

CHAPTER-2

COOPERATION OF UNCITRAL AND THE INTERNATIONAL CHAMBER OF COMMERCE: NEW POSSIBILITIES FOR COMPANIES FROM THE BELT AND ROAD INITIATIVE FOR DISPUTE RESOLUTION IN TRADE FINANCE

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I INTRODUCTION

This chapter aims to introduce the reader to the unique product of the International Chamber of Commerce (hereinafter referred to as the ICC) for dispute resolution in the area of trade finance, namely Documentary Instruments Dispute Resolution Expertise (hereinafter referred to as DOCDEX).

It is argued here that whilst there have been several approaches made with regards to dispute resolution within the Belt and Road Initiative (hereinafter referred to as the BRI), DOCDEX represents another relatively unexplored, but nevertheless effective, option for international trade actors and banks in the area of trade finance, which can offer substantial benefits to the commercial parties and banks participating in the BRI.

The chapter commences with an overview of the history of cooperation between the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) and the ICC before discussing the functioning of DOCDEX and the scope the ICC Rules for Documentary Instruments Dispute Resolution Expertise (hereinafter referred to as the DOCDEX Rules). Significant attention is dedicated to the benefits of the DOCDEX system and its limitations. Lastly, an analysis of how a DOCDEX Decision can be used in practice is made.

II COOPERATION OF UNCITRAL AND THE ICC

UNCITRAL was established by the United Nations General Assembly in 1966 with the aim of assisting countries in removing (or at least reducing) obstacles to international trade which are caused by disparities in national law.¹

Today UNCITRAL plays an important role in the harmonization and modernization of the world-wide international trade law regulatory framework by preparing and promoting international conventions, model legislative acts and soft law instruments in a number of key

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¹ UNCITRAL, 'Origin, Mandate and Composition of UNCITRAL' <<http://www.uncitral.org/uncitral/en/about/origin.html>> accessed 30 March 2018.

areas of commercial law regulation.² UNCITRAL-developed instruments are widely accepted in countries with different legal traditions and at different stages of economic development.³

The ICC was established in 1919. The founders of the organisation wanted private business to be represented in a global policy arena as at that time there was no world system of rules to govern trade, investments, and financial or commercial related issues.⁴ Gradually, the organisation became one of the most influential in the global arena.

Today the ICC claims to have a global network of over 6 million members in more than 100 countries⁵ and an expert pool of nearly 3,000 people, who make up the specialised working bodies on a broad range of issues within the organisation.⁶

The organisation's goals are to promote international trade, responsible business conduct and a global approach to regulation through, *inter alia*, formulation of the voluntary rules by which business is conducted every day and which are widely used in an international setting, most notably in the area of trade finance.⁷ The ICC is also famous for its dispute resolution services, which are widely considered as an attractive alternative to litigation.⁸

Notably, the ICC, like no other business organisation, have always enjoyed a special relationship with the United Nations (and, thus, with UNCITRAL). In particular, the ICC is the only and first business organisation granted the status of an Observer at the United Nations General Assembly.⁹

Ultimately, UNCITRAL and the ICC share the same aim of harmonisation and uniformity of international commerce, which has led to extensive cooperation between the two organisations. Such close partnership between UNCITRAL and the ICC has resulted in the endorsement of several UNCITRAL conventions by the latter¹⁰ and ICC rules by the former¹¹ in the area of trade finance, which has significantly enhanced harmonisation in the field. Thus, these two organisations have confirmed that the instruments they develop correspond to the highest standards and practices of each other.

III WHAT IS DOCDEX?

DOCDEX was established by the ICC in October 1997 as a response to a growing number of disputes between commercial parties concerning documentary credits and

² United Nations Commission on International Trade Law, 'A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law' (2013) 1.

³ Ibid.

⁴ ICC, 'History' <<https://iccwbo.org/about-us/who-we-are/history/>> accessed 30 March 2018. See also G. L. Ridgeway, *Merchants of Peace: the History of the International Chamber of Commerce* (2nd edn, Little, Brown and Company 1959).

⁵ ICC, 'Who We Are' <<https://iccwbo.org/about-us/who-we-are/>> accessed 30 March 2018.

⁶ ICC, 'Business Expertise' <<https://iccwbo.org/about-us/who-we-are/business-expertise/>> accessed 30 March 2018.

