



## INSIGHT

May 2015

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**IBA Annual Conference, « Resolving Commercial Disputes in the Arab Region — The State of Arbitration, Litigation, Mediation, and Enforcement in the Middle East”, 5 October 2015, Vienna.**

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## The new DOCDEX Rules

Across the world, banks and businesses engage in commercial dealings for considerable amounts and under a broad variety of terms. They expect their dealings to self-liquidate in a peaceful conclusion that would both be profitable to the parties and an incitation to engage into further dealings. From time to time, however, disagreements may emerge on a point of law or fact, and points of view or interests may differ between the parties. Good faith negotiation often takes care of the difference. But some disagreements evolve into a dispute and need to be submitted to a neutral forum for resolution.



It would be wrong however to consider that resorting to court litigation or to binding arbitration to put an end to the dispute is a fatality. An alternative exists. It can take the form of any of the alternative dispute resolution methods (ADR) where a neutral third person gives her expert view as to what a just solution would be.

In principle, an ADR decision is not binding. This essential characteristic frees the third person facilitating the settlement from the rigid shackles of due process and allows her to devise a flexible approach to communicating with the parties and expressing her views. In choosing an ADR, the parties compromise in no manner on

their position. But they avoid turning into enemies as is unfortunately the case when the dispute is submitted to courts. Dispute settlement becomes a friendly act!

ICC's DOCDEX is one of those ADR. First issued in 1997, and revised in 2002, the rules for Documentary Credit Dispute Resolution by Expertise gradually grew to become a trusted dispute resolution system for documentary credits, demand guarantees and collections that are governed by ICC Banking Commission rules. Jointly created by the Banking Commission and the ICC International Court of Arbitration, DOCDEX is administered by the International Center for ADR. Since its inception, 150 decisions were rendered by DOCDEX panels and helped avert costly and protracted litigation.

Over the years, the original rules showed their limits whether in terms of managing the expert appointment process, dealing with unwarranted delays or struggling to find an answer to unexpected procedural challenges. The commitment of ICC Center for ADR staff and the availability of the Banking Commission Technical Advisor and Officers ensured that a satisfactory answer was found in each case. But a more perennial solution needed to be found and implemented. It could only be brought by a comprehensive revision of the rules, in both their scope and administration.



## The new DOCDEX Rules

Jointly drafted by banking and dispute resolution experts, the new DOCDEX rules offer the world of trade finance more transparency, straightforwardness and ability to cope with today's increasingly litigious world while embracing the traditional features of DOCDEX.

**An enlarged scope.** Originally, DOCDEX was limited to interpreting and applying Banking Commission rules in a disputed context where the parties are prevented by the existence of the dispute from submitting a query for an official Commission opinion. The idea was that no one can be better suited to indicate how to apply the rules than the rules' own drafters. Meritorious as it is, that approach left large segments of trade finance transactions outside the scope of DOCDEX. This was either the result of a lack of Banking Commission rules dedicated to a particular type of transactions, as in the case of trade loans, syndications, negotiable instruments, risk purchase agreements or countertrade, or because the dispute concerned an aspect of the transaction that was not covered in the relevant ICC rules, such as authority, conflicts of priority, governing law or fraud in a letter of credit. Not only has this restrictive approach caused frustration to parties declared to be ineligible to the DOCDEX system, but it was difficult to justify when seeing the wealth of expertise that the Banking Commission enjoys in trade finance in general, far beyond the rules that it has so far issued. Building on

the untapped expertise in the Commission, the new DOCDEX rules enjoy an enlarged scope that make them available to any trade finance-related dispute whether or not a set of Banking Commission rules applies.

**More transparency.** The appointment of experts process was profoundly revised. Prospective experts are now required to state from the inception their availability, independence and impartiality to serve as appointed experts. If any expert fails to abide by the rules, the Center is empowered to replace him. The Technical Advisor enjoys new enlarged powers, including in terms of scrutinizing the decision. To that end, his independence will also be verified at the outset by the Center. A number of ethical safeguards are added to the process to ensure that a person having served as DOCDEX expert is barred from any further involvement in the dispute under any other capacity. Moreover, in the interest of transparency, but also of standardization and education, redacted DOCDEX decisions will be published more regularly and promptly after being rendered.



**More straightforward processing.** One of the key attractiveness of DOCDEX is the rapidity of the decision rendering process: 30 days from the experts' receiving the file. The new rules offer a new approach to the various submissions and communications



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by imposing the principle of electronic submissions according to standard templates available on-line. This change is expected to curb administrative delays and ultimately result in faster and better processed proceedings.

*Confirming the key characteristics of DOCDEX.* Many of DOCDEX's original rules proved over the years to be the right choice. They have brilliantly passed the test of a broad variety of disputes. Those founding features of DOCDEX were kept in the revised rules and, where necessary, clarified or reinforced. This is the case of the non-binding character of a DOCDEX decision unless the parties otherwise agree in their contract or at any stage of the dispute. It is also the case of the respective contributions by the Technical Advisor and the Center to the appointment of experts process. And, finally, the scrutiny of the

decision stage is reinforced to ensure that, in parallel to the experts' power to freely decide on the dispute, care is made to standardizing the decisions and their compliance with the Commission rules and opinions.

The new DOCDEX rules were unanimously adopted both by the ICC Arbitration Commission and by the ICC Banking Commission. They come into force on 1 May 2015 and are immediately available for use by banks and their customers in relation to trade finance disputes.

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