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## Developing a Documentary Credit Dispute Resolution System: An ICC Perspective

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# Developing a Documentary Credit Dispute Resolution System: An ICC Perspective

S. Isabella Chung

## **Abstract**

Spurred by the expansion of world trade and the increasing number of disputes involving documentary credits – a global market now estimated at a staggering US\$500 billion in letters of credit outstanding – the International Chamber of Commerce’s (“ICC”) is currently developing rules for the resolution of disputes arising from letters of credit issued under the Uniform Customs and Practices for Documentary Credits (“UCP”). The ICC’s ongoing work in this area raises a host of issues related to the sufficiency of existing dispute resolving mechanisms. The ICC’s initiative also provides a useful platform for evaluating the benefits and problems of taking an “industry-based” approach to the resolution of a specific class of disputes. This Essay will describe some of the issues raised by the ICC’s work in this area, including: (1) the ICC’s motivation in undertaking this effort; (2) its role and interest in harmonization of commercial practices as embodied by the UCP; (3) the various options the ICC considered in determining the most appropriate form of dispute resolution for documentary credits; and (4) certain issues raised in the current arbitration rules-drafting process.

## ESSAYS

# DEVELOPING A DOCUMENTARY CREDIT DISPUTE RESOLUTION SYSTEM: AN ICC PERSPECTIVE

*S. Isabella Chung\**

### INTRODUCTION

The importance of extra-judicial mechanisms for resolving international commercial disputes is virtually uncontested, as evidenced both by the breadth of scholarship dedicated to the issue and the record-breaking increases in the number of parties resorting to non-litigious dispute resolving mechanisms each year.<sup>1</sup> In this context, arbitration, with its ability to render a binding and enforceable award, has emerged as the predominant and even favored dispute resolving mechanism.<sup>2</sup> Certain commentators have even referred to international arbitration as a “universally understood, readily definable process recognized

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1. See, e.g., *1994 Statistical Report*, ICC INT'L. CT. ARB. BULL., May 1995, at 3. The International Chamber of Commerce (“ICC”) International Court of Arbitration received a record number of new cases in both 1994, when it filed 384 cases, and in 1995, when the number of new cases filed exceeded 400. *Id.* See generally WILLIAM LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (1990) [hereinafter ICC ARBITRATION]. New cases filed in 1995 in other major arbitral institutions reflect this surge in international arbitrations. For example, in 1995 there were 902 cases filed with the China International Economic Trade and Arbitration Commission (“CIETAC”), 150 cases filed with the Hong Kong International Arbitration Centre (“HKIAC”), and 200 cases filed with the American Arbitration Association (“AAA”). Materials on International Commercial Arbitration, (Feb. 28, 1996) (from Debevoise and Plimpton and Price Waterhouse LLP Seminar on Developments in International Arbitration) (on file with the *Fordham International Law Journal*).

2. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention]. See, e.g., William P. Park, *When the Borrower and the Banker Are At Odds: The Interaction of Judge and Arbitrator in Trans-border Finance*, 65 TUL. L. REV. 6 (1991) [hereinafter *Transborder Finance*]; Michael Hoellering, *World Trade To Arbitrate or Mediate — That is the Question*, DISP. RES. J., Mar. 1994, at 67.

as such amongst the global trading community.”<sup>3</sup>

While such characterizations are supported by the consistent use of arbitration by certain select trading communities, including, for example, the construction industry and other commercial sectors that have traditionally taken their disputes to arbitral forums,<sup>4</sup> it may be questionable when seen from the perspective of the banking or financial services community. These fields have had little experience with international arbitration and, in fact, have demonstrated a marked tendency to avoid arbitration, preferring resolution by national courts.<sup>5</sup> Whether the reluctance of banks and other financial services institutions has been based upon substantive deficiencies of arbitration or, conversely, on the lack of information and understanding regarding the benefits of arbitration and other non-judicial procedures are among the questions raised by the International Chamber of Commerce’s<sup>6</sup> (“ICC”) ongoing work on the subject

3. Sir Laurence Street, *The Language of Alternative Dispute Resolution*, Address Before the Chartered Institute of Arbitrators’ 75th Anniversary Conference, London (Oct. 4, 1990), in 66 *AUSTRAL. L. J.* 144, 145 (1992).

4. See *1994 Statistical Report*, *supra* note 1, at 5. The ICC Court publishes a statistical breakdown of the number and percentage of disputes submitted to it each year on the basis of industry sector and type of dispute. Construction and engineering contracts accounted for 17.9% of all ICC cases in 1994. *Id.* See, e.g., *AMERICAN ARBITRATION ASSOCIATION, CONSTRUCTION INDUSTRY DISPUTE REVIEW BOARD PROCEDURES OF THE AMERICAN ARBITRATION ASSOCIATION* (1993).

5. See *Transborder Finance*, *supra* note 2, at 1324-26. Professor Park’s paper looks specifically at the loan enforcement process from the lender’s perspective, stating that bankers may resist arbitration clauses at least in part because these clauses reduce a lender’s ability to invoke summary procedures. *Id.* at 1325. Interim measures of protection, such as pre-award attachment of assets, may be similarly unavailable to lender banks who agree to arbitration clauses since some jurisdictions may consider such measures as incompatible with arbitration agreements covered by the New York Convention. *Id.* Professor Park, however, takes the position that several considerations render arbitral awards, in some cases, to be favorable to court judgements. These include the difficulty in enforcing foreign judgements, “act of state” and sovereign immunity defenses to payment, and increases in lender liability litigation in the United States. *Id.* at 1325-26.

The statistics of the ICC International Court of Arbitration indicate a low proportion of cases involving finance, mergers and acquisitions, insurance, and other related contracts, all accounting for only 11.7% of the disputes submitted in 1994. See *1994 Statistical Report*, *supra* note 1, at 5.

6. The ICC is a global, non-governmental business organization with over 60 affiliates, or National Committees, around the world. Among the ICC’s various institutions discussed in this Essay are: the ICC Banking Commission, the ICC International Court of Arbitration, and the ICC Centre for Expertise. The ICC and its above-mentioned institutions are headquartered at 38 Cours Albert 1er, 75008 Paris. Further information regarding the ICC and its activities can be obtained by contacting its U.S. affiliate, the

of documentary credit dispute resolution.

### I. THE ICC'S EXAMINATION OF A DISPUTE RESOLUTION SYSTEM FOR LETTERS OF CREDIT

Spurred by the expansion of world trade and the increasing number of disputes involving documentary credits<sup>7</sup> — a global market now estimated at a staggering US\$500 billion in letters of credit outstanding<sup>8</sup> — the ICC is currently developing rules for the resolution of disputes arising from letters of credit issued under the Uniform Customs and Practices for Documentary Credits ("UCP").<sup>9</sup> The ICC's ongoing work in this area, which is being conducted by an ICC Working Party<sup>10</sup> composed of members of the ICC Banking Commission<sup>11</sup> ("Banking Commission"

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U.S. Council for International Business, at 1212 Avenue of the Americas, New York, NY, 10036.

7. See James E. Byrne, *Letters of Credit*, 43 BUS. LAW. 1353, 1353 (1988) (stating that perhaps most significant development affecting law of letters of credit was increase in amount of litigation and that more letter of credit opinions were reported in 1987 than in first seventy-five years of this century). See, e.g., Boris Kozolchyk, *U.C.C. Article 5 Symposium: Strict Compliance and the Reasonable Document Checker*, 56 BROOK. L. REV. 45, 49 (1990) [hereinafter *U.C.C. Article 5 Symposium*]. Kozolchyk further states that the spiraling costs and "seemingly endless litigation cycles" experienced by U.S. banks have led, in some cases, to the abandonment of letter of credit operations. *Id.* at 49.

8. James G. Barnes & James E. Byrne, Address at the Baker & McKenzie Conference on Letter of Credit Disputes 13-14 (Jan. 23, 1996) (transcript on file with the *Fordham International Law Journal*).

9. In November 1994, the ICC Banking Commission approved the establishment of an ICC Ad Hoc Working Party on the Feasibility of the Documentary Credit Resolving Conflict System to examine the necessity and feasibility of establishing a specific dispute resolution system for international letter of credit disputes. ICC Commission on Banking Technique and Practice, Summary Record of Meeting on November 3, 1994, at 6 (Dec. 23, 1994) (ICC Doc. No. 470/718) [hereinafter ICC Banking Commission Summary Record].

10. The ICC customarily establishes a "Working Party" to carry out its substantive policy or rule-making activities, members of which are appointed by the various National Committees. The members of the ICC Working Party dedicated to a documentary credit conflict resolution system are delegates from eight countries, including: the United States, Germany, Italy, Sweden, Denmark, Singapore, and Ireland. See ICC Commission on Banking Technique and Practice, Provisional List of Participants 1-2 (Mar. 29, 1995) (ICC Doc. No. 470-42/1, Annex 1). The members also include individuals representing major banks, banking lawyers representing banks in-house or private practice, national banking associations, and individuals bringing expertise in both arbitration and banking law. *Id.* Regular observers at the Working Party's meetings have included representatives of the ICC International Court of Arbitration and the ICC International Centre for Expertise.

11. See generally INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL COMMERCIAL POLICY AND TECHNIQUES DEPARTMENT FACTSHEET ON BANKING TECHNIQUE AND PRACTICE 1 (1993) [hereinafter ICC BANKING FACTSHEET]. The ICC Banking Commission

or "Commission") in conjunction with the ICC International Court of Arbitration<sup>12</sup> and International Centre for Expertise,<sup>13</sup> raises a host of issues related to the sufficiency of existing dispute resolving mechanisms. The ICC's initiative also provides a useful platform for evaluating the benefits and problems of taking an "industry-based" approach to the resolution of a specific class of disputes.