⁷ See ICC (n 5).

⁸ ICC, 'Dispute Resolution' <<https://iccwbo.org/about-us/who-we-are/dispute-resolution/>> accessed 30 March 2018.

⁹ ICC, 'Business and the United Nations' <<https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/>> accessed 30 March 2018.

¹⁰ UNCITRAL Convention on the Assignment of Receivables in International Trade [2014]; United Nations Convention on the Use of Electronic Communications in International Contracts [2006] and UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit [1999]. Additionally, in 2008 the ICC urged the governments to consider ratification of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

¹¹ Uniform Rules for Forfeiting [2017]; Uniform Rules for Demand Guarantees [2010]; INCOTERMS 2010; Uniform Customs and Practices for Documentary Credits (UCP 600) [2007] and International Standby Practices (ISP98) [1998].

“apparent frustrations of bankers that many judges, arbitrators, and lawyers failed to grasp the complexities of documentary credit practice”.¹² It positions itself as the unique platform for resolving trade finance-related matters, not on the basis of national law, but via interpretation of soft law regulations, trade usages and customs, and the application of international standard practice, which allows commercial actors to escape the issue of conflict of laws.

DOCDEX is of a hybrid nature as it has features of expert determination and arbitration and such a method for resolving disputes has been described by many as innovative.¹³

Notably, shortly following the inception of DOCDEX, a prominent dispute resolution expert commented that alternative dispute resolution was expanding into new fields and niches and adopting new forms with great future potential.¹⁴ Eventually, this respected expert’s view turned out to be prescient, but it is doubtful that he could have foreseen how vast the potential of the system was going to be: within two decades DOCDEX successfully transformed from a limited service for letters of credit disputes into a universal trade-finance dispute resolution platform.

The process is governed by the DOCDEX Rules, which have been revised twice since their initial adoption (in 2002 and 2015). Thus, pursuant to the DOCDEX Rules, a party wishing to use DOCDEX services should refer to the ICC (using a special form available at the ICC’s website) and pay a filing fee (see below).¹⁵ If the claim falls within the scope of DOCDEX Rules, it will be forwarded to the respondent who then has 30 days to answer the claim or file a counter-claim.¹⁶ Interestingly, the respondent may abstain from filing an answer. However, then it will be precluded from submission of any of its arguments.¹⁷

A DOCDEX panel may request the parties to submit additional information or documents in addition to those which accompany the claim request. Interestingly, any unsolicited submission shall be disregarded.¹⁸

A DOCDEX panel consists of three impartial experts with extensive experience in and knowledge of trade finance transactions, who are selected from a special list maintained by the ICC Banking Commission.¹⁹ Notably, unlike in arbitration, the parties do not choose the experts and the identities of the experts are not disclosed to them. Nevertheless, before acceptance of any appointment, a prospective expert must sign a statement of acceptance, availability, impartiality and independence and must disclose in writing any such facts or circumstances.²⁰

¹² Nicholas Manganaro, ‘About-Face: The New Rules of Strict Compliance under the Uniform Customs and Practice for Documentary Credits (UCP 600)’ (2011) 14 *International Trade and Business Law Review* 273, 289-290.

¹³ Isabella Chung, ‘Developing a Documentary Credit Dispute Resolution System: an ICC Perspective’ (1995) 19 (4) *Fordham International Law Journal* 1349, 1378; Anthony Connerty, ‘DOCDEX: The ICC’s Rules For Documentary Credit Dispute Resolution Expertise, part 2’ (1998) 13 (11) *Journal of International Banking and Financial Law* 523, 529; William Park, ‘Arbitration in Banking and Finance’ (1998) 17 *Annual Review Of Banking Law* 213, 242.

¹⁴ Luke Nottage, ‘The Vicissitudes of Transnational Commercial Arbitration and Lex Mercatoria’ (2000) 16 *Arbitration International* 53.

¹⁵ ICC, DOCDEX Rules, Articles 3 (1) and 3 (3).

¹⁶ *Ibid* Article 4 (4).

¹⁷ *Ibid* Article 4 (5).

¹⁸ *Ibid* Article 5 (3).

¹⁹ *Ibid* Article 7 (1).

²⁰ *Ibid* Article 7 (7).

