

23 The ICC DOCDEX System

1) Introduction

DOCDEX, standing for Documentary Credit Dispute Resolution Expertise, is a rapid, cost-effective system intended to resolve disputes involving International Chamber of Commerce (ICC) rules on documentary credits. Originally introduced in 1997, it is a private, expert-based and (unless otherwise agreed) non-binding alternative to international litigation and arbitration. The ICC says that DOCDEX has been used by practitioners worldwide who need quick decisions on outstanding conflicts.

The original DOCDEX system dealt with two of the ICC's sets of Rules: the Uniform Customs and Practice for Documentary Credits (UCP 500) and the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR 525). Since then, the Rules have been revised, expanding the DOCDEX process to encompass two other sets of ICC Rules: the Uniform Rules on Collections (URC 525) and the Uniform Rules for Demand Guarantees (URDG 458).¹¹³

The ICC says that:

"The purpose of an expertise under the DOCDEX Rules is to enable a panel of three independent, experienced documentary instruments experts, appointed by the ICC International Centre for Expertise, to issue an opinion and/or recommendation on any given dispute for a fair and rapid resolution of a dispute. There are no hearings, the decision is not binding and not intended to conform with the legal requirements of an arbitral award. The ICC urges banks to respect DOCDEX Decisions on a voluntary basis. If the parties wish to increase the enforceability of DOCDEX Decisions, they may specify in advance that the DOCDEX Decision will be legally binding between them...."

"All the parties are given the opportunity to participate in the DOCDEX proceedings. However, the DOCDEX panel issues an opinion regardless of whether or not the Respondent agrees to participate."

"The DOCDEX Experts' Panel remains anonymous. All communication between Experts and parties passes through the Centre; there are no hearings. The Experts are chosen from a list maintained by the ICC Commission on Banking Technique and Practice."

"The Chair of the Experts' Panel has to issue an opinion to the Centre within 30 days following receipt of the relevant documents. The Experts' decision is examined by the Technical Adviser of the Banking Commission, who ascertains that their decision is in line with the applicable ICC Rules and their interpretation by the Banking Commission."

"The Experts' decision is issued by the Centre as a DOCDEX Decision. It is issued in English (unless the Appointed Experts decide otherwise), and is to include a summary of the representations made and a determination of the issues and the decisions taken with 'succinctly stated reasons'. The Decision is deemed to be made in Paris on the date it is issued."

“The DOCDEX Rules provide that the ICC may publish any DOCDEX Decision provided that the identities of the parties to the dispute are not disclosed. DOCDEX Decisions have already been published in DC Insight.”

Decisions are also published in the collection of ICC decisions from the Commission on Banking Technique and Practice.¹¹⁴

2) The DOCDEX Rules

Article 1

Article 1.1 explains the scope of the DOCDEX dispute resolution service; as noted above, this relates to disputes under the various ICC rules. The Article states that the objective of the service *“is to provide an independent, impartial and prompt expert decision (DOCDEX Decision) on how the dispute should be resolved on the basis of the terms and conditions of the documentary credit, the collection instruction, or the demand guarantee and the applicable ICC Rules, be it the UCP, the URR, the URC or the URDG (ICC Rules).”*

References for the various publications – and copies of these publications – can be obtained from the ICC.

Article 1.3 deals with the appointment of the Experts' Panel:

“When a dispute is submitted to the Centre in accordance with these rules, the Centre shall appoint three experts from a list of experts maintained by the Banking Commission. These three experts (Appointed Experts) shall make a decision which, after consultation with the Technical Adviser of the Banking Commission, shall be issued by the Centre as a DOCDEX Decision in accordance with these rules. The DOCDEX Decision is not intended to conform with any legal requirements of an arbitration award.”

Article 1.4 provides that, unless otherwise agreed, a DOCDEX Decision is not binding on the parties. Article 1.5 states that in the DOCDEX procedure, communication with the Centre *“shall be conducted exclusively in writing, i.e. by communication received in a form that provides a complete record thereof, via teletransmission or other expeditious means”*.