This Essay will describe some of the issues raised by the ICC's work in this area, including: (1) the ICC's motivation in undertaking this effort; (2) its role and interest in harmonization of commercial practices as embodied by the UCP;<sup>14</sup> (3) the various options the ICC considered in determining the most appropriate form of dispute resolution for documentary credits; and (4) certain issues raised in the current arbitration rules-drafting process.<sup>15</sup>

#### A. *Institutional Considerations: The ICC Banking Commission*

Prior to developing an entirely new set of dispute resolving rules for documentary credit disputes, the ICC considered whether this initiative was justified. From the ICC's standpoint, the relevant criteria for establishing a separate set of dispute

operates within the ICC's Department of Commercial Policy and Techniques. *Id.* The Banking Commission meets bi-annually on a commission-wide basis, while its sub-groups, principally in the form of Working Parties dedicated to specific policy and rules-harmonization activities, generally meet with greater frequency. *Id.*

12. Created in 1923, the ICC Court of Arbitration received over 6700 requests for arbitration by 1990. *The ICC International Court of Arbitration: An Overview*, ICC INT'L CT. ARB. BULL., June 1990, at 3.

13. The ICC Centre for Expertise, established by the ICC in 1976, functions to identify and appoint experts and offers a procedure for expert determination in accordance with its Rule for Expertise. *The New Rules of the ICC International Centre for Expertise*, ICC INT'L CT. ARB. BULL., May 1993, at 55. Disputes may be submitted to the ICC International Centre for Expertise either mutual agreement after a dispute has arisen or by a contractual undertaking to refer disputes to the ICC Rules for Expertise prior to submitting a dispute to arbitration. *Id.* at 55-56. The substantive provisions of the ICC Rules for Expertise include articles on the appointment of Experts, the Expert's brief, notification of final report, value and evidentiary strength of the Experts' report, and costs. See INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 520, ICC RULES FOR EXPERTISE (1993) [hereinafter ICC RULES FOR EXPERTISE].

14. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 500, UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS (1993) [hereinafter UCP].

15. Given that the rules are still in development and certain comments are based upon my personal observations of the activities of the ICC Banking Commission and Working Party, I will limit discussion of the substantive provisions of the draft rules to those elements that have been discussed publicly by members of the Working Party.

resolving rules would be: (1) a demonstrated need for such a mechanism; (2) a strong likelihood that the banking industry would submit their disputes to such a mechanism; (3) the existence of claims that justify the expense of introducing such a set of rules; and (4) the availability of facilities for administering the system.

The ICC Banking Commission is uniquely situated to assess the need for, and viability of, a documentary credit dispute resolution system. As a global industry association, the Banking Commission has long provided a forum in which its members could voice their concerns. In this case, members of the Banking Commission had consistently flagged the problem of the ever-increasing number of documentary credit disputes.<sup>16</sup> Given the Banking Commission's broad international constituency, it could readily investigate the scope and nature of the problem from a multicultural vantage point. Additionally, it could provide a problem-solving process that involved the direct participation of banks, thereby enhancing the likelihood of establishing a dispute resolution system ultimately acceptable to, and utilized by, the system's eventual users.

Examining the issue of documentary credit disputes within the framework of the ICC Banking Commission also offered banks and trade finance institutions the distinct advantage of turning to an institution highly experienced in developing self-regulatory principles. The development and promotion of self-regulatory rules has long been a core activity of the ICC Banking Commission.<sup>17</sup> It has, over the years, actively addressed critical standards for international banking operations in the context of trade finance.<sup>18</sup> The Banking Commission's efforts have yielded industry standards in numerous areas of banking practice, including documentary credits,<sup>19</sup> bank-to-bank reimbursements,<sup>20</sup> and collections.<sup>21</sup> Thus, in addressing the issue of dispute reso-

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16. ICC Banking Commission Summary Record, *supra* note 9, at 6.

17. ICC BANKING FACTSHEET, *supra* note 11, at 1.

18. *See id.*

19. UCP, *supra* note 14.

20. INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES FOR BANK TO BANK REIMBURSEMENTS (forthcoming in 1996). These Rules were completed in 1995.

21. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 322 (1978), *revised* PUB. NO. 522, UNIFORM RULES FOR COLLECTIONS (1995) (all citations are to Pub. No. 522 (1995) unless otherwise noted). The Uniform Rules for Collections describe the conditions governing collections including presentation, payment, and acceptance terms. *Id.* at

lution for documentary credits, the Banking Commission could further draw upon its substantial expertise in rules development and drafting.

B. *Empirical Evidence of the Rise of Letter of Credit Disputes*

The Banking Commission's decision to examine the issue of a documentary credit dispute resolution system was also based on first-hand empirical evidence, which demonstrated the need for an international dispute resolution procedure for letter of credit disputes. Over the years, the Banking Commission received numerous requests by banks seeking the resolution of letter of credit disputes.<sup>22</sup> Although the Banking Commission lacked procedures for handling these disputes, their number and volume provided substantial evidence of a growing need for an international dispute resolving system specifically geared toward letter of credit disputes.<sup>23</sup>

A random sampling of the claims submitted to the ICC revealed submissions of claims from parties deriving from over thirty-five countries.<sup>24</sup> Significantly, a large proportion of claims submitted to the Banking Commission involved bank-to-bank disputes<sup>25</sup> in which the party banks were located in different countries.<sup>26</sup> Claims on multiple letters of credit arose frequently, in which case payment on the letters of credit was due either from the same opposing party or from multiple opposing

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13-14, 20. The articles also specify the responsibility of a bank regarding protest, case of need, and actions to protect merchandise. *Id.* at 16, 24-25.

22. Parties to conflicts involving letters of credit issued under the UCP have contacted the Banking Commission seeking their resolution. *See International Chamber of Commerce, Analysis of Claims Received by the ICC Banking Commission 1-2 (July 1995) (ICC Doc. No. 470-42/INT.20) [hereinafter Analysis of ICC Banking Claims] (noting number of incoming claims).*

23. Several commentators have remarked on the increased amount of litigation surrounding letters of credit generally. In some cases, however, this increase has been attributed to the growing number of parties involved in the letter of credit transaction. *See, e.g.,* Edgardo Colon, *Letters of Credit in Times of Business and Bank Failures*, 107 *BANKING L.J.* 6 (1990); Stanley F. Farrar & Henry Landau, *U.C.C. Survey: Letters of Credit*, 40 *BUS. LAW.* 1177 (1985) (noting that cases tended to deal with issues of non-conforming documents or fraud in transaction, as well as rise in bank failures of period).

24. Analysis of ICC Banking Claims, *supra* note 22, at 1-3.

25. *Id.*

26. *Id.* at 2. An informal statistical analysis of letter of credit claims received by the ICC Banking Commission indicated that a high proportion of disputes submitted to the ICC were bank-to-bank disputes, as distinct from disputes between banks and non-bank parties, including an applicant or beneficiary to a letter of credit transaction.



parties.<sup>27</sup> Together, records of these claims constitute a valuable resource for determining the character of disputes that typically arise in the context of international documentary credits, as well as the feasibility of administering a specialized system for their resolution.

C. *Letters of Credit and the UCP: The ICC's Activities in Rules Harmonization*

Beyond the articulated needs of its members, the Banking Commission's seminal role in developing the UCP rules for documentary credits, now incorporated into virtually all international letters of credits issued worldwide,<sup>28</sup> may have further contributed to its interest in addressing the issue of dispute resolution. First published in 1933, the UCP rules are among the ICC's most influential efforts in harmonization of international commercial practices in the form of industry code.<sup>29</sup> The UCP evolved from the world banking community's recognition that uniform procedures needed to be established to govern their use of commercial letters of credit.<sup>30</sup> Most international banks

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27. *Id.*

28. ICC BANKING FACTSHEET, *supra* note 11. See Helen Dams Chaitman & Jeff Govern, *Enjoining Payment on a Letter of Credit in Bankruptcy: A Tempest in a Twist Cap*, 38 BUS. LAW. 24 (1982).