A DOCDEX Decision is rendered exclusively on the basis of the terms and conditions of the trade finance-related instrument, undertaking or agreement in question, the applicable ICC soft law rules and international standard practice in trade finance.²¹ A DOCDEX Decision shall be rendered within 30 days following the receipt of all information and documents a DOCDEX Panel considers necessary for determining the issues in dispute.²² However, before any communication to the parties with regards to the outcome of a dispute, the ICC Technical Adviser scrutinises a rendered decision in order to ensure that it is in line with the ICC-developed instruments and/or international trade finance practice standards.²³

More than 150 DOCDEX Decisions have been rendered to date and the steady growth in the number of disputes submitted to DOCDEX since 1997 is indicative of the growing interest and confidence of commercial parties in the system. Each of the DOCDEX Decisions can be found in the Trade Finance Channel of the ICC Digital Library and the ICC also periodically publishes them in a special collected DOCDEX Decisions publication.²⁴

IV EVOLUTION OF DOCDEX SCOPE

The evolution and expansion of DOCDEX scope is illustrative of its progress and adaptation to the needs of the business community.

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

Following the latest revision of the DOCDEX Rules in 2015 the scope of application of DOCDEX has been significantly widened. It is claimed that now, DOCDEX can address any trade finance-related dispute, including trade loans, syndications, negotiable instruments, risk purchase agreements, conflicts of priority and fraud in letters of credit, etc., i.e. all areas that are not otherwise covered by existing ICC banking rules.²⁵ This should effectively transform the system into a universal platform for resolution of all trade finance and banking disputes.

V BENEFITS OF DOCDEX

DOCDEX offers commercial parties some substantial benefits. The overview of the most significant of them is provided below.

In addition, some claim that because a DOCDEX Decision is rendered by experts in the banking and trade sectors, the reasoning behind such Decision is very different from the

²¹ Ibid Article 2 (2).

²² Ibid Article 8 (5).

²³ Ibid Article 9 (2). Quite a similar process is enshrined in Article 34 of the ICC Rules of Arbitration.

²⁴ ICC, 'DOCDEX' <<https://iccwbo.org/dispute-resolution-services/docdex/>> accessed 30 March 2018.

²⁵ ICC, 'ICC revises DOCDEX rules – enhancing scope, transparency, and efficiency' (22 April 2015) <<https://iccwbo.org/media-wall/news-speeches/icc-revises-docdex-rules-enhancing-scope-transparency-and-efficiency/>> accessed 30 March 2018. However, there is some theoretical evidence that DOCDEX is not applicable to certain aspects of trade finance-related dispute, in particular to fraud in letters of credit, see Yanan Zhang, *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue* (Ph.D. Dissertation: Publications of the University of Eastern Finland, Social Sciences and Business Studies No. 15, 2011), 209.

reasoning expressed in court judgments or arbitration awards in similar matters, which tends to be overly generalized, because judges and arbitrators do not have enough expertise in the trade finance field.²⁶ This itself can be considered as a significant benefit for the parties. Remarkably, nowadays it is quite common to have an institution or organisation which exclusively renders specific dispute resolution services in a particular area of industry or economy, and the popularity of such institutions is steadily growing.²⁷

5.1 Low Cost

Perhaps, the most valuable benefit of DOCDEX is its cost compared to other dispute resolution options.

The DOCDEX Rules provide for two types of fees which a claimant may be charged: the Standard Fee and the Additional Fee.²⁸

The Standard Fee depends on the amount in dispute. Thus, if the amount in dispute is equal or below USD 1,000,000, the claimant will be required to pay USD 5,000. If the amount in dispute exceeds USD 1,000,000, the Standard Fee will be USD 10,000.²⁹

In certain circumstances and taking into account the facts and documents underlying the dispute, the Additional Fee may be charged, which does not exceed 50% of the Standard Fee.³⁰

To illustrate how beneficial such price policy is for the users of DOCDEX, one may take an example of a letter of credit, a trade finance instrument which is used frequently in modern trade and constitutes the largest proportion of all disputes submitted to DOCDEX: in 2016 the average value of a letter of credit was USD 463,000.³¹ Furthermore, according to some authors an average amount of dispute in DOCDEX is USD 4.2 million.³²

This is very striking if compared with arbitration. Thus, the average cost of arbitration at the Singapore International Arbitration Centre (the SIAC) amounts to USD 80,337, in the London Court of International Arbitration (the LCIA) – USD 97,000, and in the Hong Kong International Arbitration Centre (the HKIAC) – USD 106,503.³³

However, there is a certain downside: pursuant to DOCDEX Rules, the fee is paid by the claimant only.³⁴ Therefore, no allocation of fees is available unlike in arbitration (see, for example, the China International Economic and Trade Arbitration Commission Arbitration Rules (Art. 52), the SIAC Rules (Art. 37), the LCIA Rules (Art. 28), the HKIAC Rules (Article 33), etc.).