Article 2

The Initiator of the process is to apply for a DOCDEX Decision by the submission of a Request: *“The Initiator may be one of the parties to the dispute applying individually, or more or all parties to the dispute submitting jointly a single Request.”* Article 2 states that the Request must be concise and is to set out all necessary information, including:

“2.2.1 full name and address of the Initiator, clearly stating such Initiator’s function(s) in connection with the documentary credit, the collection, or the demand guarantee, and

¹¹⁴ Decisions taken over a seven-year period have been collected in a single volume: ICC, *DOCDEX Decisions 1997-2003*, International Chamber of Commerce, 2004.

- 2.2.2 *full name and address of any other party to the dispute (Respondent), clearly stating such Respondent's function(s) in connection with the documentary credit, the collection, or the demand guarantee, where the Request is not submitted jointly by all parties to the dispute, and*
- 2.2.3 *a statement of the Initiator formally requesting a DOCDEX Decision in accordance with the ICC DOCDEX Rules, ICC Publication No.811, and*
- 2.2.4 *a summary of the dispute and of the Initiator's claims, clearly identifying all issues related to the documentary credit, the collection, or the demand guarantee and the applicable ICC Rules to be determined, and*
- 2.2.5 *copies of the documentary credit, the collection instruction, or the demand guarantee in dispute, all amendments thereto, and all documents deemed necessary to establish the relevant circumstances, and*
- 2.2.6 *a statement by the Initiator that a copy of such Request, including all documents annexed thereto, has been sent to each Respondent named in the Request...."*

Article 3

Provisions relating to any Answer to be submitted by the Respondent are set out in Article 3:

- 3.1 *The Respondent may submit an Answer to the Initiator's Request. The Respondent may be one or more of the parties to the dispute named in the Request as Respondent, each submitting an individual Answer or submitting jointly a single Answer. The Answer must be received by the Centre within the period stipulated in the Centre's Acknowledgement of the Request (see Article 5). The Answer, including all documents annexed thereto, shall be supplied to the Centre in Paris, France, in four copies.*
- 3.2 *An Answer shall be concise and contain all necessary information clearly presented, in particular the following:*
 - 3.2.1 *name and address of the Initiator, and*
 - 3.2.2 *date of the relevant Request, and*
 - 3.2.3 *a statement of the Respondent formally requesting a DOCDEX Decision in accordance with the ICC DOCDEX Rules, ICC Publication No. 811, and*
 - 3.2.4 *a summary of the Respondent's claims, clearly referring to all issues related to the documentary credit, the collection, or the demand guarantee and the applicable ICC Rules to be determined, and*
 - 3.2.5 *copies of all additional documents deemed necessary to establish the relevant circumstances, and*
 - 3.2.6 *a statement of the Respondent that a copy of such Answer, including all documents annexed thereto, has been sent in writing to the Initiator and to the other Respondent named in the Request.*
- 3.3 *If the Respondent does not provide a statement pursuant to Article 3.2.3, then the final DOCDEX Decision will not be made available to him."*

Article 4

Article 4 contains provisions dealing with the Request, Answers and Supplements (defined in the Article). All three are final as received, and the Centre may ask the Initiator and Respondent “by way of an Invitation, to submit specific supplementary information, including copies of documents, relevant to the DOCDEX Decision (Supplement)... The Supplement shall be concise and contain all necessary information clearly presented and include copies of relevant documents.”

Article 5

Provisions relating to the acknowledgement of the receipt of Requests, Answers and Supplements, together with provisions relating to time limits, are set out in Article 5.

Article 6

Article 6 deals with the appointment of Appointed Experts:

- “6.1 The Banking Commission will maintain internal lists of experts having profound experience and knowledge of the applicable ICC Rules.
- 6.2 Upon receipt of a Request, the Centre shall appoint three independent experts from the list. Each Appointed Expert shall declare his independence of the parties indicated in the Request. The Centre shall designate one of the three Appointed Experts to act as their Chair.
- 6.3 An Appointed Expert shall at all times keep strictly confidential all information and documents related to any DOCDEX case.”