29. UCP, *supra* note 14. See, e.g., ICC BANKING FACTSHEET, *supra* note 11. Commercial letters of credit are issued regularly in the course of international trade transactions by banks as a means of guaranteeing payment between buyer and seller. JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* 4-8 (2d ed. 1991). In typical international letter of credit transactions, a letter of credit is issued by a bank (the "issuing bank") at the request of a buyer (the "applicant") who transacts with a seller of goods in another country (the "beneficiary") in exchange for payment through a letter of credit. LAZAR SARNA, *LETTERS OF CREDIT: THE LAW AND CURRENT PRACTICE* 29 (3d ed. 1992). The issuing bank, often located in the buyer's country, is obligated to pay the seller upon presentation of the documents specified in the letter of credit up to a specified amount. *Id.* To facilitate payment, a second bank, located in the seller/beneficiary's country (the "confirming bank") is designated by the issuer to confirm the letter of credit, or to pay or negotiate drafts drawn under it, in which case the bank is known as the nominated bank. *Id.* The "independence" principle protects banks in their letter of credit transactions from claims raised on the underlying contract by a beneficiary or applicant. DOLAN, *supra*, at 4-8. Although the parties disputing the credit transactions may be the real parties of interest in the underlying contract, the choice of law in the underlying contract does not control the ensuing credit litigation. *Id.*

30. The ICC began studying documentary credits in 1926 and eventually drafted procedures for their handling. The original ICC committee report was published in 1920 as the "Uniform Regulations for Commercial Documentary Credits." In 1933, the ICC reviewed and finalized its recommendations as the "Uniform Customs and Practices for Commercial Documentary Credits." See David J. Kalson, *The International Mone-*

have accepted the UCP and include it as a standard provision in their letters of credit.<sup>31</sup>

The UCP is unique in that it is not tied to a particular national regime, and, therefore, is not legislative in nature.<sup>32</sup> Rather, it is a set of industry rules that banks and trade finance institutions submit to voluntarily through express provision in the terms of a commercial letter of credit.<sup>33</sup> All evidence, therefore, indicates that the UCP rules constitute a defined and reliable supranational code<sup>34</sup> that is often given the force of law.<sup>35</sup> Many national courts and legislatures recognize the UCP principally because these UCP rules reflect existing and understood

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*tary Fund Agreement and Letters of Credit: A Balancing of Purpose*, 44 U. PITT. L. REV. 1061, 1066 (1988) (discussing history of ICC Uniform Regulations). See, e.g., Egon Guttman, *U.C.C. Article 5 Symposium: Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOK. L. REV. 167, 172-73 (1990) (indicating that ICC succeeded in developing rules to govern documentary letters of credit). Instruments of transnational finance, letters of credit nearly always involve parties in different jurisdictions, often on different continents.

31. See, e.g., Peter S. Smedresmen & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 773, 796-97 (1989) (acknowledging that many international banks have accepted UCP and generally cite it in letter of credit documentation as governing issuance of documentary credits). The ICC maintains a list of countries that have formally announced their recognition and adherence to the UCP. This list is periodically updated and may be obtained by contacting ICC or the U.S. Council for International Business. Readers should be cautioned, however, that a country's adherence to the UCP does not obviate the necessity of including formal language referencing the UCP within the letter of credit itself.

32. UCP, *supra* note 14. See generally Stanley F. Farrar, *Letters of Credit*, 39 BUS. LAW 1319, 1328-30 [hereinafter *Letters of Credit*] (discussing problems with invoking UCP's election).

33. *Id.* Although it is not the product of national legislation, most courts treat the UCP as if it were legislation. The UCP, however, does not automatically apply to a transaction, but is only triggered when the parties to a transaction agree that the UCP will govern and include a provision to that effect in the letter of credit itself.

34. International trade has historically relied upon *de facto* unity based on *lex mercatoria*, or international commercial custom. Norbert Horn, *Uniformity and Diversity in the Law of International Commercial Contracts*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 4, 15-16 (Norbert Horn & Clive M. Schmitthoff eds., 1982). See, e.g., *Pillans v. van Mierop* 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765) (Mansfield, C.J.) (holding that rules of law merchant are questions of law to be decided by court). See also *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842); MATTI KURKELA, LETTERS OF CREDIT UNDER INTERNATIONAL TRADE LAW: UCC, UCP AND LAW MERCHANT 128 (1985) ("the uniformity of the theories . . . would justify an attempt to form some kind of *lex mercatoria* of private international law in the field of letters of credit").

35. In the United States, § 1-102(3) of the Uniform Commercial Code ("UCC") allows parties to a letter of credit to give the UCP priority over the UCC where the latter does not otherwise provide. U.C.C. § 1-102(3); Farrar, *supra* note 32, at 1328.

industry practice.<sup>36</sup> The legitimacy of the UCP, therefore, derives from the parties' voluntary undertaking to a letter of credit rather than from state power.<sup>37</sup>

D. *Promoting Harmonization and the Uniform Interpretation of the UCP Through a Dispute Resolution System*

Significantly, the intent driving the UCP's development was not to formulate law. Instead, the UCP, through effecting a series of carefully wrought compromises amongst different nations and industry sectors, sought to articulate current industry practice.<sup>38</sup> This approach has been reiterated throughout the subsequent revision of the UCP rules, most recently in 1992, wherein the rules were updated to reflect evolving practices and technological innovations.<sup>39</sup> The effectiveness of the UCP rules have not, however, eliminated disputes arising in the normal course of letter of credit transactions.<sup>40</sup>

The fear of inconsistent application of the UCP rules by national courts, whether arising from misinterpretation or misapplication of the rules, has evoked substantial concern within the

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36. See Boris Kozolchik, *Letters of Credit*, in IX INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 5, Commercial Transactions and Institutions 10 (Jacob S. Ziegel ed., 1979). Bankers and courts of law continue to regard customary law as the primary source of letter of credit law.

37. The most interesting aspect of the choice and conflict of laws holdings surrounding letters of credit is the fact that these commercial divisions are treated with remarkable consistency in nearly all jurisdictions. See Kurkela, *supra* note 34; Robert Jay Gavigan, *Wysko Investment Company v. Great American Bank: A New Attack on the Usefulness of Letters of Credit*, 14 J. INTL. L. BUS. 184, 188 (1993).

38. See INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 511, UCP 500 AND 400 COMPARED (1993) [hereinafter UCP 500 AND 400 COMPARED]. See, e.g., Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, in 3 A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 1 (Walter Sterling Surrey & Don Wallace eds., 2d ed. 1983) (citing attempts at unification since 300 B.C.). See, generally, FRIEDRICH HAYEK, 1 LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 19, 77 (1973).

39. UCP 500 AND 400 COMPARED, *supra* note 38. The most recent revision, which resulted in the UCP 500, was the product of over three years of drafting and reflects a coordinated balance between the bank and transport industries, as well as the exporters and importers who utilize the rules. *Id.* See, e.g., ICC BANKING FACTSHEET, *supra* note 11 (stating that among articulated goals of drafters was simplification in order to minimize number of incidents whereby documents are rejected by banks on presentation).

40. See *Transborder Finance*, *supra* note 2, at 1323; see generally Kozolchik, *supra* note 36. When disputes arise and banks are compelled to seek remedy, they turn to national courts that have generally enforced the UCP provisions, though often with substantial variation.

ICC.<sup>41</sup> Notwithstanding the deference extended to the UCP rules in many jurisdictions throughout the world — in the United States, for example, states have enacted statutes with provisions exempting the application of Article 5 of the Uniform Commercial Code (“UCC”) when a letter of credit transaction is subject to the UCP<sup>42</sup> — the desire for greater uniformity in the interpretation and application of the rules has fueled the ICC’s efforts to establish a dispute resolution procedure.

## II. *EXAMINING THE OPTIONS: LIMITATION OF AVAILABLE DISPUTE RESOLVING MECHANISMS*

In evaluating different dispute resolution mechanisms, the Banking Commission first considered existing institutions and rules that could feasibly provide a system for the resolution of letter of credit disputes. In doing so, the ICC first distinguished between dispute resolution procedures that would result in binding awards and procedures that would result in non-binding determinations.<sup>43</sup> This distinction recognized that due process and other requirements would differ in the case of a binding versus a non-binding procedure, and that the choice between binding and non-binding procedures would therefore affect the proce-

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41. See Amy D. Ronner, *Destructive Rules of Certainty and Efficiency: A Study in the Context of Summary Judgement Procedure and the Uniform Customs and Practice for Documentary Credits*, 28 *LOV. L.A. L. REV.* 619, 626 (1995) (stating that “the provisions of the UCP . . . aim to promote certainty and efficiency not just with respect to the letter of credit as a payment mechanism, but also in connection with the resolution of disputes that arise when letter of credit transactions do in fact go awry”). See also Christopher W.O. Stoecker, *The Lex Mercatoria: To What Extent Does it Exist?*, *J. INT’L ARB.*, Sept. 1990, at 101, 108 (discussing applicability of non-nationally derived law in national courts). On the issue of standard of compliance alone, banks are now are unwilling to confirm irrevocable credits for fear of being denied reimbursement by a hypertechnical issuing bank. Many negotiating banks are similarly unwilling to negotiate beneficiaries’ drafts without recourse against the beneficiary and are only willing to act as beneficiaries’ collection agents. Kozolchik, *supra* note 36, at 46.

42. See N.Y. U.C.C. § 5-102(4) (McKinney 1991 & Supp. 1994) (permitting parties to choose applicability of UCP rules in lieu of UCC); ARIZ. REV. STAT. ANN. 44-2702(D) (1994) (repealed 1984) (renumbered 47-5102(D)) (allowing parties to govern their letter of credit transactions according to UCP); MO. ANN. STAT. 400.5-102(4) (Vernon 1994) (upholding UCP unless otherwise agreed).

43. Terms of Reference of the ICC Ad Hoc Working Party on the Feasibility of a Documentary Credit Resolving Conflict System 1 (Mar. 29, 1995) (ICC Doc. No. 470-42/2) [hereinafter ICC Working Party Terms of Reference]. See Draft Terms of Reference of the ICC Ad Hoc Working Party on the Feasibility of a Documentary Credit Resolving Conflict System (Jan. 21, 1995) (ICC Doc. No. 470-42/2/INT.1) [hereinafter Draft ICC Terms of Reference].

dural complexity, duration, and cost of the overall dispute resolving process.<sup>44</sup>

The Banking Commission then looked at the need and rationales for developing separate rules specifically tailored for the international banking industry.<sup>45</sup> The primary impetus for establishing new rules was the banks' dissatisfaction with available rules and procedures for dispute resolution. Frequent criticisms of the various existing methods of dispute resolution included the high costs,<sup>46</sup> the corporate time spent in support of litigation, the duration of disputes, the use of "scorched earth" tactics that fail to preserve the business relationship, the risk of judicial review, and the opposition to enforcement.<sup>47</sup> Many of these criticisms would become determinative in dictating the Banking Commission's decision to further examine the establishment of an entirely new dispute resolution system. Finally, the Banking Commission considered the other possible characteristics that could be included in a dispute resolution procedure system, specifically contemplating characteristics that would render the system better suited to the administration of documentary credit disputes.<sup>48</sup> In this context, the Banking Commission identified and evaluated the benefits of expert procedures, limitations on evidentiary submissions, and the feasibility of a documents-only procedure.<sup>49</sup>

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44. Draft ICC Terms of Reference, *supra* note 43, at 2-3.