5.2 Speed

A DOCDEX Decision is made within 30 days of receipt of all information and documents, which a DOCDEX Panel considers necessary for determining the issues in a

²⁶ Chang-Soon Thomas Song, 'Sectoral Dispute Resolution in International Banking (Documentary Credit Dispute Expertise: DOCDEX)' (2013) *Arizona Journal of International & Comparative Law* 529, 545.

²⁷ See, for instance, the London Maritime Arbitration Association (the LMAA) and the Society of Maritime Arbitrators (the SMA) in maritime matters, the Internet Corporation for Assigned Names and Numbers (the ICANN) in information technology, the Court of Arbitration for Sport (the CAS) in sport related issues, etc.

²⁸ DOCDEX Rules (n 15) Article 10.

²⁹ ICC, Appendix to the DOCDEX Rules, Article 1.

³⁰ *Ibid* Article 2.

³¹ ICC, '2017 Rethinking Trade & Finance: An ICC Private Sector Development Perspective' (2017) 92.

³² See Song (n 26) 534.

³³ The data is taken from the official websites of the respective arbitral institutions.

³⁴ DOCDEX Rules (n 15) Article 3 (3).

dispute.³⁵ This time limit is extended only in exceptional circumstances, which should be approved by the ICC.³⁶

Such speed is achieved, *inter alia*, through the use of electronic submissions³⁷ and absence of oral hearings.³⁸ Often the experts do not need to physically meet and be in one premises in order to resolve a dispute and can handle it via means of video and telecommunication.³⁹

The ICC estimates that the entire process from filing a claim to communication of a decision to the parties usually takes between two and three months.⁴⁰ Again, the comparison with arbitration is quite dramatic: the average duration of arbitral proceedings in the SIAC is 13.8 months, in the HKIAC is 14.63 months, and in the LCIA is 16 months.⁴¹

5.3 *Procedural Ease*

As mentioned above, DOCDEX is a documentary-based process which does not involve any oral hearings.⁴² Furthermore, the parties are not allowed to submit any supplementary documents in addition to those included in the original claim and/or answer, except for those which are specifically requested by a DOCDEX Panel.⁴³

Moreover, the absence of oral hearings also results in a non-adversarial basis of the process. This helps to maintain business relations following the resolution of a dispute, which may not always be the case in litigation and arbitration. In addition, non-adversarial forms of dispute resolution are especially favoured in the Far East and China in particular, mostly due to historical and cultural reasons.⁴⁴

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

Also, unlike in arbitration, there is no need to specify DOCDEX dispute resolution in any clause of contractual documentation or conclude a separate agreement. DOCDEX is available upon direct reference to the ICC by the claimant. Additionally, proceedings in a DOCDEX case carry on and a Decision is made even in the event of the absence of any answer and submission by the respondent.⁴⁵

5.4 *Anonymized, but Published Decisions*

³⁵ Ibid Article 8 (5).

³⁶ Ibid Article 8 (6).

³⁷ Ibid Articles 3 (1), 4 (2), 5 (2) and 6 (1).

³⁸ Ibid Articles 2 (4) and 8 (7).

³⁹ As an example, see Anthony Connerty's experience of being an expert at a DOCDEX Panel described in his article 'Trade with China: how and where disputes can be resolved' (1998) 64 (2) *Arbitration*, 129 at footnote 22.

⁴⁰ Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2009-2012* (ICC Publication No. 739E, 2012), p. 3; See also (n 24).

⁴¹ The data is taken from the official websites of the respective arbitral institutions.

⁴² DOCDEX Rules (n 15) Articles 2 (4) and 8 (7).

⁴³ Ibid Article 5 (3).