This Article also contains provisions for the replacement of an Appointed Expert who is unable to carry out his/her functions.

Article 7

Article 7 deals with the procedure to be followed by the Appointed Experts, and contains the significant provision that the parties are not entitled to seek an oral hearing before those Experts. The Article also contains the 30-day time limit for production of a draft decision:

- “7.1 The Centre shall submit to the Appointed Experts the Request, Answer(s) and Supplement(s) received in connection therewith.
- 7.2 The Appointed Experts shall render their decision impartially and exclusively on the basis of the Request, Answer(s) and Supplement(s) thereto, and the documentary credit and the UCP and/or URR, or the collection and the URC, or the demand guarantee and the URDG.
- 7.3 Where it is deemed necessary by the Appointed Experts, their Chair may ask the Centre to invite the Initiator and Respondent, pursuant to Article 4 of these rules, to provide additional information and/or copies of documents.
- 7.4 Within 30 days after they have received all information and documents deemed by them to be necessary and appropriate to the issues to be determined, and provided that the Additional Fee as mentioned in Article 10.1 is paid, the

Appointed Experts shall draft a decision and their Chair shall submit the decision to the Centre.

7.5 *Neither the Initiator nor the Respondent shall*

- *seek an oral hearing in front of the Appointed Experts,*
- *request ICC to reveal the name of any Appointed Expert,*
- *seek to have an Appointed Expert or officer of the Banking Commission called as witness, expert or any similar function to an arbitral tribunal or a court of law hearing the dispute in connection with which such Appointed Expert or officer of the Banking Commission participated by rendering a DOCDEX Decision."*

Article 8

Provisions relating to the DOCDEX Decision are set out in Article 8. The Article provides that the draft decision of the Appointed Experts is to be considered by the Technical Adviser of the ICC's Banking Commission.

These provisions are, to a limited extent, similar to the "*scrutiny of the award*" provisions contained in the ICC Arbitration Rules. Article 8 states that, on receipt of the decision of the Appointed Experts "... *the Centre shall consult with the Technical Adviser of the Banking Commission or his nominated delegate, to ascertain that the DOCDEX Decision will be in line with the applicable ICC Rules and their interpretation by the Banking Commission. Amendments suggested by the Technical Adviser (or his delegate) shall be subject to the consent of the majority of the Appointed Experts.*"

The DOCDEX Decision is to contain a summary of the representations relevant to the issues, together with a determination of those issues and the decisions taken "*with succinctly stated reasons*". The Decision is deemed to be made at Paris and on the date of its issue by the Centre.

Article 9

Article 9 provides that the ICC may publish any DOCDEX Decision "*provided always the identities of the parties to the dispute are not disclosed*".

Articles 10 and 11

Article 10 deals with costs. Article 11 contains general provisions relating to confidentiality and liability.

3) DOCDEX Decisions

Background: problems in the banking industry

Before looking at some decisions under the DOCDEX Rules, it may be useful to consider the kind of problems that had arisen in the banking world in relation to documentary credits, which problems had persuaded the ICC of the need to deal with the difficulties

being created. These largely came about because some banks were refusing to pay letters of credit on the grounds of alleged 'discrepancies'.

One of the essential elements of the documentary credit system is the autonomy of the letter of credit. The letter of credit contract is separate from the sale contract or 'underlying contract', and banks must pay it regardless of disputes concerning the underlying contract. The goods may have been lost at sea or the purchaser may have complaints regarding defects in the goods, but the bank must pay. If traders cannot rely on the obligation of banks to honour documentary credits then the system of international trade will be put at risk.

Charles del Busto of the ICC's Commission on Banking Technique and Practice explained that:

"As most participants in international trade know, there have been serious problems with certain banks as to the application, interpretation and adherence to the UCP. In addition, there is great concern at what appears to be avoidance by certain banks of their duty to honour their irrevocable and independent undertakings under their Documentary Credits.