45. On the whole, the mechanisms available to the international banking community for resolving their disputes are no different than those accessible to any other international commercial participant. *Id.* On the one hand, litigation, though effective, has become an increasingly unattractive alternative primarily from the fear of delay and extraordinary costs. *Id.* Arbitration has similarly been perceived as a poor substitute, although possibly for reasons of procedural unfamiliarity as well as cost-related concerns. *Id.*

46. Given that new developments in the world of alternative dispute resolution ("ADR") are very often the result of new pressures, mainly of an economic kind, quantitative criteria remain highly relevant in assessing the need for a separate dispute resolution system for letters of credit. In general, commercial letter of credit claims may range anywhere from US\$50,000 to greater than US\$5 million. Analysis of ICC Banking Claims, *supra* note 22, at 1-2. Increasingly, the needs of commercial actors whose claims may not require or justify highly sophisticated and costly solutions need to be addressed. This point is amplified when looking at the statistics provided by the ICC International Court of Arbitration in which the highest proportion of disputes, 32.5 %, in 1994 involved claims ranging from US\$1 million to US\$10 million. *1994 Statistical Report*, *supra* note 1, at 5.

47. See *Transborder Finance*, *supra* note 2, at 1323-25.

48. Draft ICC Terms of Reference; *supra* note 43, at 1-3.

49. *Id.* at 2.

A. *International Arbitration as a Potential Forum*

Arbitration, in particular, has long been relied upon by commercial participants worldwide as an indispensable procedure for resolving their cross-border conflicts.<sup>50</sup> The proliferation of options available globally with regard to arbitral institutions and rules demonstrates the virtual "coming of age" of international arbitration.<sup>51</sup> One of the most distinguishing aspects of arbitration is its non-appealability, given its capacity to render a final and binding award.<sup>52</sup> Its multilateral legitimacy has further placed international arbitration on a footing equal to, and in some cases exceeding, proceedings by national courts.<sup>53</sup>

Despite the significant advantages offered by existing arbitration mechanisms,<sup>54</sup> the fact remains that institutions such as

50. See, e.g., Michel Gaudet, *The International Chamber of Commerce Court of Arbitration*, 4 INT'L TAX & BUS. LAW 213, 213 (1986).

51. Among the major institutions offering international arbitration services are the American Arbitration Association, the ICC International Court of Arbitration, the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce, CIETAC, and numerous other regional institutions offering a wide range of arbitration and dispute resolution services. In addition, the United Nations Commission on International Trade Law ("UNCITRAL") and the International Centre for Settlement of Investment Disputes ("ICSID") rules continue to be utilized in the context of international arbitration. The ICC International Court of Arbitration recently announced that the number of new cases filed in 1995 stood at 400 as of January 20, 1996, surpassing their prior record of 385, achieved in 1994. Telephone Interview with Benjamin Davis, Counsel of the ICC International Court of Arbitration (Jan. 21, 1996).

52. See, e.g., New York Convention, *supra* note 2, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 42. In contrast to domestic arbitration, the status of international arbitration vis a vis other "non-arbitral" dispute resolution systems is affected by the treaties and extensive international legal support for arbitral awards at the enforcement stage. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 183 (1994). See, e.g., *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854) ("arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal").

53. For example, one commentator has emphatically insisted that arbitration is a form of international litigation and should not be confused or included for ideological purposes with alternative dispute resolution. Jan Paulsson, *What Does the Growth of ADR Mean for Traditional Arbitration?*, in INTERNATIONAL ARBITRATION FOR TODAY & TOMORROW 117, 117 (John A. Tackaberry ed., 1991) [hereinafter *Growth of ADR*]. In some cases, arbitration will provide greater certainty for parties than litigation, given that court judgements are subject to appeal where they may be reversed or even referred to a higher appellate court. Herve Charrin, *The ICC International Centre for Expertise: Realities and Prospects*, ICC INT'L. CT. ARB. BULL., Nov. 1995, at 42; see *Transborder Finance*, *supra* note 2.

54. In the case of the ICC, it is clear that any party choosing to submit its dispute to an established arbitral institution would benefit greatly from such institution's vast re-

the ICC International Court of Arbitration,<sup>55</sup> which settle a large share of major transnational sales contract, joint venture, and licensing disputes, have not been able to overturn the historical reluctance of banking and other financial services institutions to submit to international arbitration.<sup>56</sup> To explain this reluctance, the Banking Commission first examined available arbitration procedures and rules. In most cases, the Banking Commission found that existing arbitration systems were designed to provide a range of sophisticated services capable of resolving even the most complex cases.<sup>57</sup> In fact, many available arbitration procedures were intended to be "open" or "universal" systems, in order to provide users with a flexible process that is adaptable to even the most complex, sophisticated disputes.<sup>58</sup> However, Banking Commission members questioned whether such "full-

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sources and the assurance of an enforceable award. See Gaudet, *supra* note 50, at 213 (stating that ICC, with respect to its organization and rules, has been designed specifically to meet needs of international arbitration). Cf. William Laurence Craig, *Relationship Between ADR and Arbitration*, in INTERNATIONAL ARBITRATION FOR TODAY & TOMORROW 241 (John A. Tackaberry ed., 1991) (stating that arbitration is, in fact, best suited in those fields where parties have common trade background and participants in arbitral process have shared expertise). See, e.g., Paulsson, *supra* note 53.

The authority of an arbitrator to apply UCP rules in the course of arbitral proceeding is supported by the Supreme Court's decision in *Scherck v. Alberto-Culver Co.*, which recognized that adherence to the New York Convention indicated the encouragement and recognition of arbitration agreements and the development of uniform principles of recognition. 417 U.S. 506, 520 (1974); see generally Serge Gravel, *Arbitration Within the NAFTA Area: Current Difficulties and Future Trends*, ICC INT'L. CT. ARB. BULL., Oct. 1993, at 2, 47 (discussing *Scherck* case). An arbitral panel would thereby be able to give effect to the designation of international doctrines, including trade usages and *lex mercatoria*. Yves Derains, *Choice of Law Applicable to the Contract and International Arbitration*, ICC INT'L CT. ARB. BULL., May 1995, at 10, 15. Thus, there is little basis for asserting that existing arbitration or conciliation procedures would not, on procedural or substantive grounds, be capable of effectively resolving such disputes.

55. See *supra* note 12 and accompanying text (discussing ICC International Court of Arbitration).

56. See 1994 Statistical Report, *supra* note 1, at 5 (noting low percentage of cases before Court in financial services field).

57. At first glance, arbitration should be well adapted to resolving disputes in a technical context, such as documentary credit disputes, provided that the sole arbitrator or arbitral tribunal is well constituted. With regard to the capability of most major international arbitral forums, there is little question that such letter of credit disputes can be effectively resolved under the existing rules. There may also be instances in which the particular attributes of a letter of credit conflict may, in fact, be better suited for arbitration than non-arbitral procedures, particularly in cases involving a bank and applicant or beneficiary or issues such as fraud in the transaction.

58. ICC ARBITRATION, *supra* note 1, at 3-5 (describing essential features of arbitration under Rules of ICC to include "universality," which holds that "the type of transnational commercial dispute that may be resolved by ICC arbitration is not limited by the

service" arbitration procedures were best-suited to adjudicating classes of disputes involving specialized industry rules and practice.<sup>59</sup> Furthermore, it remained unclear whether available arbitration rules offered either the most efficient or effective process for resolving a relatively narrow class of disputes sharing common characteristics.<sup>60</sup>

Members also recognized the fundamentally adjudicatory nature of arbitration proceedings and its attendant due process requirements.<sup>61</sup> Furthermore, the speed and effectiveness of the procedures would greatly depend on the experience and capabilities of the arbitrator or panel of arbitrators. Thus, which party has greater access to arbitrators with the requisite experience may be outcome determinative.<sup>62</sup> In this respect, the risks involved could be comparable to litigation — namely, a high degree of uncertainty and likelihood of considerable costs.<sup>63</sup>

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nature of the parties' businesses, nor their nationality, nor indeed whether they are in the private or public sector").

59. Draft ICC Terms of Reference, *supra* note 43, at 2.

60. See, e.g., Mauro Rubino-Sammartano, *Is Arbitration to be Just a Luxury Clinic?*, J. INT'L ARB., Sept. 1990, at 3, 28-30 (indicating that existing arbitral mechanisms may not adequately address needs of parties to medium-size or small claim). Additionally, it became necessary to consider whether existing systems would necessarily be more efficient or effective than one devoted solely to the specific characteristics of a certain class of disputes, maintaining its own lists of experts, with rules addressed specifically to the needs and desires of its own industry participants, such as a documents-only procedure. *Id.* It should be noted, however that the ICC Court, as well as other major arbitral institutions, already provide for documents-only procedures. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 447-3, ICC RULES OF CONCILIATION AND ARBITRATION art. 14 (1985), reprinted in 28 I.L.M. 231 (1988); AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES art. 10, reprinted in HOUSTON PUTNAM LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 1513-22 (1991); Rules of the London Court of Arbitration art. 17.