⁴⁴ Peter Yuen and Richard Chalk, 'Mediation - East meets West: Some Thoughts on Selected Issues', (2006) 2 *Asian Dispute Review* 68, 69.

⁴⁵ DOCDEX Rules (n 15) Article 4 (5).

Confidentiality is valued within DOCDEX, so no names and/or origin of the participants of the process (parties and experts) are disclosed to the general public.⁴⁶ At the same time, every DOCDEX Decision is numbered and published without disclosure of the abovementioned information.⁴⁷

This has led to an interesting development, namely the adoption of the doctrine of *stare decisis*: the parties and DOCDEX Panels make references and use opinions expressed in previous DOCDEX Decisions.⁴⁸ Notably, there is no provision present in the DOCDEX Rules, which expressly allows/disallows the use of *stare decisis*, so this development is rather a spontaneous one which originated from practice due to wider accessibility of previously rendered DOCDEX Decisions. After such development was spotted by the ICC, it seems that, whilst not specifically addressing the matter, the organisation actually encourages the relevant practice.⁴⁹

In fact, compared with traditional general arbitration, the industry-specific dispute resolution tends to have a greater degree of transparency through the publication of its respective outcomes (decisions, awards, etc.), which often results in the gradual development of *stare decisis*.⁵⁰ This represents a significant advantage both for the users of the dispute resolution services, who can view previous opinions in similar matters and get an approximate idea of the probable outcome of their dispute, and for general development of international commercial law, which is likely to become more harmonised through uniform application of the same rules.

VI LIMITATIONS OF DOCDEX

Despite its many benefits, DOCDEX is not an ideal system and there are a couple of limitations of the process.

Naturally, DOCDEX has limited scope and applies only to disputes in the areas of banking and trade finance. Thus, its application is not universal. Moreover, due to its specific documentary-based procedure, DOCDEX is not appropriate where the hearing of witnesses, oral examination or oral submissions are required to resolve any factual or legal issues.⁵¹

In addition, Article 2(3) of the DOCDEX Rules poses significant threats towards the existing scope of the system. Thus, pursuant to this provision, if the dispute arises out of or is in connection with an instrument, undertaking or agreement that does not provide for the application of any ICC Banking Rules, it shall be administered under the DOCDEX Rules *only* if each claimant and each respondent so agree. Consequently, because a respondent is not obliged to submit an answer to a claim, in practice it is likely that DOCDEX will be used almost exclusively for resolving disputes which involve some of the ICC banking rules. Whilst there are strong claims that the UCP is incorporated in most or nearly all commercial letters of credit and is used by the banks and banking associations of virtually every country

⁴⁶ Ibid Article 12 (1)-(3).

⁴⁷ Ibid Article 12 (1).

⁴⁸ See, for example, DOCDEX Decisions No. 250, 255, 263, 302, 330, 342, 344, 345, 347.

⁴⁹ “The revised rules will also enhance transparency – requiring ICC to publish redacted decisions in every DOCDEX case. *Doing so will not only set a precedent for future cases*, it will also allow ICC to analyse the panel of experts charged with forming a decision [...]”, see (n 25).

⁵⁰ See the examples of the LMAA and the SMA in maritime industry, ICANN in information technology and the CAS in the area of sport.

⁵¹ DOCDEX Rules (n 15) Article 2 (4).

and territory in the world,⁵² this does not mean that other types of documentary instruments incorporate the ICC-developed soft law banking rules on the same scale.⁵³

Another controversy is that, unless the parties agree otherwise prior to the commencement of the proceedings, a DOCDEX Decision is not binding on them.⁵⁴ Such approach taken by the drafters of DOCDEX Rules has received some criticism and resulted in debate as to whether the DOCDEX Decision should be binding on the parties irrespective of their agreement.⁵⁵

It is likely that the approach of the ICC towards DOCDEX Decisions being non-binding, which was taken in 1997, represents an initial compromise in order to attract more users to the system at the very early stage of its development.⁵⁶ However, since DOCDEX has been positively received by commercial actors and banks, this approach might be changed upon the next revision of DOCDEX Rules. In particular, this would result in the mandatory nature and the duty of a respondent to participate in the proceedings and, consequently, would resolve the problem that arises from Article 2(3) of the DOCDEX Rules described above.⁵⁷

VII USE OF A DOCDEX DECISION

One should remember that a DOCDEX Decision is not an arbitral award,⁵⁸ and, consequently, it cannot be enforced in the same way as an arbitral award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. So, the logical question would be: how can a successful party make use of such a Decision?