"The rejection of documents presented under these Documentary Credits is based on 'alleged' discrepancies and is due in part either to misinterpretation, misapplication of the UCP or to the 'fabrication' of discrepancies with the sole intent to delay payment or to justify non-payment of the bank's irrevocable obligation. To any party involved in Documentary Credits, this practice is destructive.

"We all recognise that the Documentary Credit is part of the lifeblood of international commerce. If this practice of avoiding or delaying payment were to become widespread, the Documentary Credit would lose it into integrity, independence and thereby its raison d'être...."

The discrepancies of which Charles del Busto spoke may arise, for instance, in connection with shipping documents. Suppose there is a contract for the sale of 10,000 tons of US citrus pulp pellets by a German company to a Dutch company, delivery to be c.i.f. Rotterdam. The sale contract provides for payment by letter of credit. The shipping documents specified in the letter of credit include a commercial invoice, an insurance certificate and a certificate of origin. The spelling of a name on the commercial invoice differs slightly from the spelling in the documentary credit and the issuing bank refuses to pay. Is it entitled to do so? Is there a 'discrepancy' that justifies the issuing bank refusing payment?

Such a problem arose in the case of *Hing Yip Hing Fat Co. Ltd v Daiwa Bank Ltd*.¹¹⁵ The credit application was made by Cheergoal Industries Ltd. However, the presenting bank presented the letter of credit on a document that showed the drawee as Cheergoal Industrial Ltd. The case was heard by Mr Justice Kaplan, who said that the reference to "Industrial" was an obvious typographical error that should cause no confusion and could not be relied on as a discrepancy.

It is this type of case that might well be referred to a DOCDEX Panel.

Examples of DOCDEX decisions

As noted above, the ICC publishes DOCDEX decisions but without names or any references that might identify the parties.

Bill of Lading and Shipping Company Certificate

In this first case, the Initiator / Applicant for the DOCDEX decision was a bank in Europe and the Respondent to the application was a Middle Eastern bank.

The Middle Eastern bank was the Issuing Bank under the Documentary Credit. It had refused documents on various grounds, one of which was that the Shipping Company Certificate indicated that the vessel in question had sailed on 18 April 1998 whereas the Bill of Lading (i.e. loading) date was 14 April 1998.

The Shipping Company Certificate stated "SLD 18.04.1998". The Issuing Bank translated that into 'sailing date'. That date was not stated in the Documentary Credit or in the Bill of Lading, which contained an issuing date and a 'Shipped on Board' date. Evidently the abbreviation 'SLD' is not commonly known, even in the transport industry.

Although banks are not expected to have a specific knowledge regarding goods or shipping and related abbreviations, it is nevertheless known to be common practice that goods are loaded on a ship over a period of several days, and that shipping companies nevertheless issue Bills of Lading for a specific date of loading. Therefore the issuing and /or loaded onboard date might not actually be the date of 'sailing'.

The DOCDEX Panel said that there was therefore no inconsistency between the shipping company certificates indicating "SLD 18.04.1998" and the Bill of Lading giving the date of shipment as 14 April 1998. The Panel's decision was that the Issuing Bank had no reason to refuse payment under the Documentary Credit.

Commercial invoice

The second DOCDEX case considered involved a dispute concerning a commercial invoice. Article 37 (c) of the UCP requires that the description of the goods in the commercial invoice must correspond with the description in the Documentary Credit.

The Initiator was a confirming bank and the Respondent was the issuing bank. The Documentary Credit issued by the Respondent and confirmed by the Initiator included in the Description of Goods field the trade term "ex-works USA".

The credit was issued to cover the transport from Sacramento, USA by vessel to Mersin Free Zone, Turkey. The credit was subsequently amended to read simply "ex-works" and the invoice was amended to read "ex-warehouse Mersin Free Zone – Turkey".

The Panel held that this was acceptable. 'Ex-works USA' had meant, among other things, that the price quoted was for delivery of goods at the disposal of the buyer at a named place in the United States. The new wording in the invoice "ex-works Mersin Free Zone – Turkey" merely added to the required term 'ex-works' in the amended Documentary Credit some additional information, which information was not forbidden by the letter of credit.