61. Consistent with its characterization as a form of international litigation, arbitration remains a fundamentally adjudicatory process, raising the issues of costs that correlate with the very enforceability of arbitration and the procedural guarantees built into its rules, including costs related to the fixing of administrative and arbitrator fees. While the methods by which arbitration costs, in the form of administrative costs, arbitrator fees, and expenses, are calculated differ among the institutions, it would appear that the basic procedural guarantees required in obtaining an enforceable judgement through an adjudicatory proceeding, including cost of counsel, would render such procedures generally more costly than a non-binding proceeding. Anthony Willis, *A View From London*, ARBITRATION, Feb. 1992, at 14. See generally Eric Schwartz, *The Costs of ICC Arbitration*, ICC INT'L. CT. ARB. BULL., May 1993, at 1, 8 (discussing costs of arbitration before ICC).

62. See, e.g., Alan Shilston, *Med-Arb — Can It Work?*, ARBITRATION, Feb. 1994, at 2 (offering example of situation in which expert arbitrators are vital).

63. *Id.*; see Craig, *supra* note 54.



### B. *Non-Arbitral Dispute Resolution Procedures*

In contrast to arbitration, international disputes invoking non-arbitral procedures, such as conciliation and mediation, continue to represent only a small proportion of cross-border claims.<sup>64</sup> The potential benefits of alternatives to both arbitration and litigation, however, are increasingly being studied and developed by institutions and other rule-making bodies, indicating a growing movement towards the usage of such mechanisms in the context of international conflicts.<sup>65</sup> These procedures can be divided among those that are conciliatory in nature, involving negotiation and mutual agreement, and those that are cooperative, typically characterized by a neutral third party determination.<sup>66</sup>

Conciliatory forms of non-arbitral dispute resolving mechanisms share certain fundamental characteristics that emphasize negotiation and close party-interactivity.<sup>67</sup> The most frequently cited advantages of conciliatory procedures have centered

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64. Eric Schwartz, *International Conciliation and the ICC*, ICC INT'L CT. ARB. BULL., Nov. 1994, at 5. Generalized procedures for non-arbitral dispute resolution have long existed for transnational conflicts. The ICC, for example, offers its Rules of Optional Conciliation, which were established at the same time as the Rules of Arbitration. Although the frequency with which parties resort to the conciliation rules have decreased in recent years, there is substantial precedent in past usage. In fact, the first case resolved by the then-Court of Arbitration involved a conciliatory procedure. *Id.*

65. See Hoellering, *supra* note 2, at 67. See, e.g., Thomas P. Burke & Christine Chinkin, *Drafting Alternative Dispute Resolution Clauses*, INT'L CONST. L. REV. 446 (1990). The benefits that may be offered by non-arbitral procedures include cost-savings, time savings, a greater degree of simplicity, and procedural flexibility. Karl Mackie, *ADR in Europe — Lessons from a Classic US Case: IBM v Fujitsu*, 5 E.I.P.R. 183, 183-86 (1992). In general, ADR procedures more quickly focus on the merits, forcing clients to come to grips with core of the problem and deal with it at a stage before a third party must make a decision.

66. The range of non-arbitral dispute resolving systems abound. They include systems that emphasize negotiation and close party-interactivity such as conciliation and mediation. Other forms, such as summary jury trial and rent-a-judge, take a quasi-adjudicatory form. Certain systems, such as Med-Arb, attempt to create complementary two-step procedures, although in each of the former cases parties may resort to arbitration failing consensual resolution. Rt. Hon. Lord Donaldson, Address to the London Common Law and Commercial Bar Association (June 27, 1991), in *Alternative Dispute Resolution*, ARBITRATION, May 1992, at 102.

67. For a broader view of mediation, one commentator has identified the following four traits as fundamental characteristics of mediation: (1) The neutrality of the mediator, both perceived and actual; (2) the voluntariness of the process; (3) the confidentiality of the relationship between the mediator(s) and the parties; and (4) the procedural flexibility available to the mediator. Note, *Protecting Confidentiality in Mediation*, 48 HARV. L. REV. 441, 444 (1984).

around the non-adversarial nature of such procedures, with an emphasis on negotiation and preservation of the underlying business relationship.<sup>68</sup> Additionally, these procedures often force earlier and greater client involvement in resolving a dispute.<sup>69</sup> Results, however, are not binding on the parties unless the process results in a settlement agreement.<sup>70</sup>

The other emerging paradigm for non-arbitral systems is the neutral third party determination, where the third party may be a dispute review board or an expert advisory board.<sup>71</sup> While these processes are consensual, the overall process would involve neutral third party evaluation of documentary evidence, resulting in an expert opinion rather than a negotiated agreement.<sup>72</sup> The use of experts, both in arbitral and non-arbitral proceedings, has been increasingly advocated by commentators.<sup>73</sup>

At the onset of the ICC's review of the options for dispute resolving systems, it appeared that conciliatory procedures were better able to preserve the business relationship among parties to a documentary credit dispute.<sup>74</sup> This attribute offers a distinct benefit in the context of the international banking community.

68. Mackie, *supra* note 65, at 183-84.

69. *See, e.g. id.* at 184-85 (discussing dispute resolution action between IBM and Fujitsu).

70. *See* Note, *supra* note 67, at 442.

71. Hoellering, *supra* note 2, at 69. Dispute Review Boards ("DRBs") originated in the United States more than twenty years ago and have undergone significant development since that time. Generally applied in the context of construction disputes, DRBs typically involve a contractual undertaking to submit to expertise procedures prior to submitting a dispute to arbitration or national courts. The emergence of DRBs and other expert procedures is at least partially attributable to the recognition that "many disputes are only the legal protection of difficulties of a technical nature." Charrin, *supra* note 53, at 42. *See* WORLD BANK, PROCUREMENT OF WORKS (STANDARD BIDDING DOCUMENTS) (1995). In this publication, the World Bank institutionalizes a first stage of expertise, which is designed to take place prior to arbitration for major projects and which offers contracting parties three alternative possibilities for resort to expertise. *Id.* Parties may opt for either a DRB comprising three experts for large scale projects, a single expert for lesser projects, or resort to clause 67 of the Federation Internationale des Ingeieurs Conseils ("FIDIC") General Conditions. *Id.*; *see* FEDERATION INTERNATIONALE DES INGEIEURS CONSEILS, CONDITIONS OF CONTRACT OF DESIGN-BUILD AND TURNKEY (1995) [hereinafter CONDITIONS OF CONTRACT]. The FIDIC Conditions of Contract for Design-Build and Turnkey, also known as the Orange Book, stipulates for the appointment of an expert or experts in the context of DRBs as a first procedural phase, which may provide a permanent solution to a technical problem in that the expert(s) are capable of rendering "decisions." CONDITIONS OF CONTRACT, *supra*, art. 67.

72. Hoellering, *supra* note 2, at 69.

73. *Id.*

74. Gaudet, *supra* note 50, at 213.

For example, the nature of the letter of credit industry itself, with its reliance on the correspondent relationships that sustain their business operations,<sup>75</sup> suggested that banks would prefer a dispute resolving mechanism that could minimize or preclude the highly adversarial approach often characteristic of litigation and arbitration.<sup>76</sup>

The benefits of negotiation and conciliation in the context of letter of credit disputes, however, were outweighed by the banks' preference for a sound, expert determination of the parties' duties and liabilities in accordance with the UCP.<sup>77</sup> Particularly in the context of bank-to-bank disputes,<sup>78</sup> banks actively

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75. For a historical overview of the development of correspondent arrangements in the international banking industry in relation to the issuance of letters of credit, see D.T. Merrett, *Global Reach by Australian Banks: Correspondent Banking Networks, 1830-1960*, 47 BUS. HIST. 3, 75 (1995).

76. The benefits of a non-adjudicatory process to the letter of credit industry are clear given the likelihood that the majority of disputes submitted to the ICC would involve banks only, with, for example, an issuing bank on one side and confirming bank on the other and given the mutual desire of such banks for ongoing dealings. Even in the case of bank-customer disputes, however, the importance of relationship-banking, through which banks seek to provide their clientele with continual, comprehensive trade-finance related services, serves as an additional incentive to preserve the underlying commercial relationship. A statement by Vincent Maulella, vice-president of Chemical Banking Corporation's Geoserve unit reflects the importance of preserving a bank's relationship with both other banks and its clients: "Half the time we are litigating with another bank, and the other half of the time, with a corporation who is a customer or a potential customer . . . . Litigation has a severe impact on the relationship." Steven Marjanovic, *International Bank Group's New Chief Eyes Fed Wire*, AMER. BNKR., Jan. 5, 1995, at 19.

77. The importance for substantive expertise is heightened given the regulatory breadth of the UCP rules. See UCP RULES, *supra* note 14; ICC BANKING FACTSHEET, *supra* note 11; UCP 500 & 400 COMPARED, *supra* note 38. The UCP rules are not limited to technical or operational standards of practice; rather, they regulate a comprehensive range of elements, including the form and notification of credits, liabilities, duties, document criteria, insurance, and commercial invoicing.