The ICC claims that DOCDEX Decisions have a high level of voluntary compliance by the parties via their contractual obligation.⁵⁹

However, a party may use a DOCDEX Decision as additional evidence in a court hearing. Due to the limited number of DOCDEX Decisions rendered to date and anonymity of the origin of parties involved in the proceedings, it is not an easy task to trace court judgments wherein a party had presented a DOCDEX Decision in its favour. Nevertheless, in several available court judgments from common law jurisdictions (including from the BRI) the courts were unanimous in considering a DOCDEX Decision to be of ‘persuasive value’

⁵² Walter Baker and John Dolan, *Users' Handbook for Documentary Credits under UCP 600* (ICC Publication No. 694, ICC Services Publications 2008) 10; Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 48; GAFTA, ‘Guidelines for Letters of Credit’, (2012) <<https://www.gafta.com/write/MediaUploads/Contracts/2012/guidelet.pdf>> accessed 30 March 2018.

⁵³ See examples in Mugasha (n 52) 48-55.

⁵⁴ DOCDEX Rules (n 15) Article 2 (6).

⁵⁵ See Song (n 26) and Manganaro (n 12) 290.

⁵⁶ See Song (n 26) 533.

⁵⁷ *Ibid* 550.

⁵⁸ DOCDEX Rules (n 15) Article 2 (5).

⁵⁹ Collyer and Katz (n 40); ‘Chapter 6: Other Methods of Dispute Resolution Under ICC Rules’, in Herman Verbist, Erik Schäfer, et al., *ICC Arbitration in Practice* (2nd edition, Kluwer Law International 2015) 245, 268. See also Fung King Tak, ‘Effective Resolution Strategies for Letter of Credit Disputes’ (03 October 2008), DLA Piper International Law Office Newsletter.

and ‘evidence of international commercial practice’.⁶⁰ Furthermore, the party presenting a DOCDEX Decision in its favour was always successful in winning a case in a court.⁶¹

Additionally, there was one instance when a judge relied upon a DOCDEX Decision, even though the parties did not specifically refer to it in the course of court proceedings.⁶²

In another notable development, jurisprudence made by DOCDEX panels has started to be considered as a separate source of banking practice. Today DOCDEX Decisions are often referred to as an informal source of international business law⁶³ and, reportedly, nowadays banks have developed a tendency to base their rejection notices with regards to letters of credit on DOCDEX Decisions rather than on UCP alone.⁶⁴ Furthermore, DOCDEX Decisions and opinions expressed therein are used for updating the most commonly used ICC-developed soft law regulations in the field, such as UCP, URDG, URC, URR, etc.⁶⁵

Interestingly, this leads to an introduction of a ‘DOCDEX clause’ which is now becoming more common. Under such clause, all disputes arising out of or in connection with a documentary instrument shall be finally settled under a DOCDEX Decision in accordance with the ICC DOCDEX Rules, giving DOCDEX exclusive jurisdiction to hear such disputes.⁶⁶ There even have been calls expressed in favour of inserting a mandatory provision of dispute resolution exclusively through DOCDEX in the next revision of the UCP, but this is unlikely to happen any time soon.⁶⁷

VIII CONCLUSIONS

It is clear that UNCITRAL and the ICC share common goals and adhere to the same high standards of international commercial regulation. These two institutions have significantly shaped the applicable international legal framework, specifically in the area of trade finance, through the development of widely accepted regulations. Notably, their cooperation has resulted in the mutual endorsement of each other’s instruments, which are or will undoubtedly be used and referred to within the BRI.

⁶⁰ See English judgments of *Bulgrains & Co Ltd v Shinhan* [2013] EWHC 2498 and *Fortis Bank SA/NV & Stencor UK Limited v Indian Overseas Bank* [2011] EWCA Civ 58; see also Singaporean judgments of *Mizuho Corporate Bank Limited v Woori Bank* [2004] SGHC 219 and *Abani Trading Pte Ltd v BNP Paribas and another* [2014] SGHC 111.

