make the rules current.

Courts, for the most part, have recognized the practice-based nature of the Uniform Customs.⁸⁹ Consequently, whenever issues arising under the UCP rules are put before the court, and instead of applying national laws to construe the provisions, the courts have applied an interpretation of the UCP in accordance with their aims and evaluations.

Courts have recognized that they should not interpret the UCP according to some statutory methods of interpretation, but instead based on the international standard practice from which it came. When deciding compliance issues involving examination of documents, the court has stated that the banker must exercise his own judgment as to whether the requirement is satisfied by the documents presented to him, thereby acknowledging that it is not the judge's views, but the views of the banker that should prevail in reviewing letter of credit cases. Thus, in determining whether there was compliance, the exercise of judgment, rather than a mechanistic approach, is required.⁹⁰

Although the courts have done a good job of adjudicating letter of credit cases for many years, litigation by banks or companies is much too burdensome. Under the circumstances, a better alternative has to be sought in order to speed up the process and to lower the cost of resolving such disputes among the parties. It

⁸⁹ *Fortis Bank Sa/NV & Anor*, [2010] EWHC (Comm) 84, [16] ("The proper interpretation of art. 16 [UCP] was that it did impose an obligation on the issuing bank to act in accordance with the disposal statement it had made in its art. 16(c)(iii) notice. Such an interpretation reflected both best practice and the reasonable expectations of experienced market practitioners.")

⁹⁰ *Kredietbank Antwerp v. Midland Bank Plc.*, [1999] C.L.C. 1108, 1112 (Eng.).

is the author's view that the DOCDEX provides that better alternative, and although the procedures at present are non-binding on the parties, once the parties to a letter of credit transaction agree to abide by the decisions of the DOCDEX procedures, disputes in letters of credit can be swiftly taken care of for all concerned.

Not only is the UCP a compilation of the observance of reasonable standards of fair dealing in international letter of credit operations, but the DOCDEX procedures provide the means by which experts in letters of credit can apply such standard practice in resolving disputes arising in letters of credit, and thereby revitalize the utilization of the ever-useful letter of credit in international trade.