78. Letter of credit disputes often involve complex operational and technical issues which requires specialized knowledge and expertise in the UCP rules and banking practices, as well as relevant law. See, e.g., Kozolchyk, *supra* note 36. The preference for an expert panel seems to lie in the shared belief that the nature of the dispute is fundamentally a technical one, hinged on sufficient expertise in the UCP, international banking practice, as well as applicable law. *Id.* To some extent, disputes submitted between two banks, perhaps one as issuer and the other as confirming bank, are those in which the expert interpretation of the UCP is the critical issues. *Id.* See generally, Karen L. Liepman, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93, 97 (1986). One significant reason why banks have turned to national courts instead of arbitration and other non-state forums in cases involving non-bank parties has been the availability of summary judgement and interim measures such as pre-award attachment of assets. *Transborder Finance, supra*

preferred a process of objective evaluation by recognized industry experts. Thus, the Banking Commission began to consider the remaining option — namely to develop a new procedure that would not be characterized by negotiation or interactivity among the parties, but rather, would be based upon an “expert interpretation of the UCP.”<sup>79</sup>

### III. AN INDUSTRY-BASED APPROACH TO DEVELOPING DISPUTE RESOLUTION SYSTEMS

Existing dispute resolution institutions are recognizing that they cannot always be all things to all comers.<sup>80</sup> The key point

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note 2, at 1325. In cases where the dispute is between two banks, however, the dimensions of the dispute are likely to differ, minimizing the importance of such judicial measures. Other broad categories of disputes that arise in the context of letter of credit include: (1) actions for damages by the beneficiary against the issuing bank for either “wrongful dishonor” or “anticipatory breach” of the letter of credit; (2) actions for injunctive relief by the customer against the issuing or confirming bank to prevent payment to the beneficiary; and (3) actions by the issuing bank against the customer for reimbursement after the letter of credit has been honored. SARNA, *supra* note 29, ch. 3, at 8.

79. The past experience of the ICC Banking Commission also contributes to this analyses. Among others, the Banking Commission maintains a Group of Experts. The Group of Experts are a body of some of the leading international experts in the UCP and banking practice and law. International Chamber of Commerce, Commission on Bank Technique and Practice, Summary of May 15, 1995, Meeting of Group of Experts on Documentary Credits (Apr. 1995) (ICC Doc. 470/434). The Group of Experts addresses issues of interpretation of the UCP based upon hypothetical issues. *Id.* Their opinions are published only upon approval of the Banking Commission generally, and serve to promote the harmonization of application of the UCP rules. *Id.* Thus, negotiations and conciliatory measures were believed to be secondary in importance in relation to a correct interpretation of the UCP, placing greater emphasis on expertise of a quasi-technical nature. Testifying to its technical nature, the UCP 500 now includes separate articles on each of the main types of transport documents employed in international trade, including non-negotiable sea waybills, marine/ocean and charter party bills of lading, and air, multimodal, rail, and road transport documents. Additionally, the UCP lists the elements of acceptability for each of the aforementioned documents. UCP, *supra* note 14. See, e.g., Lawrence W. Newman & Michael Burrows, *Letter of Credit Disputes*, N.Y. L.J., Mar. 29, 1996, at 3, 40.

[T]here is much to be said in favor of a system that, by applying industry expertise, will ‘get it right’ the first time. . . . Because letter of credit law has been shaped to a great extent by business entities and individuals outside the legal profession . . . there exists considerable knowledge, expertise and experience concerning these instruments and the transactions in which they are used that cannot be found in the federal or state reporters.

*Id.*

80. Several heads of major arbitral institutions have voiced increasing interest in alternatives to both litigation and arbitration. See, e.g., Schwartz, *supra* note 61; Hoellering *supra* note 2. The emergence of alternative non-arbitral procedures points to a

that seems to be emerging, therefore, is not to settle for a "catch-all" alternative to the courts, but to identify in each instance the most appropriate dispute resolution forum.<sup>81</sup> Identifying the proper forum would, at minimum, necessitate an examination of the substantive aspects of a dispute, including applicable law, industry sector, and the nature of the parties.<sup>82</sup> It is within this context, then, that the ICC examined what procedures would provide the best fit for the documentary credit disputes of the international banking industry.

In reviewing the options, the ICC Working Party finally decided to establish a discrete set of dispute resolution rules utilizing an industry-based approach.<sup>83</sup> The determinative criteria compelling the ICC's establishment of a separate set of industry rules included: (1) dissatisfaction with existing arbitration processes, based in part on defined criteria and in part on the perceptions of international bankers that arbitration was unsuitable for letter of credit disputes; (2) the perception that quantitative aspects of letter of credit disputes would, under certain arbitration mechanisms, result in disproportionately high fees; (3) the perception that bank-to-bank letter of credit disputes were better resolved by industry experts and did not warrant litigation; and (4) the desire to submit to a process that entailed a high level of interaction with the ICC Banking Commission.<sup>84</sup>

#### A. *Charting the Rise of Industry-Specific ADR Initiatives*

The notion that certain specific varieties of disputes should be resolved through industry-specific dispute resolution systems has received increasing attention in recent years.<sup>85</sup> In most

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different set of values. These values look to the substantive elements of the dispute in the attempt to identify recurring patterns and common denominational characteristics that may lead to a better-constructed, "tailored" dispute resolution system.

81. See Jacques Werner, *ADR: Will European Brains be Set on Fire*, J. INT'L. ARB., Dec. 1993, at 45.

82. See, e.g., Rubino-Sammartano, *supra* note 60 (discussing different resolution forums for different size disputes). The U.K. trade associations, for example, have established dispute resolution mechanisms for their members and the public. *Id.*

83. This industry-based approach to dispute resolution assumes, at least in part, that certain classes of disputes can be categorized, not merely based on quantitative criteria such as the size of the dispute, based on sectoral criteria, such as industry. See Liepman, *supra* note 78 (discussing environmental mediation).

84. These criteria, although not formally documented, are based upon discussions conducted by the ICC Working Party at their meeting of June 9, 1995, in Paris.

85. See, e.g., STEPHEN S. GOLDBERG ET AL., DISPUTE RESOLUTION 5 (1985) (identify-

cases, the possible dispute resolution mechanisms applicable to specific industries or economic sectors are examined with the intent of identifying the dispute resolving forum or system most appropriate to the sector or industry. One commentator, for example, has posited that mediation provides a valuable supplement to litigation or arbitration in environmental conflicts.<sup>86</sup> Other commentators have undertaken similar studies in a wide range of fields, including insurance,<sup>87</sup> intellectual property,<sup>88</sup> and international trade.<sup>89</sup>

The trend towards the development of industry-based dispute resolving mechanisms is by no means a new one, and may be tied to the very roots of arbitration.<sup>90</sup> Some commentators trace these industry-based dispute resolution methods to the British Law Merchant, which developed in the eleventh century.<sup>91</sup> The Law Merchant was a body of rules based primarily on the customs and practices of manufacturers and traders, established to govern the resolution of commercial disputes. This system was implemented and administered by non-lawyers, providing an expeditious out-of-court mechanism for the resolution of commercial disputes in accordance with the practices and customs of the merchant's trades.<sup>92</sup>

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ing one goal of ADR movement as providing more effective dispute resolution). In certain cases, practitioners have even identified the "type" of dispute "best-suited" for particular procedures, depending in certain cases upon attributes of size, complexity, and even substantive issues arising within it. This trend is confirmed by the proliferation of substantive rules and institutional services specifically focused on providing conflict-resolving solutions to certain classes of disputes.

86. ALLAN R. TALBOT, *SETTLING THINGS* 97 (1983). See Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 314-316 (1980).

87. See Patrick O'Connor, *Alternative Dispute Resolution: Panacea or Placebo?*, *ARBITRATION*, May 1992, at 107 ("It is probably true to say that it was the insurance industry rather than any other that generated, and continues to generate, interest in and development of ADR.").

88. See Mackie, *supra* note 65, at 184.

89. See Michael Hoellering, *Alternative Dispute Resolution and International Trade*, 14 N.Y.U. REV. L. & SOC. CHANGE 785, 785-86 (1986) [hereinafter *ADR and International Trade*].

90. See JAMES F. HENRY, CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM: *WHY A CORPORATE POLICY STATEMENT ON ADR?* 1 (1984). See, e.g., Friedrich K. Juenger, *The Lex Mercatoria and the Conflict of Laws*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT* 213 (Thomas E. Carbonneau ed., 1990).

91. *Id.* See Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is it Still a Conflicts of Law Problem?*, 16 INT'L LAW. 613 (1982).

92. Although the Law Merchant was incorporated into the British courts system in

While the movement towards the development of industry specific dispute resolving systems has since gained significant ground, particularly in the United States, greater examination of this approach may be increasingly warranted in an international context.<sup>93</sup> In support of taking an industry-based approach to dispute resolution is the emergence of identifiable classes of international disputes that are more likely to be submitted to arbitration and other non-judicial procedures than others.<sup>94</sup> Further examination of the specific elements of disputes that arise in the context of international commercial transactions, and their categorization along industry lines, could provide valuable insights into developing global, industry-tailored resolution systems.

#### B. *Developing Industry-Based Rules for the International Banking Industry*

It is significant that the ICC's work in this area was originally conceived by its Banking Commission, lending to its characterization as an industry-led effort, rather than one developed and proposed by the dispute resolution community.<sup>95</sup> One scholar

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the late eighteenth century, its emphasis on resolution of disputes according to commercial practice, notwithstanding the lack of any governmental or judicial means to force parties to arbitrate or enforce awards, provides a historical perspective for the ICC's current initiative. Juenger, *supra* note 90, at 213. Commentators have noted that arbitration originally grew "as an alternative forum where *lex mercatoria* [ould] find a better understanding from an arbitrator which has been chosen by the parties because of his expertise in the international field." See Croff, *supra* note 91, at 634.