⁶¹ According to Fung King Tak, the chances of winning such a case wherein a DOCDEX Decision supports your opponent’s position are quite low because most courts respect the ICC’s views and decisions with regards to application of documentary instruments, unless local law provides otherwise, see Tak (n 59).

⁶² See *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2013] EWHC 808 (Comm) at 62, wherein Teare J relied upon DOCDEX Decision No. 303.

⁶³ Natalie Joubert and others, ‘Chronicle of the informal sources of international business law’ (2009) 3 *International Business Law Journal* 383; Laurence Ravillon, ‘Informal sources of international commercial law: the ICC’ (2008) 4 *International Business Law Journal* 549.

⁶⁴ Ravillon (n 63) 555.

⁶⁵ See, for example, Anna Mari Antoniou, ‘New rules for letters of credit: time to update the UCP 600’ (2017) 32(4) *Journal of International Banking Law and Regulation* 128; Joubert and others (n 63); Bob Ronai and others, ‘UCP 700 on the table? (Discussion)’ (Jan/Feb/Mar 2015) *Trade Services Update*; Chang-Soon Thomas Song, ‘Enhancing the Credibility of the Letter of Credit in UCP Revision’ (Apr/May/June 2015) *Trade Services Update*.

⁶⁶ See Chang-Soon Thomas Song, ‘DOCDEX’ (*DCInsight Vol. 19 No.3*, July-September 2013) <http://library.iccwbo.org/content/tfb/dcinsight/DCI_Vol19n3_DOCDEX.htm?AUTH=7677fd17-4350-&Timeframe> accessed 30 March 2018 and Kim Sindberg, ‘LC disputes – is DOCDEX the answer?’ (*LCViews White Papers on Trade Finance*) <http://www.lcviews.com/index.php?page_id=43> accessed 30 March 2018.

⁶⁷ See Ronai (n 65) and Song (n 65).

The BRI is a challenging project, which provides for an enormous amount of economic cooperation for its implementation in various sectors of industry, but predominantly in trade, finance and infrastructure.⁶⁸ In all these areas, trade finance documentary instruments are used extensively.

In fact, the World Trade Organisation estimates that today around 80%-90% of world trade relies on trade finance.⁶⁹ Out of all trade finance traffic around 22% is attributed to letters of credit.⁷⁰ Notably, the Asia-Pacific region (where the majority of the BRI countries are located) represents the greatest volumes for issued and received letters of credit (73% and 77% respectively) than any other region in the world.⁷¹ Moreover, exclusively Asian nations are in top-5 countries with the largest volume of issued and received cross-border letters of credit.⁷²

Therefore, naturally, trade finance disputes are inevitable in the BRI and, consequently, their settlement is an important issue.

Various proposals have been expressed with regards to dispute resolution within the BRI. In particular, the most recent proposal to establish three international courts in Shenzhen, Xi'an and Beijing is, by no means, a very ambitious one, but raises a number of significant general⁷³ and specific trade finance-related⁷⁴ concerns with regards to its successful implementation. Other proposals, which favour mediation and, if not successful, arbitration,⁷⁵ or just arbitration⁷⁶ generally seem to be more viable options. However, from a trade finance perspective, arbitration, despite all its relative advantages over litigation, often lacks efficiency in several aspects, in particular with regards to money and time expenses.

⁶⁸ 'The Belt and Road Initiative' (*Hong Kong Trade Development Council*, 13 September 2017) <<http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative/obor/en/1/1X3CGF6L/1X0A36B7.htm>> accessed 30 March 2018.

⁶⁹ See World Trade Organisation, *Trade finance and SMEs Bridging the gaps in provision* (World Trade Organization 2016) 6; see also 'Trade Finance' (*World Trade Organisation*) <https://www.wto.org/english/thewto_e/coher_e/tr_finance_e.htm> accessed 30 March 2018.

⁷⁰ See ICC (n 31) 89.

⁷¹ Ibid 88-98.

⁷² Top-5 countries with the largest volume of the issued letters of credit are: South Korea, Bangladesh, China, India and Hong Kong. Top-5 countries with the largest volume of the received letters of credit are: China, Hong Kong, India, Singapore and Japan, *ibid* 90-93.