93. See generally Juenger, *supra* note 90.

94. A recent breakdown of cases submitted to a leading arbitral institution, the ICC International Court of Arbitration, reveals that nearly half of the 400 cases submitted to it in 1994 involved international sales, distributorship, and related contracts. *1994 ICC Statistical Report*, *supra* note 1, at 5. Construction, engineering, and related joint venture agreements accounted for a substantial 17.9% of all cases. *Id.* Intellectual property disputes comprised 15.9%, while finance, mergers and acquisitions, and insurance disputes constituted 11.7% of all disputes submitted that year. *Id.* While not dispositive of the need to develop wholly new procedures, adaptive to all industry sectors or varieties of disputes, these figures indicate that at the very least, resort to non-litigious resolution of international disputes can be delineated along sectoral or dispute-type lines.

95. This is not to suggest that industry associations are always best suited for establishing dispute resolution systems for their members. On the contrary, the ICC's experience in this area reveals that substantive expertise and institutional experience in dispute resolution is vital to the effective development and administration of an international dispute resolution system. See, e.g., Craig, *supra* note 54.

has described a "herd mentality" in the banking community,<sup>96</sup> characterized by a strong desire to maintain self-regulation and demonstrated by their adherence to the UCP rules. Although this herd mentality may breed resistance to the unfamiliar, it also established a preference for creating self-regulatory solutions that could actively facilitate the operations of the international banking industry.<sup>97</sup>

That industry affiliations can and do eclipse geographical ones may well be illustrated by the empirical evidence gathered by the Banking Commission through passive submissions.<sup>98</sup> A rough breakdown by number of claims reveals that the greatest number of claims were received, in order of most to least, from Asia, the Middle East, Western Europe, and the Pacific region.<sup>99</sup> Even a perfunctory examination reveals that there is little real correlation between the number of claims submitted from a particular region and the receptivity of the overall commercial participants in that region to alternative dispute resolution mechanisms in the aggregate. Instead, it is the industry affiliation that binds.

#### IV. *THE ACTIVITIES OF THE ICC WORKING PARTY*

To carry out its substantive activities, whether in its policy or rule-making function, the ICC customarily establishes a "Working Party" whose members are appointed by the various National Committees.<sup>100</sup> The ICC Working Party for a Documentary Credit Resolution System included representatives from eight countries, including: Germany, Denmark, Ireland, Italy, Sweden, Singapore, and the United States.<sup>101</sup> A chairperson was

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96. *Transborder Finance*, *supra* note 2, at 1325-26. Such a herd mentality may result from the global banking industry's deep-rooted reliance on correspondents and historical need to maintain transnational relationships, particularly in the area of trade finance.

97. In this case, "generalist" arbitration institutions, those that admit all disputes regardless of type within its jurisdiction, may be perceived by the banking industry as lacking the specific industry expertise needed to generate sound results. Thus, banks may reason that there is little or no distinction in outcome whether they submit a dispute to arbitration or a national court because neither necessarily possess industry expertise.

98. See *Analysis of ICC Claims*, *supra* note 22.

99. *Id.* at 1-3.

100. See *supra* note 6 (discussing National Committees).

101. Provisional List of Participants of the ICC Working Party on a Documentary Credit Dispute System (May 22, 1995) (ICC Doc. No. 470-42/INT.10).



appointed to set the agenda for the activities of the Working Party, and a Term of Reference<sup>102</sup> was drawn. This Term of Reference, formulated and approved by the Working Party, stated the purpose, goals, and general mandate of the group as a whole.<sup>103</sup> In this case, the Terms of Reference stated that the intention of the Working Party was to examine any issues devolving from the feasibility of creating a system of dispute resolution, to compare alternative mechanisms, to assess the possible cost, duration, and need for administration of a given method, to draft Model Rules, and establish an operational system for the program.<sup>104</sup>

#### A. *General Principles of the ICC Working Party*

The original draft version of the Terms of Reference articulated the principle features of the proposed resolution system.<sup>105</sup> These general goals guided the activities of the Working Party and included ensuring the greatest amount of simplicity and flexibility and the least costs to users. Likewise, the Working Party hoped to use experts in both legal and business aspects of the dispute, resolve any disputes in a timely manner, and conform its activities to the UCP rules.<sup>106</sup>

Thus, a fundamental element envisioned by this draft concerned the use of experts familiar with banking industry practice and relevant legal issues.<sup>107</sup> An additional feature envisioned by certain members of the Working Party was a documents-only procedure.<sup>108</sup> A final feature proposed by the original Terms of

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102. Terms of Reference are customarily drawn by members of Working Parties of the ICC to serve as a general charter for its activities. In the present case, the Terms of Reference of the ICC Working Party on a Documentary Credit Dispute System mandates its creation, lists its objectives, states its general principles, and sets a provisional timetable for upcoming meetings. ICC Working Party Terms of Reference, *supra* note 43, at 1-2.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* A neutral body could be established with the ICC acting as an appointing authority, in order to reduce time for constituting the panel. *Id.*

108. The Charter Institute of Arbitration developed a documents-only arbitration procedure, recording more than 400 cases per year as of 1990. Margaret Rutherford & Lynn Slade, *Documents Only Arbitration and the Chartered Institute Low Cost Schemes for Consumers Disputes*, ARBITRATION, May 1987, at 87. Although numerous major arbitral institutions expressly provide for documents-only arbitration, the procedures are not often used given concerns that either: (a) conducting a proceeding without oral hearing

Reference contemplated scaling costs in accordance to the complexity of the dispute, subject to specific fee ceilings.<sup>109</sup>

Consistent with the goals of cost-savings, wherever possible the procedure would operate on written submissions only.<sup>110</sup> Such measures would be justified by avoiding the risk of protracted litigation and reducing related legal fees. Moreover, in light of the reliance on correspondent relationships in the banking community, preservation of the business relationship was yet another goal of the original Terms of Reference. The proposed system would seek to preserve the business relationship by promoting consensual settlement wherever possible. Other features described in the original Terms of Reference included provisions on procedure, expert qualifications, limitations on access to those letters of credit issued under the UCP rules, and minimization of political risk.<sup>111</sup> These considerations generally promoted the essential goals of cost and time savings, while concurrently pointing out the benefits offered by each attribute.

Once the Terms of Reference were finalized, the Working Party commenced the rule-drafting process. This process began with a memorandum of major issues drafted by the Chairman of the Working Party, providing the basis for the subsequent rules. By raising the issues at the onset, members were able to use a uniform document that allowed them to express their respective viewpoints.

#### B. *Drafting the ICC Rules for a Documentary Credit Resolution System*

The draft rules, while still in progress, are sufficiently developed to provide a platform for discussion. Without issuing predictions as to the eventual outcome, certain elements of the framework for an ICC dispute resolution system for documentary credits are emerging, raising a broad range of issues. Cer-

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would restrict an arbitrator's authority; or (b) a waiver by the parties to an oral hearing might constitute a breach of due process. Rubino-Sammartano, *supra* note 60, at 28-29. With respect to the former concern, the problem could be cured by giving the arbitrator the authority to decide whether or not a hearing was needed, thereby avoiding the issue of arbitrator's authority.

109. Draft ICC Terms of Reference, *supra* note 43, at 1-2.

110. *Id.*

111. *Id.*

tain critical issues such as liability of the Experts,<sup>112</sup> time limits,<sup>113</sup> and operational matters remain as yet unresolved and, therefore, will not be addressed below.

Generally, the accession to the system will require a party to submit a request for expert determination under the ICC Documentary Credit Dispute Resolution Rules ("ICC Documentary Rules").<sup>114</sup> By submitting a dispute under the final version of these rules, the initiating party ("initiator") agrees to adhere to the ICC Documentary Rules administrative and procedural provisions. The process, however, remains voluntary, except to the extent that the parties formally enter into an agreement to seek an expert decision under the ICC Documentary Rules. It is unclear whether a party that answers the request may be regarded as having waived its right to deny the existence of a contract, as this would depend on the substantive laws of a court confronted with this argument. If a formal agreement to submit the dispute to the ICC Documentary Rules is entered into by the parties, the

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112. Unlike the position of arbitrators or referees, there may be issues relating to a lack of immunity from negligence of experts. Whether explicit language granting an expert immunity is effective to exclude liability is similarly subject to question and may depend on the substantive law of a given jurisdiction. In the United Kingdom, such explicit language granting an engineer immunity in a case where parties had included FIDIC Conditions was held to extend to an engineer engaged as an expert although he was not a party to the contract. *Pacific Assoc. Inc. v. Baxter*, 44 B.L.R. 33 (C.A. 1988) (Gibson, L.J.).

113. The ICC Court has, in its fast-track arbitration program, had experience with expedited, tightly scheduled cases. One documented case involved a technical issue for price and volume redeterminations in a commodity contract. In an article detailing his experience in the matter, a Counsel for the intermediary pointed out that fast-track was feasible in the case because the issues were relatively straightforward and would not require serious factual determinations or extensive discovery. Peter J. Nickles, *Three Perspectives From the Parties' Counsels*, ICC INT'L CT. ARB. BULL., Nov. 1992, at 9.

The criteria set forth above for fast-track arbitrations may well describe the "ideal for letter of credit disputes submitted to the ICC under the proposed procedures. A documents only system with fixed time limits, notwithstanding the possibility for extensions and hearings, will operate at an optimum given a case that, while requiring expertise, does not involve parol evidence or other factual disputes.