⁷³ Such as the identities of judges, possibility of them to be non-Chinese and their independence, the scope of jurisdiction of such court and the types of disputes to be heard, enforceability of judgments in other countries-members of the BRI, see William Jones, 'Belt and Road Insights - China announces new courts for resolving Belt and Road disputes' (Berwin Leighton Paisner, 22 March 2018) <<http://www.blplaw.com/expert-legal-insights/articles/belt-and-road-insights-china-announces-new-courts-for-resolving-belt-and-road-disputes>> accessed 30 March 2018. See also Guiguo Wang, 'The Belt and Road Initiative in quest for a dispute resolution mechanism' (2017) 25 (1) *Asia Pacific Law Review* 1.

⁷⁴ Judges often misinterpret standard trade finance terms and conditions of documentary instruments and undertakings, and therefore litigation is not considered as a preferred option for resolving trade finance disputes, see Manganaro (n 12) and Song (n 26).

⁷⁵ See Wang (n 73); Emma Yin, 'Blue book the dispute resolution mechanism for B&R was issued' (*Xinhua Finance Agency*, 12 October 2016) <http://en.xfafinance.com/html/13th_Five-year_Plan/Development_Policy/2016/267617.shtml> accessed 30 March 2018.

⁷⁶ Wang (n 73); Olga Boltenko, 'Resolving Disputes Along the Belt and Road: are the Battle Lines Drawn?' in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review* (Hong Kong International Arbitration Centre 2017); Sarah Grimmer and Christina Charemi, 'Dispute Resolution along the Belt and Road' (*Global Arbitration Review*, 22 May 2017) <<https://globalarbitrationreview.com/chapter/1141929/dispute-resolution-along-the-belt-and-road>> accessed 30 March 2018; Jessica Fei, Antony Crockett and Peter Chen, 'Facilitating The Belt and Road: CIETAC Launches Investment Arbitration Rules' (*Herbert Smith Freehills Arbitration Notes*, 4 December 2017) <<https://hsfnotes.com/arbitration/2017/12/04/facilitating-the-belt-and-road-cietac-launches-investment-arbitration-rules/>> accessed 30 March 2018.

Generally, within the BRI, at least three distinct types of dispute might arise: between states, between investor(s) and states and commercial disputes between private actors.⁷⁷ Trade finance disputes are especially likely to arise in the latter category.

In this regard, the ICC is famous for its high-class dispute resolution services for private commercial parties. In fact, nearly two thirds of the BRI member states⁷⁸ have a national committee established within the ICC. Therefore, ICC dispute resolution services should be familiar to the majority of BRI companies.

Of all the ICC's products particular attention should be given to DOCDEX, which is likely to be of substantial interest to companies from the BRI. The primary reason for that is, of course, the fact that DOCDEX allows the parties to escape the issue of conflict of law.

Additionally, DOCDEX has a variety of other advantages: it is cost effective and speedy, its procedural rules are clearly defined and the *stare decisis* doctrine is followed. Today DOCDEX decisions are widely recognised as an authoritative source of international trade finance practice and provide additional strength to a party's position if used in courts.

However, a number of limitations of the system has been also identified. Most notably, there are some reservations applicable to the existing scope of the system, which may result in unavailability of DOCDEX application to each and every trade finance dispute, as provided by the DOCDEX Rules. The issue of DOCDEX Decisions being non-binding is also quite controversial.

Overall, for the purposes of the BRI, DOCDEX can be a very convenient platform for resolution of trade-finance disputes in connection with various documentary instruments and undertakings. Greater efficiency and speed can be achieved in the resolution of trade finance disputes with the introduction of the specific requirement for mandatory submission of any disputed trade finance matter between private actors (such as companies and banks) to DOCDEX or its alternative prototype model established specifically for the BRI, rather than to mediation, arbitration or litigation.

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⁷⁷ Evgeny Rashevsky, 'When "One Belt One Road" project disputes arise, who will resolve them?' (*Practical Law Arbitration Blog*, 23 November 2017) <<http://arbitrationblog.practicallaw.com/when-one-belt-one-road-project-disputes-arise-who-will-resolve-them/>> accessed 30 March 2018.

⁷⁸ See the list of the current member states at 'Country Profile' (*Hong Kong Trade Development Council*) <<http://beltandroad.hktdc.com/en/country-profiles/country-profiles.aspx>> accessed 30 March 2018.

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