Benjamin Davis, *Fast-Track Arbitration: Different Perspectives*, ICC INT'L CT. ARB. BULL., Nov. 1992, at 4.

114. ICC Working Party on a Documentary Credit Dispute Resolution System, Draft ICC Documentary Credit Dispute Expertise Rules (Feb. 2, 1996) (ICC Doc. No. 470-42/INT.25) [hereinafter Draft ICC Documentary Credit Expertise Rules]. This version of the draft ICC Documentary Credit Expertise Rules has been revised since the most recent meeting of the ICC Working Party, held on March 4, 1996 in Paris. Wherever possible, discussions of these rules incorporate recent developments; however, readers are reminded that the rules drafting process remains in progress.

provisions of the agreement will dictate whether the decision of the Experts results in a binding agreement. In the absence of an explicit statement to consider the procedure final and binding, the default rule will establish a presumption that the expert decision is non-binding.<sup>115</sup>

### 1. Administration of the System

The ICC system would be made available to any party directly affected by a documentary credit in any dispute related to a documentary credit and the application of the UCP.<sup>116</sup> Although it is anticipated that the majority of the disputes submitted to the system will be bank-to-bank disputes, the process will be available to any party directly affected by a documentary credit, including applicants and beneficiaries.<sup>117</sup>

Given the emerging preference for a system based on expertise, it was determined that the ICC International Centre for Expertise<sup>118</sup> ("Centre"), which was created in 1976 and which has been working closely with the Working Party, would provide the framework within which to administer the dispute resolving system.<sup>119</sup> The Centre's current field of activity extends to all areas liable to benefit from expertise, whether in technical, financial, or service sectors. Since 1976, the Centre has received 123 requests for Experts, involving parties of over fifty nationalities, and has appointed Experts from sixteen countries.<sup>120</sup>

The secretariat<sup>121</sup> of the system, in this case the Centre,

115. Telephone Interview with William W. Park, Member of the ICC Working Party on a Documentary Credit Dispute Resolution System (Mar. 15, 1996). Mr. Park stated that the ICC Working Party had decided in its meeting of March 6, 1996 that the so-called "default rule" that would operate if the parties failed to specify whether they were submitting a dispute to a binding or a non-binding process would result in a non-binding procedure. *Id.*

116. Draft ICC Documentary Credit Expertise Rules, *supra* note 114, art. 1.1.

117. *Id.*

118. See *supra* note 11 (discussing ICC International Centre for Expertise).

119. Draft ICC Documentary Credit Expertise Rules, *supra* note 114, art. 1.1.

120. As it currently operates, the Centre is based on a two-tiered complementary system whereby a party could submit certain substantive issues to the Centre and thereafter opt for arbitration, if the parties either failed to settle their disputes or if additional issues remained for adjudication. This decision to operate a documentary credit resolution system within the Centre's framework, although not yet formalized, has been discussed in the context of the ICC Working Party's meetings. See generally *The ICC International Center for Expertise*, ICC INT'L CT. ARB. BULL., May 1993, at 53 (including description of services and rules provided by Centre).

121. The secretariat of the ICC Documentary Credit Expertise Rules would func-

would undertake the administration of the rules in conjunction with the Banking Commission. The Centre would maintain a list of Experts drawn in conjunction with the Banking Commission.<sup>122</sup> The secretariat would then appoint a panel of three Experts. A provision could be incorporated stating the grounds for removal from the list, including, for example, lack of substantive expertise, inability to fulfill obligations as an expert, and resignation of an expert.

## 2. Request for Expertise

Any one or more parties seeking to submit a dispute to the Experts would forward a written request for a decision pursuant to the ICC Documentary Credit Dispute Expertise Rules, accompanied by four copies of the documentary credit and all documents annexed thereto.<sup>123</sup> Provisions as to form are flexible, but should include the names, description, and addresses of the parties to the dispute, as well as the parties' function in the documentary credit process. The request would include the relevant agreement of the parties to submit their dispute to the Experts, as well as a summary of the case and claims clearly identifying all issues related to the UCP to be determined and the applicable initial fee.<sup>124</sup>

## 3. Answer

Other than the claimant, the party or parties named in the dispute would be allowed a specific time period in which to respond. They would also be given all documentary submissions, which would include the same information requested in the original Request.<sup>125</sup> The ICC Rules also contemplate that the submission will be accompanied by the payment of the applicable initial fee by the respondent.<sup>126</sup>

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tion as the central administrator of cases submitted under those rules. Its functions would encompass the administration of parties' submissions, communications among parties and experts, and the appointment of experts. *Id.* art. 1.

122. *Id.* art. 1.3.

123. *Id.* art. 2.

124. *Id.*

125. *Id.* art. 3.

126. *Id.*

#### 4. Acknowledgement and Rejection of Requests, Answers, and Other Communications

Once a Request, Answer, or similar communication is received by the secretariat, the secretariat will acknowledge the receipt of Requests, Answers, and supplementary submissions to the parties without delay.<sup>127</sup> Provision may be made allowing the secretariat to request further information.<sup>128</sup> The time period for submitting an Answer would be limited, and any communications received after that time period could be disregarded.<sup>129</sup> Provisions could also be made setting the dates that toll the deadlines specified in the rules.<sup>130</sup> The secretariat could reserve the right to reject documents deemed unrelated to a documentary credit and the UCP or which in other ways fail to conform with the rules.<sup>131</sup> That right would be preserved in the event that the Initial Fees are not remitted on time.<sup>132</sup>

#### 5. Appointment of Experts

Within a specified time, the secretariat would appoint a panel of three Experts from its List of Experts.<sup>133</sup> Upon the confirmation of all statements of independence, a chairperson would be appointed.<sup>134</sup> Time limits or guidelines could be included regarding the constitution of the Expert panel, and provision would be made for the secretariat to forward all information received, including the Request, Answer, and documents, to the Experts.<sup>135</sup> Provisions would be made for the replacement of experts who resign or who, for other reasons, become ineligible to serve.<sup>136</sup> A specific provision concerning the Experts' duty of confidentiality could be included as well.<sup>137</sup>

#### 6. Experts' Procedure

Experts could render decisions exclusively on the basis of

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127. *Id.* art. 4.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* art. 5.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

the Request, Answer, any supplementary submission, and the documentary credit and annexed documents, observing the principle of fairness and impartiality.<sup>138</sup> If Experts believe further information is needed, they could transmit the request to the secretariat, who would inform the parties of the Experts' request.<sup>139</sup> Once the Experts were provided with all necessary information, a specific time period would be set in which the Experts would be expected to prepare a decision.<sup>140</sup>

### 7. Experts' Decision

Upon receipt of the decision of the Expert panel, the Centre would consult with an officer of the Banking Commission to ascertain his opinion as to possible modifications.<sup>141</sup> Amendment of the Experts' decision would be subject to the agreement of the Expert panel.<sup>142</sup> After the decision is finalized, it would be forwarded to the secretariat, who would first inform the parties of the applicable costs of the procedure and, thereafter, transmit the decision to the parties, accompanied by a summary of the case, a determination of issues, and an opinion.<sup>143</sup>

### 8. Deposit and Publication of Decision

An original copy of the decision would be maintained by the secretariat.<sup>144</sup> The ICC could retain the authority to publish any decision provided that the information regarding the identities of natural person or legal entities remain anonymous.<sup>145</sup>

### 9. Costs

The costs of the procedure would be divided between administrative costs and Experts' fees.<sup>146</sup> The secretariat, after receiving the Initial Fee, will fix the administrative and Experts costs at that time.<sup>147</sup> While subject to increase if the dispute is exceptionally complex, a schedule of fees would be made avail-

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138. *Id.* art. 6.

139. *Id.*

140. *Id.*

141. *Id.* art. 7.

142. *Id.*

143. *Id.*

144. *Id.* art. 8.

145. *Id.*

146. *Id.* art. 9.

147. *Id.*

able to the parties and used to calculate all costs.<sup>148</sup>

V. *CONCLUSION: THE EMERGING RULES AND PROSPECTS FOR THE FUTURE*

The emerging picture, although unfinished, is that of a privatized dispute resolution in which parties voluntarily submit their dispute to an expert appointed on the basis of his or her banking and legal expertise. It is not mediation in its form; rather, its defining characteristic is that of a neutral expert rendering an opinion based upon documentary submissions, with a presumption that an in-person hearing will not be necessary.

Fundamentally, it is an expert determination in which panelists are not bound by the same formalities of arbitration but can establish an expedited procedure in an effort to save time and costs. In its critical elements, the program has been nurtured by those who, in some respects, are in the best position to identify the needs of the international banking community — namely, the bankers themselves. By bringing industry representatives directly into the rules-development process, the ICC may have accomplished more than a solution to a small subset of documentary credit disputes. Perhaps more importantly, the ICC played an important role in educating and stimulating discourse among the industry participants in the field of alternative dispute resolution, bringing the process that much closer to its users. Thus, the ICC may set an important precedent that paves the way for further innovations in effective dispute resolution for a greater span of international commercial activity.

The ICC's initiative may also have broader implications in the context of trade facilitation. The globalization of the world economy has spurred issues surrounding the harmonization of international law and resolution of transnational commercial disputes to the forefront. The ICC's efforts in both of these undertakings — the first in rule-harmonization as exemplified by the UCP, and the second in dispute resolution, as represented by the ICC's current effort — lay an indispensable foundation for transnational commercial transactions. Taken together, the ICC's efforts facilitate what have come to be globally-embraced ideals: namely, the promotion of certainty and the development of practical, effective aids to the international trading process.

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148. *Id.*